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American Mining Law

With Forms and Precedents

(THIRD EDITION—ENLARGED AND REVISED TO DATE)

By
A. H. RICKETTS
of the San Francisco Bar

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To

William Henry Metson

One of the Builders of the American Mining Law

TABLE OF CONTENTS

BULLETIN 98, AMERICAN MINING LAW, BY A. H. RICKETTS.

ERRATA

Page 19, Note 132, before the figures "290", insert "209 Cal."

Page 22, Note 151, line 6, change "completed" to read "competent".

Page 65, Note 21a, line 1, change "__Cal. A. __", to read "107 Cal. A. 457, 290 Pac. 530".

Page 243, Note 92, line 17, change "Col." to read "Colo."

Page 286, Note 71, to last line of note, add "operation of mining claims held in group does not apply to adjoining tracts of ground held under oil leases."

Page 381, Note 5, change "__ Cal. __" to read "209 Cal. 765".

NOTE.—Chichagoff Co. vs. Alaska Handy Co. (See §§ 441, 479, 757) is cited from advance sheets; for modified decision, see bound volume, 45 Fed. (2d) 553.

TABLE OF CONTENTS

LETTER OF TRANSMITTAL.

To His Excellency,
THE HONORABLE C. C. YOUNG,
Governor of the State of California.

SIR: I have the honor to transmit herewith Bulletin No. 98 on the subject of American Mining Law, by Mr. A. H. Ricketts of the San Francisco Bar, one of the best-known and experienced attorneys in this highly-specialized branch of the law of such great importance in our western mining states in particular.

Among the most frequent subjects of inquiry addressed to the State Mineralogist are questions involving the statutes, decisions and rulings of the courts and the United States Land Department relating to mineral locations, their development, and maintenance. Mr. Ricketts has previously contributed at various times to the publications and reports of this division; and the present volume is the outgrowth of our mutual experiences in endeavoring to meet the need and demand of the mining fraternity for a comprehensive and detailed yet concise and plain-reading exposition of the American mining law as now recognized and interpreted.

WALTER W. BRADLEY,
State Mineralogist.

San Francisco, January 1, 1931.

FOREWORD.

What is commonly thought of and referred to in speaking of the 'American Mining Law' is the system which has developed, now in considerable part of judicial interpretations by the courts and the land department, based upon a relatively few federal statutes supplemented by statutes of certain of the western 'mining' states. It is also relatively young—the first federal act being that of July, 1866, which was preceded by the local rules and customs adopted and utilized in the various western mining camps and districts in the fifties and sixties. While the federal mining statutes apply specifically only to the western public land states (with certain exceptions), there is much in the judicial decisions of many of the other states relating to property rights and contractual relations that have distinct bearing upon the maintenance and conduct of mining operations.

Since the classic treatise of Lindley and the earlier work of Yale, followed by those of Shamel, Morrison, Costigan, and Ricketts, many disputed and uncertain points have been adjudicated, and in addition the federal and certain state leasing acts have been put upon the statute books dealing with mineral resources. The present volume is the outgrowth of many friendly and generous instances of assistance to the State Mineralogist and his staff on the part of the author, Mr. A. H. Ricketts of the San Francisco Bar. Among the most frequent subjects of inquiry addressed to the State Mineralogist are questions involving the statutes relating to mineral locations, their development, and maintenance. As far back as 1892, Mr. Ricketts contributed to one of the reports of the State Mining Bureau an article on American mining law.[1] Later, in 1924, he prepared a series of articles relating to oil and gas rights,[2] followed by one on adjudicated mining terms and phrases.[3] This led to an arrangement whereby he would write a complete and comprehensive work on the subject, to be published by this division as one of its official bulletins. He has been most untiring in his energy applied to the task, and painstaking in his attention to details and the desire to obtain the utmost possible accuracy. The form of presentation is original with Mr. Ricketts and follows that adopted by him in his earlier work[4] which was privately published. By stating the subject matter and the principle or argument succinctly, briefly and topically, coupled with citations to and excerpts from the full-text decisions, it is intended and expected that it will prove highly useful and valuable, both to the layman and the lawyer, to the miner and to the engineer.

[1] Ricketts, A. H., A dissertation upon the origin, development and establishment of American mining law: State Mineralogist's Report XI, pp. 521–574, 1893.
[2] State Mineralogist's Report XX, pp. 105–148, 208–304, 381–415, 1924.
[3] State Mineralogist's Report XXI, pp. 77–121, 1925.
[4] Ricketts, A. H., A manual of American mining law, 1911.

Mr. Ricketts desires, and it appears fitting, that the preface to his earlier work[5] written by Mr. Chas. G. Yale be incorporated in the preface to this, his latest:

"My schoolmate and friend, Mr. A. H. Ricketts, considers it proper that the eldest son of the author of the first work on American mining law should write the preface to the latest book on that subject. But for the sentiment involved, I should hesitate, as a mere layman, to identify myself, even in this small way, with a work of the technical character of this book. My father, the late Gregory Yale, as far back as 1867 wrote his book on 'Mining Claims and Water Rights,' before which there was no original contribution on mining law in American legal literature. Based largely on the now obsolete mining law of congress of July, 1866, that work is now mainly of interest for the historical features connected with the subject, and has been long out of print.

"This latest work on American mining law, by Mr. Ricketts, brings everything on the subject up to date, as to state and federal legislation, the decisions of the courts, and the rulings of the departments. On reading the advance sheets one is at once struck by the conciseness in which the facts are presented. There has been no attempt whatever toward elaboration or argument. The author gives what he considers the proper construction of the law and in each case cites the authorities. There is therefore nothing to confuse the layman, while at the same time the book is of great value for reference to those of the legal profession. Under each general heading are numbered and titled paragraphs, exceedingly brief but expressive, and containing reference to the footnote showing the authority and its source. No arrangement could well be handier for reference to the prospector, miner, mine manager or lawyer."

"It is to be noted that both the first book on American mining law and the latest one on the same subject are by California authors, practicing attorneys in the city of San Francisco, where both books were published."

It also seems pertinent to quote herewith the introduction written by Mr. Ricketts in his first contribution to the reports of the State Mining Bureau referred to above:[6]

"It would require great skill in gracefulness of style and power of artistic presentation to popularize an article on mines and mining and make it attractive to the general reader. And yet the products of mines and mining are more intimately interwoven with the joys and sorrows, the hopes and fears, the every day affairs and tragedies in human life and in human history, than all else except marriage and religion. Some have ascribed the high estimate in which gold and silver have been held, to the influence had upon mankind by a prehistoric people, inhabitants of the lost Atlantis. However that may be, it is certain that from the earliest mythic twilight of the historic period, universally, the human race have looked upon the possession of the precious metals as the highest temporal good. The student of Gibbon will be impressed with the potency of gold and silver in directing the varying fortunes of nations during the existence of the Roman Empire, and in our time it is not diminished.

"In the spring of 1608, a yellow deposit was discovered in the neighborhood of Jamestown, Virginia, which was taken for gold, and a gold fever was developed. There was no thought, no discourse, no hope, and no work but to dig gold, refine gold, and load gold. A cargo of the 'gilded dirt' shipped to London turned out to be worthless. Sturdy Captain John Smith alone, not indulging in these dreams of imaginary wealth, scoffed at their infatuation 'in loading such a drunken ship with gilded dirt.' This disappointing experience seems to have chilled hope, and in the United States for nearly two hundred and fifty years no craze for gold hunting was aroused.

[5] Idem.
[6] *Supra* (1).

"The discovery of the Gold Hill mines in North Carolina, in 1842, produced no very extensive interest. [Nor did the knowledge that gold was being recovered in a small way from stream gravels near Los Angeles, California, as early as possibly 1820.[7] A total of at least 2000 ounces of gold dust was produced there up to December, 1843, most of which was sent to the Philadelphia Mint.[8]—W. W. B.]

"The finding of the gold kernel at Coloma in California by Marshall and its indirect bearing upon the course of events in the United States, and even upon the world at large, never will be fully discerned or appreciated until after the actors who participated in the scenes that followed that discovery have passed away. It is reserved for the philosophic historian of the future to point out the relation of cause and effect, and to present as a whole the consequences of what may be termed the sequences of the great movement of '49 upon the course of destiny. Certain it is, that any great popular movement that allures into its vortex great masses of men, and deflects largely the course of human thought from its channels of routine, will leave its impress upon the succeeding course of events. In fact it will largely determine what the course of events will be. It was as impossible for Europe to be after the Crusades what it was before, as that war after the invention of gunpowder should be carried on in the manner of the preceding ages.

"The exodus to California in the time of the gold fever, followed as it was by the discovery of the gold of Australia, pushed forward the onward march of events with an intensity and a rapacity never before known. In a large sense it constituted an awakening of the human mind. It disclosed possibilities, developed energies, and promoted activities fraught with influences still affecting the destinies of the race.

"As the intended scope of this article is to present some considerations of a practical nature, and more especially some legal aspects to which the subject invites, we can now only briefly indicate, before passing to our main purpose, some of the more manifest outgrowths of the California gold excitement. It widened the scope of vision, and broadened and strengthened individual character. This is illustrated by the fact that the greatest soldiers of our late war had received an impress from life among the vitalizing influences of a society loosened from tradition. Grant, Sherman, Sheridan, Halleck, Hooker, Albert Sidney Johnston and many others of martial achievement had lived in California.

"It is not too much to say that a new species of literature blossomed from the fermenting influences of California life. Invention in mechanical art was stimulated and received an impulse, the bounding current of which is still headed toward the consummation of much for the comfort and in aid of the race.

"The production of gold and silver gave staying power to the government while engaged in a struggle for national life. It has built temples to science that are the admiration of nations that had long been in vigorous life when Isabella pledged her jewels in behalf of the Genoese adventurer. It has breathed civilization, vigorous and aggressive, into an empire of its own creation, and given as pledge for its perpetuation the means of universal mental development. It has reacted upon the

[7] Bancroft, H. H., History of California: Vol. II, p. 417, 1886.
[8] Mercantile Trust Review of the Pacific, Vol. XIV. No. 2, p. 43, Feb. 1925.

sleepy provincialism of older communities, and taught them a broader sense of the immensity of our domain and the indissolvable links of a common destiny. It has demonstrated the possibility, under a free government, of the people by their own industry creating for themselves a safe means of commercial exchange, and thus enhancing the possibilities of industrial pursuits. It has been a crusade against blind tradition, an unreasoning adherence to the old, merely because it is old, more far-reaching and infinitely more beneficial than all the religious crusades of mediæval times. All this has been done in the latter half of the nineteenth century, and by men many of whom will live to herald the dawn of the twentieth century.

"Who shall say that mines and mining is not one of the impellant onward forces?

"The purpose of the foregoing references has not been so much to point out the glories of material advancement, as to delineate in perspective that which is the crowning glory of all; that from which results law, order, liberty, protection to person and property, a sacred regard for the rights of others, joined with an absolute independence of individual effort in security, a security based upon reason and a sense of moral obligation. The aptitude of the American people for such achievement the American mining law amply proves, and the course of its advancement, the history of its growth, should be interesting as well to the student of law as to the miner whose welfare is dependent upon its due administration.

"Let us examine with more or less detail the constituent elements out of which the system has been evolved. These may be stated generally to be:

"*First*—The customs and regulations of miners themselves.
"*Second*—State and federal legislation and federal treaties.
"*Third*—Spanish and Mexican law.
"*Fourth*—Judicial decisions.

"In the days of early mining in California and elsewhere, from the very necessity of the circumstances in which the miners found themselves, customs grew up which soon became a guide for all, or in mass meetings regulations were adopted concerning mining rights, and rules as to working them, which had the force of law in the locations where adopted, and constitute the American common law on mining for precious metals.[1] These meetings were held at a known place in the district, upon previous notice that the meeting would take place for the purpose intended, either to establish the laws for the first time, or to alter or repeal those formerly established. One of the miners present acts as the presiding officer, another as secretary, who keeps a record of the proceedings of the meeting, and afterwards hands the laws adopted to the recorder elected, who records them, as directed, in a book kept for that purpose. The laws are adopted in the usual way of conducting public metings, without much regard to Jefferson's Manual, but with the business tact of American instinct for public meetings. In regard to the notice for the meeting, there is a decision which may be given: 'There is,' says Mr. Justice Baldwin, in Gore vs. McBayer (18 Cal. 588), 'nothing in the point that the mining laws offered in evidence

[1] King vs. Edwards, 1 Mont. 235.

were passed on a different day from that advertised for a meeting of miners. We can not inquire into the regularity of the modes in which local legislatures or primary assemblages act. *They must be the judges of their own proceedings.* It is enough that the miners agree, whether in public meetings or after due notice, upon their local laws, and that these are recognized as the rules of the vicinage, unless some fraud be shown, or some other like cause for rejecting the laws.'[2]

"Senator Stewart, the author of the act of 1866, in advocating its passage in the senate, spoke in high praise of the regulations and customs of miners, and portrayed in glowing language the wonderful results that had followed the system of free mining, which had prevailed with the tacit consent of the government. The legislature of California, he said, had wisely declared that the rules and regulations of miners should be received in all controversies respecting mining claims, and when not in conflict with the constitution or laws of the state, or of the United States, should govern their determination; and a series of wise judicial decisions has molded these regulations and customs into 'a comprehensive system of common law, embracing not only mining law, properly speaking, but also regulating the use of water for mining purposes.' The miner's law, he added, was a part of the miner's nature. He made it, he trusted it, and obeyed it. He had given the honest toil of his life to discover wealth, which, when found, was protected by no higher law than that enacted by himself under the implied sanction of a just and generous government.[3]

"Most of the local rules and customs are easily recognized by those familiar with the Mexican law, the Continental Mining Codes, especially the Spanish, and with the regulations of the Stannary Convocation among the Tin Bounders of Devon and Cornwall, in England; and the High Peak Regulations for the lead mines in the county of Derby.

"General Halleck ascribed to them a more limited origin. In his introduction to the translation of De Fooz, he says: 'But the miners of California have generally adopted as being best suited to their peculiar wants, the main principles of the mining laws of Spain and Mexico, by which the right of property in mines is made to depend upon the *discovery* and *development*; that is, *discovery* is made the source of title, and *development*, or working, the condition of the continuance of that title. These two principles constitute the basis of all our local laws and regulations respecting mining rights.'[4]

"These regulations are founded in nature, and are based upon equitable principles, comprehensive and simple, have a common origin, are matured by practice, and provide for both surface and subterranean work, in alluvium, or rock *in situ*.[5]

"The rules and regulations originally established in California have, in their general features, been adopted throughout all the mining regions of the United States. They were so wisely framed and were so just and fair in their operation that they have not to any great extent been interfered with by legislation, either state or national,[6] and they are subject to the same rules of construction as statutes.[7] But the rule,

[2] Yale on Mining Claims and Water Rights, 73.
[3] Jennison vs. Kirk, 98 U. S. 453.
[4] De Fooz, 5, 7. See also King vs. Edwards, *supra*.
[5] Yale on Mining Claims and Water Rights, 58.
[6] St. Louis vs. Kemp, 104 U. S. 636.
[7] Rush vs. French, 1 Ariz. 99.

regulation or custom to be valid must not only have been established, but it must be in *force* in the district at the time the location is made. It does not, like a statute, acquire validity by the mere enactment, but from the customary obedience and acquiescence of the miners following its enactment. It is void whenever it falls into disuse and is generally disregarded.[8]

"It will be presumed that a party in possession of a mining claim holds in accordance with the local rules and customs of the district.[9] All mineral locations made before the enactment by congress of any law governing the subject are to be regulated by the local rules and customs in force when the location was made;[10] but if a mining claim, actually possessed and worked for several years, has been generally recognized as validly made, the claimant's title is good, though the mining rules in force when the location was made were not fully observed in making it. This is especially the rule as between cotenants and those claiming through them.[11] The courts have always sustained rights that grew up under them, and the Code of Civil Procedure of California declares that 'in actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages, or regulations, when not in conflict with the laws of this state, must govern the decision of the action.'[12] This is in terms a renactment of section 621 of the 'Practice Act' of California, and the views of the late Judge Sanderson announced upon this subject are as follows:

"'At the time the foregoing became a part of the law of the land, there had sprung up throughout the mining regions of the state local customs and usages by which persons engaged in mining pursuits were governed in the acquisition, use, forfeiture, or loss of mining ground. (We do not here use the word forfeiture in its common law sense, but in its mining law sense, as used and understood by the miners, who are the framers of our mining codes.) These customs differed in different localities, and vary to a greater or less extent according to the character of the mines. They prescribed the acts by which the right to mine a particular piece of ground could be secured, and its use and enjoyment continued and preserved, and by what nonaction on the part of the appropriator such right should become forfeited or lost, and the ground become, as at first, *publici juris,* and open to the appropriation of the next comer. They were few, plain, and simple, and well understood by those with whom they originated. They were well adapted to secure the end designed to be accomplished, and were adequate to the judicial determination of all controversies touching mining rights. And it was a wise policy on the part of the legislature not only not to supplant them by legislative enactments, but on the contrary to give them the additional weight of a legislative sanction. These usages and customs were the fruit of the times and demanded by the necessities of the communities who, though living under the common law, could find therein no clear and well-defined rules for their guidance applicable to the new conditions by which they were surrounded, but were forced to depend upon remote analogies, of doubtful application and unsatisfactory results. Having received the sanction of the legislature, they have become as much a part of the law of the land as the common law itself, which was not adopted in a more solemn form. And it is to be regretted that the wisdom of the legislature in thus leaving mining controversies to the arbitrament of mining laws, has not always been seconded by the courts and the legal profession, who seem to have been too long tied down to the treadmill of the common law to readily escape its thraldom while engaged in the solution of a mining controversy. These customs and usages have, in progress of time, become more general and uniform, and in their leading features are now the same throughout the mining regions of the state; and however it may have been heretofore, there is no reason why judges and lawyers should wander, with counsel for the appellant in this case, back to the time when Abraham dug his well, or explore with them the law of agency or the statute of frauds, in order to solve a simple question affecting a mining right, for a more convenient and equally legal solution can be found nearer home, in the 'customs and usages of the bar or diggings embracing the claim' to which such right is asserted or denied.'[13]

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[8] 15 Am. and Eng. Ency. of Law, 561.
[9] Robertson vs. Smith, 1 Mont. 410.
[10] Glacier Co. vs. Willis, 127 U. S. 471.
[11] Kinney vs. Con. Va. Co., 4 Sawy. 382; Mt. Diablo Co. vs. Callison, 5 Sawy. 439.
[12] See Deering's C. C. P. of Cal. and a note thereto giving reference to numerous decisions in California as to the rights of parties under local rules.
[13] Morton vs. Solambo, 27 Cal. 528.

"The extent of a mining district may be changed by those who created it, if vested rights are not interfered with.[14] Miners are still permitted, in their respective districts, to make rules and regulations not in conflict with the laws of the United States, or of the state or territory in which the districts are situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim.[15] And a corporation interested in mining may be represented by any of its officers or agents at any meeting of miners called together to frame rules and regulations in their mining district.[16] But in order that mining claims may be held and the government title acquired, it is not essential that mining districts should be organized and local rules adopted, and in absence of local rules a compliance with the public law will secure the claim.[17]

"In 1848 the treaty between the United States and Mexico, following the Mexican War, was ratified.[18] By that treaty California, Arizona, New Mexico, Texas and that part of Colorado south of the Arkansas River were ceded to the United States. That year gold was discovered in California, and soon thereafter began the exodus of the gold seekers from the eastern states and elsewhere to the Pacific Coast. The effect of the treaty was, of course, that the government of the United States became the landowner of all that part of the ceded territory to which, under the treaty, some private right of ownership had not attached. Up to that time, and even until a later period, as we shall see, congressional legislation with regard to minerals had been sporadic and unimportant. There had been some legislation as to salt springs, the leasing of lead mines, and the sale in Michigan and Wisconsin of lands containing copper, lead, or other valuable ores, but no general scheme in regard to minerals. Our forefathers of the thirteen original colonies inherited the common law of England, and under that law all gold and silver mines (speaking in general terms) belonged to the crown. The citizens of that portion of Mexico ceded to the United States inherited the law of Spain. Under the laws or ordinances of Spain certain rights were conferred upon the discoverer of gold and silver mines, and regulations were prescribed for working them. These ordinances, at the time of the cession somewhat modified by Mexican law, furnished an established system in relation to mines of gold and silver, and as before said, some of the features have been blended into the miner's customs and regulations.

"On July 26, 1866, congress passed the act that was the first effort by the federal legislature to create and establish a system of federal mining law.[19] It marked a new era in the development of the American legislation, and yet it is a singular fact to note, in passing, that in its title, mines are not mentioned, nor the purpose of the act disclosed. It reads: 'An act granting the right of way to ditch and canal owners over the public lands, and for other purposes.' The explanation of it is an interesting fact in the history of congressional legislation. Mr. Gregory Yale explains it, as follows:

[14] King vs. Edwards, *supra*.
[15] Erhardt vs. Boaro, 113 U. S. 527.
[16] McKinley vs. Wheeler, 130 U. S. 630.
[17] Golden Fleece Co. vs. Cable Con. Co., 12 Nev. 312.
[18] 9 U. S. Stats. at Large, 922.
[19] 14 U. S. Stats. at Large, 251.

"'The miners of California, and the states and territories adjacent thereto, have but a very inadequate idea of the imminent peril in which the pursuit in which they are engaged was placed at the commencement of the thirty-ninth congress. Two years ago there was a strong disposition in congress and the east generally to make such a disposition of the mines as would pay the national debt. The idea of relieving the nation of the payment of the enormous taxes which the war has saddled upon us by the sale of the mines in the far distant Pacific slope, about which few people here have any knowledge whatever, was the most popular that was perhaps ever started—compelling other people to liquidate your obligations, has been in all ages and all nations a highly comfortable and popular proceeding. There were some at the time of which I write who would not be satisfied with the sale of the mines. They held that even after the sale the government should be made a sharer in the proceeds realized from them.

"'The first bill on the subject was introduced in the Senate by Mr. Sherman of Ohio and in the House by Mr. Julian of Indiana. Both of these bills contain the most odious features. Sherman's bill went to the Committee on Public Lands, of which Mr. Stewart is a member. After much consideration it was understood that the committee would report adversely. Julian's bill received a much more favorable consideration in the House. In fact, the House went so far as to pass a resolution indorsing legislation substantially of the character contemplated in Julian's bill. After much canvassing, Mr. Conness and Mr. Stewart came to the conclusion that it was no longer safe to act on the defensive, and that it was necessary to determine what legislation would be acceptable, and to make a bold move to obtain it. The Secretary of the Treasury was then one of the strongest advocates of the sale of the mines, and appeared to be under the impression that it would yield a large revenue. The movement thus far had been encouraged by him, and it was thought that a partial success of his views would be more satisfactory to him than entire defeat. Mr. Conness accordingly suggested to him to have a bill prepared in his department, which would avoid the odious provisions of the other two propositions, and get some senator to introduce it, assuring him that a liberal measure would receive the favorable consideration of the Pacific delegation. The result was that the secretary had prepared the second bill, introduced by Mr. Sherman, which was a great gain on the first bill. This bill went to the Committee on Mines, of which Mr. Conness was chairman and Mr. Stewart a member. After much discussion these two senators were appointed a committee to draft a substitute, which, after several weeks of close study, resulted in the reporting of a bill substantially the same as the one which is now the law. At this time it was not expected that it would be possible to do more than get a report of the committee in favor of the measure, which it was thought would be an advanced affirmative position, from which the granting, selling, or other calamitous disposition of the mines could be successfully withstood. Upon making the report, however, it was determined to put on the boldest front possible, and try and pass it through the Senate. It came up on the eighteenth day of June, 1866, and at first had but two warm advocates—its authors. The discussion occupied the entire day, Mr. Stewart supporting the bill. Mr. McDougall first favored the bill, and then made a speech against it. Mr. Williams of Oregon was opposed to all bills of the kind. Nesmith contented himself with voting against it. Nye opposed it and said it would be good policy to let the whole subject alone, and not legislate upon it at all. This speech left his real position somewhat indefinite. In the course of the debate, however, it became manifest, from the remarks of Senators Sherman, Buckalew and Hendricks, that the real merits of the bill were beginning to be appreciated by the Senate. The two authors of the bill congratulated themselves on this sign of progress, and resolved to try again.

"'It was called up again on the twenty-eighth by Mr. Stewart, and was debated by Senators Stewart, Conness, Sherman, Hendricks, and others. After being amended slightly by Mr. Stewart, the bill passed the Senate. When it was first introduced, the bill had no friends in the House, but after it passed the Senate some of the Pacific delegation began to regard it favorably. It should have gone in the House to the Committee on Mines, of which Mr. Higby was chairman; but Mr. Julian, who is an older member, and was then chairman of the Committee on Public Lands, seized on the bill at once, and had it transferred to his committee. Then the struggle came to get it out of that committee. Mr. Stewart addressed himself to the members of it, and got every one of them but Julian, but he was intractable. He wanted his bill to go first, and would not let this supersede it. The House, too, was canvassed, and was found to be favorably disposed, but there was no way of getting at the bill. In the meantime, Higby had passed a bill from the Committee on Mines in regard to ditches. It contained only three provisions, and bore no resemblance to the bill in question, but it related to the same subject. When this bill came into the Senate, the mining bill was tacked on as a substitute, and was passed. It was then sent back to the House and went on the Speaker's table. In that condition it required a majority to refer it. To get that majority Julian exerted all his strength, but failed. The bill was passed in the house without an amendment and became a law. This accounts for its being entitled 'An act granting the right of way to ditch and canal owners through the public lands, and for other purposes.' I have been particular about hunting up all the facts bearing upon this struggle, for the reason that the bill evolved from it is the most important, so far as California is concerned, that has ever been passed by congress. The rules which have recently been proposed for the execution of the law, it is thought, will not meet the wants of the miners. If they do not, they will be amended. If difficulty should arise as to the authority to make such regulations under the law, a simple resolution, which can be passed any day, will be sufficient to legalize them. It is now thought best not to have the general subject opened again. It is far better to perfect the system which has been established as practical experience shall point the way, than to have any more agitation over it in congress. The result of the whole fight is the grant of all the mines to the miners, with some wholesome regulations as to the manner of holding and working them, which are not in conflict with the existing mining laws, but

simply give uniformity and consistency to the whole system. The escape from entire confiscation was much more narrow than the good people of California ever supposed. If either of the bills originally introduced had been passed, the Pacific states and territories would have received a blow from which they never would have recovered. The government could only have receded after the most irreparable and widespread damage had been done.'[20]

"The first section of the act of 1866 declared the mineral lands of the public domain to be free and open to exploration and *occupation* by all citizens of the United States and those who had declared their intention to become such. It established the first express right that ever existed for any and every citizen to go upon the public domain for the purpose of mining. Up to that time the immense mining enterprises that had been carried on in California and elsewhere had been under the silent acquiescence rather than the direct sanction of the federal government. It will be observed that the right is limited to citizens and those who have taken the initiatory step to become such, in which respect the great republic was less liberal than Spain, for in that country the right was conferred upon natives 'and all other persons whatsoever, though strangers to these, our kingdoms, who shall work or discover mines whatsoever, discovered or to be discovered; that they shall have them, and that they shall be their own in possession and property.'[21]

"Under the act a miner was enabled to acquire a fee simple title to his property. It assumed the existence of miners' customs or rules, and conferred the rights expressed, subject to such customs or regulations, when the same were not in conflict with the laws of the United States. It made no provision how a mining claim should be located. It provided, however, that no location thereafter should exceed 200 feet in length along the vein for each locator, with an additional claim for the discoverer; that no person shall make more than one location on the same lode, and not more than 3000 feet should be taken in one claim by any association of persons. The amount of surface ground was to be fixed by the local rules, and the extralateral right was given without regard to the position of the apex or top of the vein or lode appropriated. It made no mention of 'end lines.'[22] No patent should issue for more than one vein or lode, which should be expressed in the patent.

"There would seem to be no recognition or possibility of state legislation as to acquiring mines, although the fifth section provides that 'in the absence of necessary legislation by congress the local legislature of any state or territory might provide rules for working mines involving easements, drainage, and other necessary means to their complete development.' It provided for a stay of proceedings until a final settlement of the rights of adverse claimants in courts of competent jurisdiction. It made no mention of placer claims, nor of tunnel rights.

"It will thus be seen that though the act was a great step in advance, it was by no means complete, and on July 9, 1870, congress passed another act,[23] which it declared to be a continuation of the foregoing act, and annexing thereto six additional sections. It declared that placer claims should be subject to entry and patent upon like conditions provided as to lode claims. It also provided that in the absence of

[20] Yale on Mining Claims and Water Rights, 10.
[21] Rockwell's Spanish Law, 122.
[22] Eureka-Richmond Case, 4 Sawy. 302.
[23] 16 U. S. Stats. at Large, 217.

an adverse claim, where parties and their grantors had held and worked a claim equal to the period of the statute of limitations of the state or territory within which the same was situated, that that *ipso facto* established a right to a patent thereto. It declared that no location of a placer claim thereafter made should exceed 160 acres for any one person or association.

"In 1872 the foregoing legislation was superseded by a more elaborate act, for May 10th of that year congress passed another, in which it 'showed its hand' by entitling the same 'An act to promote the development of the mining resources of the United States.' [24] It enacted that 'all valuable mineral deposits' in lands belonging to the United States, both surveyed and unsurveyed, are 'free and open to exploration and *purchase*, and the lands in which they are found, to occupation and purchase.' This language, it will be seen, is of broader import than that of the first section of the act of 1866. It defined a 'lode claim.' It allowed surface of 1500 feet by 600 feet, whether located by one or more persons. It imposed no limitation as to locating by same person on the same lode in separate location. It recognized the local customs or rules of miners so far as the same were applicable and not inconsistent with the laws of the United States, and provided that the miners of each mining district may make rules and regulations, not in conflict with the laws of the United States, or of the state or territory in which the district is situated, governing the location, manner of locating, amount of work necessary to hold possession of a mining claim, subject to the requirements of distinctly marking the location on the ground, so that its boundaries can be readily traced; and that all records of mining claims thereafter made should contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as would identify the claim. It provided that the end lines of each claim should be parallel with each other. It granted exclusive right to possession and enjoyment to all lodes, the top or apex of which lay inside the surface lines of the location, with the right to follow the same beyond the side lines and within the end lines of the claim located, to any depth. It provided how tunnel rights might be secured, and how much annual work was necessary on each claim located prior or subsequent to the act; and that where claims were held in common, such work could be done upon any one claim. It further provided that when a co-owner failed to contribute his proportion of the expenditures required by this act, how his interest in the claim should become the property of his co-owners who had made such expenditure. It declared the conditions upon which a patent might be obtained, and provided that adverse claims should be determined by proceedings in a court of competent jurisdiction. It provided, as did the act of 1866, that as a further condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development, and those conditions shall be expressed in the patent.

"On the eleventh day of February, 1875, congress passed an act amending the then existing law 'so that where a person or company has

[24] 17 U. S. Stats. at Large, 91.

or may run a tunnel for the purpose of developing a lode or lodes owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes.' [25] The act was made retroactive, and exempted the owners from the performance of work upon the surface of the lode.

"The foregoing several acts of congress were codified as Title XXXII, Chapter VI of the Revised Statutes of the United States, 1878, embracing sections 2319 to 2346, inclusive.

"On January 22, 1880, congress passed an act declaring that the period within which work is required to be done on all unpatented mineral claims located since May 10, 1872, should commence on the first day of January succeeding date of location.

"On March 3, 1881, congress passed an act declaring that if any action brought pursuant to section 2326 of the Revised Statutes (which prescribe the method of determining adverse claims), title to the ground shall not be established by either party, the jury shall so find, and the claimant shall not proceed in the land office or be entitled to a patent until he shall have perfected his title.[26]

"The intended scope of this article does not include a reference to the statutes of the various states and territories enacted in relation to working, draining, and preservation of mines, the transfer and mortgage of mining rights, and kindred subjects. They will be found in the statutes and the various treatises upon mining law.

"It may be well, however, to direct attention to an act of the legislature of California of March 31, 1891.[27] It is therein provided that when a mine owner has performed the labor and made the improvements necessary for the location and ownership of mining claims or lodes, he should, within thirty days, file with the recorder of the county within which the property is situated an affidavit describing the labor performed and the improvement made, and the value; and failure to do such work renders the mine open to relocation. It makes provision, however, for saving the rights of locators who shall return to work before a relocation and continue the same with reasonable diligence. Also, when a person runs a tunnel in good faith for the purpose of developing a lode or claim, the money so expended shall be considered as expended on said lode or claim; provided, that such lode or claim shall be distinctly marked on the surface, as required by law. It also declared that mining claims shall be subject to a right of way for the purpose of working other mines; provided that damage be assessed and paid for as in land taken for public use. The act is not the best specimen of lucid expression, but perhaps the intention can be ascertained without much difficulty.

"Another act of a state legislature, interesting to the people of Montana, but not within the purview of this article, was the act of the legislature of that state of March 5, 1891, creating a Mineral Land Commissioner, whose duty is 'to prepare and publish a clear and concise statement of the facts in respect to the danger of millions of acres of the best gold, silver, and copper-bearing mineral lands of Montana becoming the property of the Northern Pacific Railroad Company.' [28]

[25] U. S. Stats. at Large, 315.
[26] 21 U. S. Stats. at Large, 505.
[27] Stats. Cal. 1891, 219.
[28] Stats. Mont. 1891, 178.

"The opportunities that mines have afforded for the acquisition of wealth have been provocative of much sharp litigation as to the ownership of mining property. The result has been that nearly every term used in the mining laws has received judicial interpretation and definition."

WALTER W. BRADLEY,
State Mineralogist.

San Francisco, January 3, 1931.

CHAPTER I.

MINING TERMS AND PHRASES.

(For additional terms and phrases see appropriate titles.)

§ 1. Abandonment.

"Abandonment" of a mining claim is a matter of intent [1] which is to be arrived at from consideration of the acts of the parties.[2] Forfeiture results from failure to perform annual assessment work under the mining statutes, and the relocation of the land by another.[3]

II. Absence of Discovery.

It is a very common notion among prospectors in this country that if they sink a shaft, which they call a "discovery shaft" or run a cut or a tunnel for a few feet and put up their stakes, they acquire thereby some sort of an interest in the public domain, although within the limits of their shaft, cut or tunnel, there may be no indications whatsoever of a vein or mineral deposit and work has ceased. Whatever may be the comity in respect to this matter among miners and prospectors, as a matter of law such a location absolutely is worthless for any purpose.[4]

III. Abstract of Title.

An "abstract of title" is a paper prepared by a skilled searcher of records which should show an abstract of whatever appeared on the public records of the county affecting the title,[5] but an abstract of title of an unpatented mining claim merely is of the nature of memoranda

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[1] Black vs. Elkhorn Co., 163 U. S. 445. Peachy vs. Frisco Co., 204 Fed. 668.
The doctrine of abandonment relates to abandonment of possession, whereupon the mining claim is restored to the public domain and subject to relocation. Alaska-Dano Co., 52 L. D. 550.

[2] Lakin vs. Sierra Buttes Co., 23 Fed. 337.

[3] Goldberg vs. Bruschi, 146 Cal. 708, 81 Pac. 23.
Burden of proving abandonment is on party asserting it. Thornton vs. Phelan, 65 Cal. A. 480, 224 Pac. 259.
That the Supreme Court of the United States has not always recognized the distinction between abandonment and forfeiture: see Lavignino vs. Uhlig, 198 U. S. 443; Donnelly vs. U. S., 228 U. S. 267; Union Oil Co. vs. Smith, 249 U. S. 330, aff'g. 166 Cal. 217, 135 Pac. 966. In Farrell vs. Lockhart, 210 U. S. 142, the distinction is pointed out. Ground embraced within a mining location may become a part of the public domain so as to be subject to another location before the expiration of the period for performing the assessment work, where there is an abandonment of the claim by the first locator. Farrell vs. Lockhart, *supra*; Street vs. Delta Co., 42 Mont. 384, 112 Pac. 701; see Brown vs. Gurney, 201 U. S. 184, 32 Colo. 472, 77 Pac. 357; and see Nash vs. McNamara, 30 Nev. 114, 93 Pac. 405, criticizing Lavagnino vs. Uhlig, *supra*.

[4] McLaughlin vs. Thompson, 2 Colo. A. 135, 29 Pac. 817. See Erhardt vs. Boaro, 113 U. S. 527; Bulette vs. Dodge, 2 Alaska 427.
If such a location is followed by possession with a view of making discovery and work to that end diligently is prosecuted such possession cannot be disturbed by strangers. Hullinger vs. Big Sespe Oil Co., 28 Cal. A. 69, 151 Pac. 369; *but see* Hanson vs. Craig, 170 Fed. 62. The diligence in such a case has been defined as "that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs; such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time. It is the doing of an act, or series of acts, with all practical expedition with no delay except such as may be instant to the work itself." U. S. vs. Midway Oil Co., 232 Fed. 626. Furthermore, no adverse location can be made during the period allowed by the state statute for the recording of the location. Sierra Blanca Co. vs. Winchell, 35 Colo. 13, 83 Pac. 628; see Union Oil Co. vs. Smith, *supra* [3]; McKenzie vs. Moore, 20 Ariz. 1, 176 Pac. 568.

[5] Smith vs. Taylor, 82 Cal. 533, 23 Pac. 219; Taylor vs. Williams, 2 Colo. A. 559, 31 Pac. 505.

which never show the true or, at least, the complete title.[6] Its examination, therefore, should, properly be coupled with personal inspection of the ground and its vicinity in order to ascertain, (1) that the mineral deposit (if any), warrants the character of the location made[7]; (2) that there is a valid "discovery" within the limits of the claim[8]; (3) that the notice of location has been posted upon the claim as and where required by local statute[9]; (4) that the location is so marked that its boundaries can be readily traced[10]; (5) that the end lines are parallel[11]; (6) that the location has not been laid across the vein or lode[12]; (7) or upon its "dip"[13]; (8) that there is no "known vein or lode" within a placer claim not separately located[14]; (9) that the required annual expenditure has been made[15]; that there is no conflicting surface claim.[16] The abstract of title is incomplete unless due note is made therein of the records of the local land office.[17]

2. Abstract of Title of Patented Claim.. An abstract of title of a patented mining claim should include all *data* of record in the local recorder's office and in the local land office.[18] It may thus be made to appear that the patentee holds in trust for pretermitted coowners, or other owners[19]; that dual patents have been issued[20]; that the property is not free from subsisting lien.[21] It is the date of the location notice and not the date of entry in the land office that determines priority of discovery and location of a patented lode claim.[22]

[6] Patterson vs. Hitchcock, 3 Colo. 533.

"An abstract of title merely is a memorandum or a concise statement of the conveyances and incumbrances appearing of record and affecting the title to real property, and its object is to enable the purchaser or his counsel to readily pass upon the validity of the title in question as shown by the records, but, regardless of what is shown by an abstract or the public records a purchaser of real estate is charged with notice of the rights of persons in actual possession thereof." Foley vs. Brown, 85 Okla. 1, 204 Pac. 267; Duncan vs. Kelley, 103 Okla. 74, 229 Pac. 425.

[7] Cole vs. Ralph, 252 U. S. 295, rev'g. 249 Fed. 81; Harry Lode, 41 L. D. 403.

[8] Cole vs. Ralph, *supra*[(7)]; see Fox vs. Myers, 29 Nev. 169, 86 Pac. 793.

[9] Batt vs. Stedman, 36 Cal. A. 608, 173 Pac. 99; Butte Co. vs. Radmilovich, 39 Mont. 157, 101 Pac. 1078. As to state regulations see Butte City Co. vs. Baker, 196 U. S. 119; McCleary vs. Broaddus, 14 Cal. A. 60, 111 Pac. 125; Stock vs. Plunkett, 181 Cal. 193, 183 Pac. 657.

[10] Harper vs. Hill, 159 Cal. 253, 113 Pac. 162.

[11] Elgin Co. vs. Iron Co., 14 Fed. 377, aff'd. 118 U. S. 196.

[12] Flagstaff Co. vs. Tarbet, 98 U. S. 467.

[13] Larkin vs. Upton, 144 U. S. 21; *but see* Van Zandt vs. Argentine Co., 8 Fed. 75; Bunker Hill Co. vs. Shoshone Co., 33 L. D. 142.

[14] See McKay vs. Mesch, 274 Fed. 867; see, also, Reynolds vs. Iron Co., 116 U. S. 698; South Star Lode, 20 L. D. 204; *but see* South Butte Co. vs. Thomas, 260 Fed. 814, *certiorari* denied, 253 U. S. 486.

[15] See Last Chance Co. vs. Tyler Co., 61 Fed. 557. The statutory affidavit of expenditure presents *prima facie* evidence of the fact. Cal. C. C. § 1426*m*. Book vs. Justice Co., 58 Fed. 106, and forms a link in the chain of title. Thompson vs. Pack, 219 Fed. 624.

[16] Brannagan vs. Dulaney, 2 L. D. 744; Holdt vs. Hazzard, 10 Cal. A. 444, 102 Pac. 540, see Cook vs. Klonos, 164 Fed. 529.

The record of the certificate of location of a mining claim required by law does not necessarily disclose the title. The law prescribes what the certificate shall contain. This, however, gives the purchaser no information respecting conflicting claims. For this he is dependent on examination and inquiry. If a conflicting claim be ascertained the record still does not necessarily disclose the better title. Location and record still relate back to the date of discovery for the inception of title. Location and record may both be prior to those of a cross lode, and still the latter be the older title, by reason of an earlier discovery, perfected within the statutory time, of which the record gives no information. Patterson vs. Hitchcock, *supra*.[(6)]

[17] See U. S. vs. Wesley, 189 Fed. 276; Adams vs. Smith Co., 273 Fed. 652; 50 L. D. 199.

[18] Id. The register's final certificate of mineral entry (formerly receiver's final receipt) is not conclusive because it is subject to cancellation. Deffeback vs. Hawke, 115 U. S. 392; U. S. vs. Record Oil Co., 242 Fed. 746; *but see* El Paso Co. vs. McKnight, 233 U. S. 250; rev'g. 16 N. M. 721, 120 Pac. 694; Silver King Co. vs. Conkling Co., 256 U. S. 18, rev'g. 230, Fed. 553.

[19] Turner vs. Sawyer, 150 U. S. 578; Sussenbach vs. Bank, 5 Dak. 477; 41 N. W. 662; Thomas vs. Horst, 54 Mont. 260, 169 Pac. 731.

[20] See *supra*, note 17; see, also, Round Mt. Co. vs. Round Mt. Co., 36 Nev. 543, 138 Pac. 71, rev'g. 35 Nev. 392, 129 Pac. 308.

[21] Forbes vs. Gracey, Fed. Cas. 404; Butte Co. vs. Frank, 25 Mont. 344, 65 Pac. 1.

[22] Butte Co. vs. Frank, *supra*[(21)]; When a patent issues it becomes operative as of date of the final receipt. U. S. vs. Detroit Co., 200 U. S. 335; Cassidy vs. Silver King Co., 199 Fed. 102.

The patent may have issued after title had already passed out of the United States, in which case it is void.[23]

Placer patents always are doubtful, in theory at least.[24]

Personal examination of the ground covered by a patent is proper as, in the event of misdescription therein, the monuments fixed by the official survey govern.[25]

IV. Accident.

An "accident" as used in its popular sense is any unlooked for mishap or untoward event not expected nor designed.[26]

V. Act of God.

An "act of God" as known in the law is an irresistible superhuman cause, such as no reasonable human foresight, prudence, diligence, and care can anticipate.[27]

VI. Adjacent.

The word "adjacent," as generally defined and understood, means by, or near, and close, but not actually touching; and nonadjacent, representing the opposite situation, means not near, and not close.[28]

VII. Adoption of Boundary Marks.

In Campbell vs. McIntyre.[29] it is said: "We see no reason why the corner posts of an adjoining well-known placer claim, may not with the consent of the owner of such adjoining claim, be adopted as corner posts by the locator. Such adoption does not in any way tend to confusion as to the boundaries of the claim so located. It is not unlike the case of the adoption of the stakes of a prior location which has been abandoned as in Conway vs. Hart, 129 Cal. 480, 62 Pac. 44, and in Brockbank vs. Albion Co., 29 Utah 367, 81 Pac. 863. In Eaton vs. Norris, 131 Cal. 561, 63 Pac. 856, the court sustained claims where two adjoining locations were each marked by stakes set at the four corners, two thereof being stakes upon the dividing line and common to both claims."

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[23] Davis vs. Weibbold, 139 U. S. 525; Francoeur vs. Newhouse, 40 Fed. 618; N. P. R. Co. vs. Barden, 46 Fed. 606. In Gleason vs. White, 199 U. S. 54, the court said: "By mistake of the land department, two patents have been issued. * * * It is one of those unfortunate mistakes which sometimes occur, and which necessarily throw confusion and doubt upon titles." In Adams vs. Smith Co., *supra* [17] both a mineral and an agricultural patent were issued partly embracing the same ground.

[24] McKay vs. Mesch, *supra* [14]; see Dahl vs. Raunheim, 132 U. S. 261; Thomas vs. South Butte Co., 211 Fed. 107; Barnard Co. vs. Nolan, 215 Fed. 996.

[25] 32 Stats. 545; Coffee vs. Emigh, 15 Colo. 184, 25 Pac. 83. See Silver King Co. vs. Conkling Co., *supra*.[18] As to parties in possible adverse possession of the patented property see Reedy vs. Wesson, 1 Alaska 570; Wetzstein vs. Largey, 27 Mont. 212, 70 Pac. 717.

[26] Indian Creek Coal Co. vs. Calvert, 68 Ind. A. 474, 110 N. E. 522. It is a general rule that the happening of an accident carries with it no presumption of negligence on the part of the employer. Johnson vs. Silver King Co., 54 Utah 34, 179 Pac. 64. But it is the duty of a mine operator or other employer where an employee is injured to exercise ordinary care to secure and provide first aid for the injured employee and in the exercise of such care to secure for the injured employee surgical and medical treatment at the hands of competent physicians and surgeons. Hunicke vs. Meramic Co., 262 Mo., 560, 172 S. W. 43; see Cushman vs. Cloverland, 170 Ind. 402, 84 N.E. 759.

[27] Garrett vs. Beers, 97 Kan. 255, 155 Pac. 2; see Georgia Co. vs. Hall, 124 Ga. 324, 52 S. E. 679, 683, 684; Rosenwald vs. Oregon City Co., 84 Or. 15, 163 Pac. 831, Id. 164 Pac. 189; see, also, Lysaght vs. Lehigh Co., 254 Fed. 353. No one is responsible for the act of God, or inevitable accident. But when human agency is combined with it, and neglect occurs in the employment of such agency, liability for damage results. Stapp vs. Madera Co., 34 Cal. A. 49, 166 Pac. 823. See, also, Wallner vs. Barry, 207 Cal. 470, 279 Pac. 148.

[28] Brick Pomeroy Mill Site, 34 L. D. 324.

[29] 295 Fed. 47.

VIII. Adverse Claim.

The signification of the words "adverse claim" as used in the mining law, is a claim filed in the United States land office opposing an application for patent for mining premises made by another person.[30]

IX. Adverse Intent.

The terms "claim of right," "claim of title" and "claim of ownership," when used in the books to express "adverse intent," mean nothing more than the intention of the dissessor to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title.[31]

X. Adit.

"Adit" is a term in mining used to denote the opening by which a mine is entered, or by which the water or ores are carried away; called also a drift.[32]

XI. Affidavit of Labor.

The object of the acts providing for the recording of "affidavits of labor" evidently is to fix some definite way in which the proof as to the performance of the work or expenses incurred in the making of improvements might be, in many cases, more accessible. Such acts simply provide the method of preserving *prima facie* evidence of the fact that such requirement has been fulfilled. The failure to comply with the terms of such an act will not work a forfeiture[33] and a local statutory enactment to that effect is void.[33*]

XII. Alien.

The location by an alien and all the rights following from such location, are voidable, not void, and are free from attack by any one except the government.[34]

XIII. Annual Assessment Work.

The terms "assessment" and "annual assessment labor," refer to the annual labor required by § 2324 Rev. St., (5 U. S. Comp. St. p. 5525, § 4620), that being commonly called by miners the "annual assessment" or the "assessment work" and so described in many judicial opinions[35] and in at least two acts of Congress.[36] As applied to a mining claim, assessment work has nothing to do with locating or holding a claim before discovery. It is a condition subsequent to discovery and location

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[30] McCowan vs. McClay, 16 Mont. 234, 40 Pac. 602; see Upton vs. Santa Rita Co., 14 N. M. 120, 89 Pac. 275.

[31] Crowder vs. Doe, 162 Ala. 151, 50 So. 430; Bessler vs. Power River Co., 95 Or. 271, 185 Pac. 573.

[32] Gray vs. Truby, 6 Colo. 260; Electro Magnetic Co. vs. Van Auken, 9 Colo., 204, 11 Pac. 80. "In the United States, the word *tunnel* is used instead of adit in most cases, although properly a tunnel means a nearly horizontal excavation through the mountain, open at both ends, as a railroad tunnel." Shamel on Mining Law, page 19.

[33] Book vs. Justice, *supra*.(15) See Musser vs. Fitting, 25 Cal A. 746, 148 Pac. 536. It has been held that the claim is not open to relocation until after the expiration of the time allowed by law for the recordation of the affidavit. Jones vs. Peck, 63 Cal. A. 397, 218 Pac. 1030.

[33*] Betsch vs. Umphrey, 270 Fed. 45, rev'g. 6 Alaska 211.

[34] Manuel vs. Wulff, 152 U. S. 505. Shea vs. Nilima, 133 Fed. 215. See Ginaca vs. Peterson, 262 Fed. 904. The question of citizenship is immaterial and can not be raised nor determined in suits between individuals except in "adverse suits." Holdt vs. Hazard, *supra*.(16)

[35] See El Paso Co. vs. McKnight, *supra* (18); Union Oil Co. vs. Smith, *supra*.(3)

[36] 28 Stats. 6; 30 Stats. 651.

to be performed in order to preserve the exclusive right of possession of a valid mining location upon which discovery has been made.[37]

XIV. Annual and Patent Expenditure.

Annual expenditure solely concerns adverse claimants of the same mineral land; goes to the right of possession and is determined by the courts, alone. The sufficiency of the expenditure of five hundred dollars as a condition precedent to the obtaining of patent is wholly within the jurisdiction of the land department.[38]

XV. Anticline and Syncline.

An "anticline" is the crest of a ridge and the "syncline" the lower portion.[39]

XVI. Anticline and Fissure Veins.

The only difference between a vein in the form of a single anticlinal fold and the ordinary fissure vein is that the former has a crest, the limbs of which dip in opposite directions, while the latter has a terminal edge and a dip in but one direction.[40]

XVII. Appropriation.

The term "appropriation" in mining law means the posting of notice at or near the point where the ledge is exposed; next the recording of the notice; next the marking of the boundaries.[41]

XVIII. Assay.

An "assay" is a means of ascertaining the commercial value of a mineralized substance, as, for example, ore or black sand, or the product of a mill or smelter, either by a "fire" or a "wet" process,[42] and is

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[37] Union Oil Co. vs. Smith, *supra* [3]; McLemore vs. Express Oil Co., 158 Cal. 563, 112 Pac. 59; Borgwardt vs. McKittrick Oil Co., 164 Cal. 650, 130 Pac. 417.

To "resume work" is to actually begin work in good faith and diligently prosecute the same to completion before an adverse relocation actually has been made. McCormick vs. Baldwin, 104 Cal. 229, 37 Pac. 903; Hirschler vs. McKendricks, 16 Mont. 211; 40 Pac. 290. There can be no resumption of work in Alaska, Thateher vs. Brown, 190 Fed. 708; Ebner Co. vs. Alaska Co., 210 Fed. 599, see Chichagoff vs. Alaska Handy Co., 45 Fed. (2d) 553; nor within withdrawn or reserved areas unless the mining location antedates the inhibition. Navajo Ind. Res., 30 L. D. 515; Krushnic vs. West, 30 Fed. (2d) 742; aff'd. 280 U. S. 306; *but see* Interstate Oil Corp., 50 L. D. 262.

[38] Poore vs. Kaufman, 44 Mont. 248, 119 Pac. 785.

[39] Empire Co. vs. Tombstone Co., 131 Fed. 341. When strata dip like the roof of a house, the strata are spoken of as forming an anticline or saddleback. Page Advd. Textbook on Geology, IV, 83. Inclining in opposite directions from a central axis; applied to stratified rocks when they incline or dip from a central unstratified mass; or when in consequence of crust movements they have been folded or pressed together so that they dip each way from a central plane, which indicates the line parallel to which the folding has taken place; opposed to synclinal. Cent. Dict. There is nothing in the court definitions which militates against the crest of an anticlinal roll being the apex of a vein. Jim Butler Co. vs. West End Co., 35 Nev. 375, 158 Pac. 881, aff'd 247 U. S. 450.

[40] Jim Butler Co. vs. West End Co., *supra*.[39]

[41] McCleary vs. Broaddus, *supra*.[9] See, generally, Gould vs. Maricopa Co., 8 Ariz. 429, 76 Pac. 598.

But no location is complete without discovery therein. Cole vs. Ralph, *supra*.[7]

[42] Puget Co., 96 Fed. 90; Phipps vs. Hully, 18 Nev. 133, 1 Pac. 669. For difference in results of wet and fire assays see Puget Co., *supra*; Shamel on Mining Law, page 12. For a discussion, of where assays were made from mine specimens, from car samples, and from mill or battery samples, see Fox vs. Hale & Norcross Co., 108 Cal. 369, 41 Pac. 308. For method of sampling and assay on ore sales see Chisholm vs. Eagle Co., 144 Fed. 670. For assay as evidence see Cole vs. Ralph, *supra* [7]; Mudsill Co. vs. Watrous, 61 Fed. 163; People vs. Whalen, 154 Cal. 472, 98 Pac. 194; Healey vs. Rupp, 28 Colo. 102, 63 Pac. 319; Phipps vs. Hully, *supra*.

Assays do not have to be taken to establish the existence of a vein, nor warrant a location thereon. Iron Co. vs. Mike & Starr Co., 143 U. S. 404; Madison vs. Octave Oil Co., 154 Cal. 768, 99 Pac. 178; Muldrick vs. Brown, 37 Or. 185, 61 Pac. 429. Samples and assays without *data* of extent of the dimensions of ore bodies mean little or less than nothing of value, and are well calculated to deceive. U. S. vs. N. P. R. Co., 1 Fed. (2d) 57.

termed "ordinary assays," "commercial assays," "specimen assays," "control assays" and "umpire assays."

XIX. Assay Value.

The term "assay value" means the standard value of gold everywhere.[43] An average "assay value" of several samples can not be taken as an absolute mathematical demonstration of the value of an orebody [44] nor is the assay return necessarily conclusive of the value of the thing assayed [45]; it may, however, tend to prove discovery.[46]

XX. Assessment Labor.

The term "assessment labor" refers to the annual labor required of the locator of a mining claim after discovery and not to work before discovery.[47]

XXI. Association.

The term "association" usually means an unincorporated organization composed of a body of persons, banded together for some particular purpose, partaking in its general form and mode of procedure of the characteristics of a corporation.[48]

XXII. Association Placer Location.

A placer location made by an association of persons in one location covering one hundred and sixty acres is not eight locations covering twenty acres each. It is in law a single location, and as such a single discovery is sufficient to support such a location; the only assessment work required is as for a single claim.[49]

XXIII. Barren Mine.

A mine may be fully developed and yet, owing to the barrenness of the ore, it would be impossible to work it with profit.[50]

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[43] Vietti vs. Nesbitt, 22 Nev. 390, 41 Pac. 151.

[44] Golden Reward Co. vs. Buxton Co., 97 Fed. 413; Pittsburg Co. vs. Glick, 7 Colo. A. 43, 42 Pac. 188. Mr. Costigan, in his work on Mining Law (page 108), says: "A 'mill run' is where a number of tons of supposedly representative ore are run through a mill to serve as an indication of the value of the ore in the mining claim. It is, of course, a far better test of the worth of the ore than an assay is, since an assay tests the value of only a very small piece of ore, and so is much less likely to be representative of the lode." See U. S. vs. N. P. R. Co., *supra* (42). See, generally, Chisholm vs. Eagle Ore Sampling Co., 144 Fed. 670.

[45] Phipps vs. Hully, *supra* (42); see Mudsill Co. vs. Watrous, *supra* (42); Ormund vs. Granite Co., 11 Mont. 303, 28 Pac. 289; see, also, Cheesman vs. Shreeve, 40 Fed. 787; Dobler vs. N. P. R. Co., 17 L. D. 103.

[46] Healy vs. Rupp, *supra* (42); see Cole vs. Ralph, *supra*.(7) The results of assays of rock taken from a mining claim long after the date of its location are competent evidence to show that the locators discovered a vein at the time of location. Southern Cross Co. vs. Europa Co., 15 Nev. 383; *but see* Iron Co. vs. Mike & Starr Co., *supra* (42).

[47] Union Oil Co. vs. Smith, *supra*.(3)

[48] Ruple vs. DeJournette, 50 L. D. 139. See, also, U. S. vs. Trinidad Co., 137 U. S. 160.

[49] Con. Mutual Oil Co. vs. U. S., 245 Fed. 521. See U. S. vs. California Midway Oil Co., 279 Fed. 521; Miller vs. Chrisman, 140 Cal. 440, 73 Pac. 1085; 74 Pac. 444, aff'd. 197 U. S. 313; Reeder vs. Mills, 62 Cal. A. 426, 217 Pac. 562; McDonald vs. Montana Wood Co., 14 Mont. 88, 35 Pac. 668.

[50] People vs. Whalen, *supra*.(42) For a case involving an "exhausted mine" see Martin vs. Walsenburg Co., 200 Fed. 270. Lillibridge vs. Lackawanna Co., 264 Pa. St. 235, 107 Atl. 688.

XXIV. Battery.

A "battery" is made of three stulls placed together and put in at the pitch of the vein, usually located a few feet apart, up and down, and crosswise of a stope.[51]

XXV. Bell Holes.

"Bell holes" are holes dug, or excavations made at the section joints of a pipeline for the purpose of repairs.[52]

XXVI. Boss.

The term "boss" means a master workman or superintendent; a director or manager.[53]

XXVII. Cap.

A "cap" is a square piece of plank or block wedged between the top of posts and the roof of a mine the better to hold the roof.[54]

XXVIII. Carnotite.

"Carnotite" essentially is a vanadate of uranium and potassium, but with other bases present also. It is found as a canary-yellow impregnation in sandstone in western Colorado and eastern Utah. By the reduction of carnotite ore radium, bromide or chloride, uranium oxide and vanadium oxide are obtained. The elemental substances radium, uranium and vanadium generally are classed as metals. However, they are not produced, marketed nor utilized in their elemental or metallic state but as the compounds above mentioned. The radium salts are used for scientific and medicinal purposes. Uranium is a heavy metal found chiefly in uraninite, carnotite, samarskite, and a few other rare minerals. Vanadium is a rare element, but acid and base forming, found in vanadates and allied to phosphorus. Carnotite is an impure vanadate of potassium and uranium. The elements of radium, uranium and vanadium are not dealt with in the metal market or the trades in their elemental form as metals, are not so produced or recovered immediately in the reduction of carnotite ore. While the two substances last named appear in some forms of special steels, the percentage so used is very small.

The compounds or oxides of the two elements are the forms used in the production of such steels. It follows therefore that carnotite is not a metalliferous mineral and a mineral location thereof within a petroleum withdrawal can not stand.[55]

XXIX. Character of Land.

The question of the "character of land" can be raised only by the United States or those claiming under them[56] and conclusively is determined in and by the land department.[57] The question usually

[51] Lesh vs. Tamarack Co., 186 Mich. 399, 152 N. W. 1022.
[52] Moore vs. Hope Co., 76 W. Va. 651, 86 S. E. 565.
[53] Johnson vs. Butte & S. Co., 41 Mont. 158, 108 Pac. 1057; Applebee vs. Albany Co., 12 N. Y. S. 576.
[54] Big Branch Co. vs. Wrenchie, 160 Ky. 668, 170 S. W. 16.
[55] Con. Ores Co., 46 L. D. 468.
[56] Ryan vs. Granite Hill Co., 29 L. D. 522; Lorenz vs. Waldron, 96 Cal. 243, 31 Pac. 54.
[57] Burfenning vs. Chicago Co., 163 U. S. 321; Standard Co. vs. Habishaw, 132 Cal. 115, 64 Pac. 113. See Kirk vs. Olson, 245 U. S. 225; Day, 50 L. D. 24; *but see supra* note 43.

arises at the instance of some party connected with the paramount title, who claims the land to be nonmineral.[58] The land department, however, is authorized at any time before patent to inquire whether the original entry was in conformity to law.[59] A patent duly issued by the land department sets at rest for all time the question of the mineral or nonmineral character of the land described therein.[60]

XXX. Citizens.

Mining claims within the United States may be located by citizens of the United States and by those who have declared their intention to become such citizens.[61]

A corporation existing by virtue of the laws of the United States or of a state or territory of the United States is a citizen of the United States.[62]

Native born citizens of the Dominion of Canada are accorded certain reciprocal mining rights and privileges within Alaska.[63]

Citizens of the United States and citizens of the Philippine Islands may make mining locations therein.[64]

Citizens of the United States who are employed in the general land office are prohibited by statute from in any manner acquiring public land under penalty of removal from office.[65]

XXXI. Claim.

The word "claim" in mining parlance when used as a noun has a definite meaning, denoting when coupled with the name of a miner, a particular piece of ground to which he has a recognized, vested and exclusive right of possession for the purpose of extracting metals and minerals therefrom.[66] The term is applied indifferently to both lode and placer claims.[67]

XXXII. Claim Jumping.

The location of a mining claim on supposably excess ground within the staked boundaries of an existing location on the theory that the

[58] Chrisman vs. Miller, 197 U. S. 213; aff'g. 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, Book vs. Justice Co., *supra* (15); Olive Land Co. vs. Olmstead, 103 Pac. 568; Mutchmor vs. McCarty, 149 Cal., 603, 87 Pac. 85.

Where in a controversy between rival claimants to a tract of public land the issue is as to its character and it is adjudged upon hearing to be mineral, the issue as to the character of the land as of the date of the hearing is *res judicata*, and further consideration of the matter will not be given by the land department in the absence of a showing that exploration and development subsequent to the hearing disclosed that the land was not in fact of mineral value. Gorda Co. vs. Bauman (on petition), 52 L. D. 519.

[59] Kirk vs. Olson, *supra* (57); Nichols & Smith, 46 L. D. 26. See Cowell vs. Lammers, 21 Fed. 200. See, also, Wyoming vs. U. S., 255 U. S. 489.

[60] Thomas vs. Horst, *supra*.(19)

[61] Gleeson vs. Martin White Co., 13 Nev. 442.

[62] McKinley vs. Wheeler, 130 U. S. 630; Doe vs. Waterloo Co., 70 Fed. 455; aff'g. 55 Fed. 11.

[63] See Instructions, 32 L. D. 424.

[64] 32 Stats. 697; amended, 33 Stats. 692.

[65] Rev. Stat. § 452; 2 Mason's U. S. Code, p. 2850, § 11; Baltzell, 29 L. D. 333; Contzen, 38 L. D. 346. See Waskey vs. Hammer, 223 U. S. 85, aff'g. 170 Fed. 31; Stutsman vs. Olinda Co., 231 Fed. 529.

[66] N. P. R. Co. vs. Sanders, 49 Fed. 129. The word "claim" as used in the law affecting adversary patent proceedings refers to an unpatented claim. Iron Co. vs. Campbell, 135 U. S. 286; Wright vs. Town, 13 Wyo. 506, 81 Pac. 649.

The words "mining claim," as used in the law, have no reference to the different stages in the acquisition of a government title. They include all mines, whether the title is inchoate, as in the case of a mining claim in its strict sense, or perfect, as in the case of a fee-simple title. Bewick vs. Muir, 83 Cal. 372, 23 Pac. 389.

[67] Sweet vs. Webber, 7 Colo. 443, 4 Pac. 752; see Bay State Co. vs. Brown, 21 Fed. 167.

law governing the manner of making the original location has not been complied with is called "claim jumping." [68]

XXXIII. Caims Held in Common.

The phrase "held in common" means a claim whereof there are more owners of a claim than one, while the use of the words "claims held in common," on which work done upon one of such claims shall be sufficient, means that there must be more than one claim so held, in order to make a case where work upon one of them shall answer the statutory requirement as to all of them.[69]

XXXIV. Claimant.

The word "claimant" as used in the federal mining law, means "locator." [70]

XXXV. Classification of Land.

There is no certain, well-defined obvious line of demarcation between mineral and nonmineral land.[71] No land can be valuable mineral land unless it contains a deposit of mineral in some form, metalliferous or nonmetalliferous in quantity sufficient to justify expenditures in the effort to extract it.[72]

XXXVI. Computing Time.

In "computing time," when notice is given in land office proceedings, the first day is excluded and the last day included.[73]

XXXVII. Concentrate.

In mining the term "concentrate" means to separate ore or metal from its containing rock or earth. The concentration of ores always proceeds by steps or stages. Thus the ore must be crushed before the mineral can be separated, and certain preliminary steps, such as sizing and classifying, must precede the final operations, which produce the finished concentrates.[74]

XXXVIII. Constructive Possession.

"Constructive possession" is that possession which the law annexes to the legal title or ownership of property, when there is a right to the

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[68] Nelson vs. Smith, 42 Nev. 302, 176 Pac. 265; see Stock vs. Plunkett, *supra* (9) 183 Pac. 657; Murphy vs. Cobb, 5 Colo. 281; Arnold vs. Baker, 6 Neb. 134.

[69] Chambers vs. Harrington, 111 U. S. 352; Union Oil Co. vs. Smith, *supra*.(3) See Eberle vs. Carmichael, 8 N. M. 169, 42 Pac. 95.

[70] Garden Gulch Placer, 38 L. D. 31.

[71] Ah Yew vs. Choate, 24 Cal. 562.

[72] Deffeback vs. Hawke, *supra* (18); N. P. R. Co. vs. Soderberg, 188 U. S. 526, aff'g. 104 Fed. 525; Brophy vs. O'Hare, 34 L. D. 596. In U. S. vs. N. P. R. Co., *supra* (42), it is said: "The long established criterion of mineral land is land that at the vital time is known to contain minerals in quality and quantity reasonably inspiring the average man to believe that expenditure in development is justified, in that it is reasonably probable that such minerals will be found to return reasonable profits upon the investment, and more valuable therefor than for other uses; the latter for that it is not valuable for mineral, if, to secure the mineral, uses of greater value must be destroyed. See Chrisman vs. Miller, *supra* (58); U. S. vs. Plowman, 216 U. S. 372; Deffeback vs. Hawke, 115 U. S. 404." See Oregon Basin Co., on review, 50 L. D. 253; *Id.* 6 Fed. (2d) 676.

[73] Bonesell vs. McNider, 13 L. D. 286; see Waterhouse vs. Scott, 13 L. D. 718; and see Rousseau, 47 L. D. 590. Where the relative priority of conflicting locations depends upon the exact hour of the day of filing for record, fractions of a day are taken into account. See Washington Co. vs. O'Laughlin, 46 Colo. 503, 105 Pac. 1092.

[74] The Santa Clara, 181 Fed. 725.

immediate actual possession of such property but no actual possession.[75]

XXXIX. Contiguous.

The term "contiguous" means touching sides, adjoining, adjacent. Two tracts of land touching only at a point, are not contiguous.[76]

XL. Contributory Negligence.

The term "contributory negligence" means that the law imposes upon every person the duty of using ordinary care for his own protection against injury. [77] It is not synonymous with assumption of risk.[78]

XLI. Copper Matte.

"Copper matte" is a product obtained by smelting copper sulphide ores. It mainly is cuprous sulphide, with a varying quantity of ferrous sulphide.[79]

XLII. Copper Ore and Copper Concentrate.

"Copper ore" and "copper concentrates" are not interchangeable, but mean two distinct and different things. "Copper ore" is the raw material of nature; and "copper concentrate" is the product of any one of a number of forms of concentration processes. The concentrates invariably are more valuable than the ore, being the natural product after it has been mechanically treated. The mechanical operation involves important changes in the natural product. In the first place it is pulverized, and converted from a solid, rocky condition to a fine, powdered condition. Then water or oil is added, and a chemical change takes place, so that the chemical analysis of the concentrates is different from that of the crude ore from which the concentrate is made, and there is a sifting out from the metallic content of the ore of the mineral waste content of the ore. It converts a noncommercial ore into a commercial product.[80]

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[75] Southern Ry. Co. vs. Hall, 145 Ala. 224, 41 So. 136. Where a mining claim lacks none of the essential elements of a location and the requisite expenditure is made thereon it can be held by constructive possession. Belk vs. Meagher, 104 U. S. 283; Union Oil Co. vs. Smith, *supra* (3); Harris vs. Equator Co., 8 Fed. 863; McCulloch vs. Murphy, 125 Fed. 150; Trinity Co. vs. Beaudry, 223 Fed. 741; McLemore vs. Express Co., *supra* (37); Holdt vs. Hazard, *supra* (16); Burke vs. McDonald, 2 Ida. 325, 33 Pac. 49. See Harris vs. Kellogg, 117 Cal. 488, 49 Pac. 708; Peoria Co. vs. Turner, 20 Colo. A. 479, 79 Pac. 915. A miner is not expected to reside upon his claim nor to cultivate the ground nor to inclose it. Table Mt. Co. vs. Stranahan, 20 Cal. 210; see English vs. Johnson, 17 Cal. 107.

[76] Hidden Treasure Mines, 35 L. D. 485, cited with approval in Anvil Co. vs. Code, 182 Fed. 205.

[77] Beers, vs. Housatonic Co., 19 Conn. 466; Graham vs. Penn. Co., 139 Pa. St. 149, 21 Atl. 151; Gulf Co. vs. Shieder, 88 Tex. 152, 30 S. W. 902; see, also, De Honey vs. Harding, 300 Fed. 696. Neither the defense of contributory negligence nor the defense of assumption of risk can arise unless the defendant in the action—a mine operator—has been guilty of negligence which, but for want of both these defenses, would render the operator liable for damages to an injured miner, as in the absence of such negligence there is nothing against which to make such a defense; but if there is evidence from which a jury may find the operator guilty of such negligence, then either of these defenses, if it exists in fact, is available to the defendant operator to defeat a recovery. Osage Co. vs. Sperra, 42 Okla. 726, 142 Pac. 1040. A miner whose duty it was to push loaded cars of ore from the mine to the dumping place and who instead of pushing or following the loaded car got upon the car to ride down a steep grade and who by reason of the velocity attained by the car was injured by reason of selecting the dangerous method of tramming the ore, was guilty of such contributory negligence as would prevent a recovery. Dilley vs. Primos Co., 64 Colo. 361, 171 Pac. 1147.

[78] Dolese Bros. Co. vs. Kahl, 203 Fed. 627.

[79] Pierce Smith Co. vs. United Verde Co., 293 Fed. 109.

[80] The Santa Clara, *supra*.(74)

XLIII. Corporation.

A "corporation" is a legal entity and can have no greater rights than an individual in acquiring public lands.[81] Hence a corporation, regardless of the number of its stockholders, may lawfully locate no greater area than is allowable in the case of an individual.[82] A corporation is a citizen of the state within which it is incorporated [83] and it is conclusively presumed that all of its stockholders are citizens.[84] An "ultra vires location" is valid until inquest of office found.[85]

See §§ 568 to 574.

XLIV. Course of Employment.

The term "course of employment" means where a miner is working within the period of the employment at a place he may reasonably be and while he is reasonably fulfilling the duties of his employment or is engaged in doing something incidental thereto.[86]

XLV. Crevice.

"Crevice" is a word sometimes applied to a mineral-bearing vein.[87]

XLVI. Cut.

The word "cut" may have a meaning other than that employed in mining but when it is used in conjunction with "shaft" and "drift" it means a surface opening in the ground intersecting a vein and never is intended to apply to a ditch or trench temporarily open for the purpose of laying sewer pipe.[88]

XLVII. Declaratory Statement.

A "declaratory statement," in practical mining operations, is a term applied to the statutory certificate of location, and is a certificate or statement of the location, containing a description of the mining claim, verified by the oath of the locator, performing, when recorded, a

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[81] McKinley vs. Wheeler, *supra* (62); Igo Placer, 38 L. D. 281; Bakersfield Co., *supra* (76).

[82] Gird vs. California Oil Co., 60 Fed. 531; Nome & Sinook Co. vs. Snyder, 187 Fed. 385; Coalinga Co., 40 L. D. 401; Mitchell vs. Cline, 84 Cal. 409, 24 Pac. 164; Miller vs. Chrisman, *supra* (58). See, also, Durant vs. Corbin, 94 Fed. 383; Wilson Co. vs. U. S., 188 Fed. 545; Chanslor-Canfield Co. vs. U. S., 266 Fed. 150; Frank Hough Co., 42 L. D. 99. Any device whereby one person is to acquire more than twenty acres or an association more than one hundred and sixty acres by one location is a violation of law, a fraud upon the government and without legal support. U. S. vs. Brookshire Oil Co., 242 Fed. 718; U. S. vs. Midway Oil Co., 259 Fed. 343. Where individual stockholders in a mining corporation made locations of land desired by the corporation, with the understanding that they would thereafter quitclaim to the corporation, which they did, said locations being made for the sole benefit of the corporation, such stockholders could not include in a single location an area exceeding twenty acres. Centerville Co., 49 L. D. 503. But where certain persons locate sixteen individual claims intending to work the same through a corporation to be formed and in which they hold stock in equal proportions of one-sixteenth each, such procedure is valid. Borgwardt vs. McKittrick Oil Co., 164 Cal. 650, 130 Pac. 417, distinguishing Mitchell vs. Cline, *supra*, followed in McKittrick Oil Co., 44 L. D. 340.

[83] North Noonday Co. vs. Orient Co., 1 Fed. 522; see Doe vs. Waterloo Co. *supra* (62); Jackson vs. White Cloud Co., 36 Colo. 122, 85 Pac. 639; Duncan vs. Eagle Rock Co., 48 Colo. 569, 111 Pac. 589; see *supra*, XXX, subd. II.

[84] Doe vs. Waterloo Co., *supra*.(62) The patent is conclusive evidence of citizenship. Steel vs. St. Louis Co., 106 U. S. 447; Dahl vs. Raunheim, *supra* (24); Justice Co. vs. Lee, 31 Colo. 260, 40 Pac. 444; rev'g. 29 Pac. 1020.

[85] Rose Claims, 22 L. D. 83; see Union Bank vs. Matthews, 98 U. S. 628.

[86] Granite Co. vs. Willoughby, 70 Ind. A. 77, 123 NE 195; see, also, Kish vs. California Ass'n. 190 Cal. 246, 212 Pac. 27.

[87] St. Anthony Co. vs. Shaffra, 138 Wis. 507, 120 N. W. 238; see Terrible Co. vs. Argentine Co., 89 Fed. 583; see, also, Barnard Co. vs. Nolan, *supra* (20); Beals vs. Cone, 27 Colo. 473, 62 Pac. 948; McShane vs. Kenkle, 18 Mont. 208, 44 Pac. 979; Muldrick vs. Brown, *supra* (42); Fox vs. Myers, *supra*.(8)

[88] McLaughlin vs. Bardsen, 50 Mont. 177, 145 Pac. 956.

permanent function. It is the beginning of the locator's paper title, is the first muniment of such title, and is constructive notice to all the world.[89]

XLVIII. Deposits.

The term "valuable mineral deposits" in section 2319 Revised Statutes, the expression "lands valuable for minerals" in section 2318 Revised Statutes, and the word "mines" in section 2323, Revised Statutes (Tunnel Right), the term "valuable deposits" in section 2325, Revised Statutes (Patent application), as well as the expression "mines of gold" in section 2392, Revised Statutes (Townsites), all refer to substantially the same thing and embrace both veins or lodes and placers.[90]

XLIX. Description Required in Other Cases.

In patent proceedings the words "and the description required in other cases" contemplate a plat and field notes of the survey properly made and approved by the cadastral engineer (surveyor general) as required in applications for lode claims.[91]

L. Desert Lands.

"Desert lands" are all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop.[92]

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[89] Gird vs. California Oil Co., *supra* (82) Magruder vs. Oregon Co., 28 L. D. 177; Pollard vs. Shively, 5 Colo. 312; Metcalf vs. Prescott, 10 Mont. 283, 25 Pac. 1037; McCowan vs. McClay, *supra* (30); Hickey vs. Anaconda Co., 33 Mont. 62, 81 Pac. 806. See Cole vs. Ralph, *supra*.(7)

The federal mining law does not use the term "declaratory statement," but by usage among miners the term has reference to the recorded certificate or notice of location required by local statute or local rule. There is a clear distinction between a posted notice and the declaratory statement. Peters vs. Tonopah Co., 120 Fed. 589; Sanders vs. Noble, 22 Mont. 110, 55 Pac. 1037.

[90] Hawke vs. Deffeback, 4 Dak. 33, 22 N. W. 480; see also, Pacific Coast Co. vs. N. P. R. Co., 25 L. D. 243; Forsythe vs. Weingart, 27 L. D. 680. The value and not the kind of any given mineral deposit is the controlling key by which to determine the question whether such lands containing such deposits are "valuable for minerals" and are mineral lands. Pacific Coast Co. vs. N. P. R. Co., *supra*. Lands known to be valuable for mineral can not be acquired for any purpose other than for mining and under the mining statute, and the terms "lands known to be valuable for mineral" means that there must be knowledge of the presence of mineral deposits of such quality as would render their extraction profitable and justify expenditures to that end; but there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them, and it is not to such lands that the term "mineral" in the sense of the statute is applicable, and the term "known to be valuable" has reference to the time of purchase, and if the land so purchased is not known to be valuable at the time doubt can not be cast upon the title to any subsequent discovery of minerals however valuable. Diamond Coal Co. vs. U. S., 233 U. S. 240. To illustrate: Proof of the existence of small quantities of gold not sufficient to warrant miners in working the land will not prevent a homesteader from taking it as agricultural land. Steele vs. Tanana Co., 148 Fed. 678; Meyers vs. Pratt, 255 Fed. 765; see Yard, 38 L. D. 69. The mere existence of outcroppings does not constitute a mine. There must be evidence of the actual value of the deposit to establish the mineral value of the land. Colorado Coal Co. vs. U. S., 137 U. S. 307; Iron Co. vs. Mike & Starr Co., *supra* (42). The term "valuable mineral deposits" includes diamonds. 14 Op. Atty. Gen. 115; see, also, Kentucky Co. vs. Kentucky Co., 141 Ky. 97, 132 S. W. 3997, and also guano. Richter vs. Utah, 27 L. D. 97.

[91] Harsh, 2 L. D. 706; Donlan, 39 L. D. 354.

[92] 19 Stats, 377, § 2; see, also, Peoples, 48 L. D. 554. Desert land claimants will rarely come in conflict with mining claimants. In such event contests are decided on the same principle as homestead entries. See 1 Lind. Mines (3d ed.). § 212; Costigan on Mining Law, page 88; Shamel on Mining Law, page 106. For validity of assignment by entryman see Eymann vs. Wright, 177 Cal. 144, 169 Pac. 1037. See, also, Ruple vs. De Journette, *supra*.(48)

LI. Dewater.

"Dewater" is a term applied to pumping and removing water from a mine.[93]

LII. Diatomaceous Earth.

"Diatomaceous earth," also called infusioral earth and kieselguhr, is a light earthy material which from some sources is loose and powdery and from others is more or less firmly coherent. It may resemble clay or chalk in physical properties, but can be distinguished at once from chalk by the fact that it does not effervesce when treated with acids. It generally is white or gray in color, but may be brown or even black when mixed with much organic matter. It is made up of remains of minute aquatic plants and is composed chemically of hydrous silica.

Owing to its porosity it has great absorptive powers and high insulating efficiency and is an effective filter. Its hardness, the minute size, and the shape of its grains make it an excellent metal polishing agent. Diatomaceous earth undoubtedly is a mineral substance and if found in such quantities and qualities as to render lands containing such deposits valuable, it constitutes a valuable deposit under the mining laws.[94]

LIII. Dip and Downward Course.

The words "dip" and "downward course" are synonymous.[95] The dip in different veins and in the same vein sometimes varies from a perpendicular to the earth's surface to an angle, perhaps, only a few degrees below the horizon. The dip is spoken of from three different points of view; (1) As to its inclination from a perpendicular to a horizontal, as so many degrees from the perpendicular or from the horizontal. A vein is thus described as having a dip of twenty degrees, thirty degrees, etc.; (2) As to the direction it takes from the strike or apex, by the points of the compass. If the strike were due east or west, and the vein in its course downward departed from the perpendicular at an angle so that a perpendicular shaft sunk at the apex would leave the vein to the north of such shaft, the dip in this point of view, would be said to be due north, or, the conditions reversed, due south. In this respect the dip—that is the direction of the dip—is said to be, and is, at right angles to the strike; (3) The dip is again spoken of as the portions of the vein successively encountered in getting down and away from the apex. The miner follows the dip when he works downward, leaving the apex further from and above him at each advance. He follows the strike when he works lengthways of the vein on a level; that is when he is advancing along the vein, rising neither toward the surface of the ground nor descending, but going on a level with the plane of the earth's surface. A failure to distinguish these three views of the dip in using the word sometimes leads to confusion. For the sake of definition let us call the dip from the first point of view the inclination dip, the second the compass dip, and the third the practical

[93] Mackie-Clemens Co. vs. Brady; 202 Mo. A. 551, 208 S. W. 152. See Evalina Co. vs. Yosemite Co., 15 Cal. A. 714, 115 Pac. 946; and see Miller vs. Chester Co., 129 Pa. St. 81, 18 Atl. 565.

[94] C. P. R. Co. 45 L. D. 223.

[95] Duggan vs. Davey, 4 Dak. 110, 26 N. W. 901.

dip, for this is the practical idea of the miner when he speaks of following his dip.

Under this definition, a vein absolutely perpendicular to the plane of the earth's surface, an occurrence rarely if ever encountered, has no inclination dip nor compass dip. It has only the practical dip; but in actual mining, veins possess a dip from all three points of view. Keeping these definitions in mind, some expression of courts and argument of counsel become more clear. The word "dip" is not used in the mining act of congress. The expression there is "course downward." Dip is the miner's word which has attained the signification above defined.[96]

LIV. Dump.

The intention with which the owner of the property extracts the ore from the ground, and the purpose and intention of the owner with which it is placed on the "dump," is controlling in arriving at a solution of the question whether the ore after having been extracted and placed in the "dump" is personalty or realty.[97]

LV. Election.

The offer contained in an option contract is called "election" and it gives rise to a subsequent contract between the parties to buy or sell, or perform whatever other acts have been specified in the option contract.[98] The particular act or acts which constitute an "election" may be fixed by the terms of the option, as also the time when, the place where, and the person to whom it shall be made.[99]

LVI. Electro-Metallurgy.

"Electro-metallurgy" is a term characterizing all processes in which electricity is applied to the working of metals.[100]

LVII. Entry.

The term "entry" as applied in the appropriation of public land means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country.[101]

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[96] King vs. Amy Co., 9 Mont. 513, 24 Pac. 202.

[97] Steinfeld vs. Omega Co., 16 Ariz. 230, 141 Pac. 847. That a dump is considered a part of the mine, see Savage vs. Nixon, 209 Fed. 124. See, also, Nordstrom vs. Sivertsen-Johnsen Co., 5 Alaska 208, in which the word "dump" is defined. See, also, Costigan Min. Law, p. 107, § 30*c*. For various questions affecting a "dump" see *Id.* pp. 227, 238, 239, 553, note, and Lindl. Min. (3d ed.), p. 1180, § 523. Both authors agree that a mill site may be located for dumping purposes.

In Utah Copper Co. vs. Montana-Bingham Co., 69 Utah 423, 255 Pac. 672 the dump in question was on defendant's ground; the latter claimed that under its grant to the plaintiff the latter had the right only to deposit and remove the ore, overburden, and other material deposited on the surface of the defendant's claim or claims, but had no right to remove waters from the dump, or to avail itself of waters carrying copper or other minerals in solution; that the defendant became the owner of the waters from the time they fell on the dump, and seeped and percolated through it, not only after such waters left the dump, but while they were still in the dump. The court held that copper in solution is a mineral, and, though the dump on the defendant's ground is the property of the plaintiff nevertheless the mineral in solution is from the dump and from the ore and material deposited thereon and therein and not otherwise "it would seem that the defendant has no better claim to the minneral in solution, so long as it is in the dump, than to the ore or other material in the dump."

[98] Penn. Co. vs. Smith, 207 Pa. St. 210, 56 Atl. 426; see, also, Flickinger vs. Heck, 187 Cal. 114, 202 Pac. 1045. Cline vs. Hall, 107 Okla. 218, 232 Pac. 31.

[99] Flickinger vs. Heck, *supra* [98]; see, generally, Craig vs. White, 187 Cal. 489, 202 Pac. 648.

[100] Edison Co. vs. Westinghouse Co., 55 Fed. 508. See, also, Cowles Co. vs. Lowney, 79 Fed. 331.

[101] Sturr vs. Beck, 133 U. S. 541; Mason vs. U. S., 260 U. S. 545; see Witherspoon vs. Duncan, 71 U. S. 210; Wilson, 48 L. D. 380.

The "certificate of entry" now is issued by the Register of the proper land office, instead of by the Receiver as formerly, to the party entitled by law thereto.[102]

A certificate of entry is equivalent to a patent issued.[103] When in fact the patent does issue it relates back to the inception of the right of the patentee, and cuts off intervening claimants.[104] In the meantime the government holds the naked legal title in trust for the entryman.[105]

An entry sustained by a patent is conclusive evidence that there had been, at the time of the entry, a valid location;[106] but the patent and entry do not conclusively evidence the length of time before the entry that such location existed. The time when the location was made is an open question of fact, provable like any other fact.[107] A failure to perform the annual assessment work after entry does not subject the claim to relocation, as a delay in issuing the patent does not affect the rights of the applicant.[108]

It is the province of the land department to investigate the legality of an entry prior to patent and cancel the certificate of entry, in whole or in part, so as to conform the entry to the law.[109] In other words the land department, as a specially constituted tribunal, has jurisdiction over mining locations enabling it to declare them valid as well as invalid in accordance with the facts and the appropriate law as found and determined by it after due notice and hearing.[110] If the cancellation is based upon a misconstruction of the law, it can be corrected by the courts.[111]

An applicant whose application, entry, or proof has been rejected is entitled to repayment when neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application.[112] The demand must be verified and made through the local or general land office.[113]

It now is usual for the cadastral engineer to make immediate repayment of any excess of an amount deposited for the platting of a mineral claim and other work in his office.[114]

LVIII. Escape Way.

The term "escape way" as used in a mining statute means a passage way leading from the inside to the outside of the mine through which miners in the mine could escape.[115]

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[102] Witherspoon vs. Duncan, *supra*.(101)

[103] Benson Co. vs. Alta Co., 145 U. S. 428; Cranes Gulch Co. vs. Scherrer, 134 Cal. 353, 66 Pac. 487; Davis vs. Fell, 59 Cal. A. 438, 211 Pac. 30.

[104] Stark vs. Starrs, 73 U. S. 402; Amador Median Co. vs. South Spring Hill Co., 36 Fed. 668.

[105] Witherspoon vs. Duncan, *supra* (101); see U. S. vs. Record Oil Co., *supra*.(18)

[106] Creede Co. vs. Uinta Co., 196 U. S. 337; Last Chance Co. vs. Tyler Co., 61 Fed. 557.

[107] El Paso Co. vs. McKnight, *supra* (18); Lawson vs. U. S. Co., 207 U. S. 1; aff'g. 134 Fed. 769. Creede Co. vs. Uinta Co., *supra* (106); Hickey vs. Anaconda Co., 33 Mont. 46; 81 Pac. 806; Washoe Co. vs. Junila, 43 Mont. 178; 115 Pac. 917; see, also Butte & S. Co. vs. Clark-Montana Co., 249 U. S. 12, aff'g. 248 Fed. 609; aff'g. 233 Fed. 547.

[108] Benson vs. Alta Co. *supra* (103); Neilson vs. Champagne Co., 111 Fed. 657, Marburg Lode, 30 L. D. 202; Batterton vs. Douglas Co., 20 Ida. 764; 120 Pac. 827; see South End Co. vs. Tinney, 22 Nev. 19, 35 Pac. 89.

[109] Pfau, 39 L. D. 359; see, generally, Hamilton, 38 L. D. 597.

[110] Clipper Co. vs. Eli Co., 194 U. S. 220; Cameron vs. U. S. 252, U. S. 450, aff'g. 250 Fed. 943; Lane vs. Cameron, 45 App. D. C. 404; Yard, *supra* (90); Nichols & Smith, *supra* (59); Pollock 48 L. D. 5.

[111] Hawley vs. Diller, 178 U. S. 476, aff'g. 233 Fed. 547.

[112] Kern Co., 48 L. D. 367; see Hawk, 41 L. D. 350.

[113] Repayment, 39 L. D. 141.

[114] See Hanson, 38 L. D. 169, 469.

[115] Roberts vs. Tennessee Co., 255 Fed. 469.

LIX. Exception or Reservation.

A "reservation" or "exception" of the minerals in a tract of land conveyed is a separation of the estate in the minerals from the estate in the surface, and it makes no difference whether the word used is "excepted" or "reserved".[116]

LX. Exemptions.

Exemption laws are grants of personal privileges to debtors, which may be waived by contract or surrender or by neglect to claim before sale.[117]

LXI. Experts.

An "expert" is defined to be one who is skilled in any particular act, trade or profession, being possessed of peculiar knowledge concerning the same. Strictly speaking, an "expert" in any science, art or trade, is one who by practice or observation has become experienced therein.[118]

LXII. Extralateral Rights.

What in mining cases is termed the "extralateral right" is a creation of the mining laws of congress, and to learn what it is we must look to them rather than to some system of law to which it is a stranger. Besides, as congress has plenary power over the disposal of the mineral bearing public lands, it rests with it to say to what extent, if at all, the right to pursue veins on their downward course into the earth shall pass to and be reserved for those to whom it grants possessory or other titles in such lands.[119]

See Intralimital and Extralateral Rights.

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[116] De Moss vs. Sample, 143 La. 243, 78 So. 486.

[117] Spitley vs. Frost, Fed. Cas. 299; see Conde vs. Sweeney, 16 Cal. A. 160, 116 Pac. 319.

[118] Turner vs. Haar, 114 Mo. 335, 21 S. W. 737. The scope of "expert evidence" is not restricted to matters of science or skill, but to any subject in respect to which one may derive, by experience, special and peculiar knowledge. Zarnick vs. Reiss Co., 133 Wis. 290, 113 N. W. 752; Hamann vs. Milwaukee Co., 127 Wis. 550, 106 N. W. 1081. The owner of an interest in, and who operated an oil and gas mining lease, producing oil from several wells thereon for several years, who claimed to be familiar with values of such property in the community, was competent as a witness to estimate its value. Gypsy Co. vs. Karns, 110 Okla. 156, 236 Pac. 609. The positive testimony of miners who mined the ore and developed the mine and the engineers and others who made actual surveys of the mine involved in a controversy as to the extralateral rights must be taken for more than the speculative theories of experts on the geology and formation of ore bodies and the mineralization of veins. Physical facts should be given greater weight than mere expert opinion and speculative theories. Alameda Co. vs. Success Co., 29 Ida. 618, 161 Pac. 868. See, also, Northern California Co. vs. Waller, 174 Cal. 277, 163 Pac. 214; Ward vs. Massachusetts Co., 67 Cal. A. 792, 228 Pac. 363; People vs. Boggess, 194 Cal. 212, 228 Pac. 448. Expert testimony is not binding but is only advisory to the court or jury. It never is legally necessary to sustain a verdict involving the question. Chicago Co. vs. Gilmore, 52 Okla. 296, 152 Pac. 1096; Gypsy Co. vs. Karns, *supra*.

See § 580.

[119] Jim Butler Co. vs. West End Co., *supra*.[(39)]

Under the common law a mineral claimant would be entitled only to what might be over and under the surface of his mining claim, carved out by the extreme lines of location extended downward indefinitely; but the mining statute qualifies or enlarges this right in one respect only to the extent that the locator may follow the lode or vein from the apex found within the surface ground of his claim, on its dip, to any depth, although in its course downward it may depart from the perpendicular and enter the land adjoining. This right to follow the vein beyond the side line does not apply on the course or strike of the vein. Whildin vs. Maryland Co., 38 Cal. A. 270, 164 Pac. 908. See, also, Bourne vs. Federal Co., 243 Fed. 468.

LXIII. Float.

The term "float" or "float rock" means bunches, blotches, pieces, or boulders of quartz or rock lying detached from, or resting upon the earth's surface without any walls.[120]

LXIV. Foreman.

A "foreman" is one who takes the lead in the work, and may or may not have authority over his fellow workmen, and because he takes the lead and points out the work to be done, it does not necessarily follow that he stands in the place of the master.[121]

LXV. Forfeiture.

The term "forfeiture" does not appear in the federal mining law providing for the relocation of mining claims; but the courts employ the term as a comprehensive word indicating a legal result flowing from a breach of condition subsequent, subject to which the locator acquires his title.[122] The term "forfeiture" as used in the mining customs and codes of California means the loss of a right previously acquired to mine a particular piece of ground, by neglect or failure to comply with the rules and regulations of the bar or diggings in which the ground is situated; as "abandonment" in its common-law sense, merely is a question of intention, and takes place when the ground is left by the locator, without any intention of returning or making any future use of it, independently of any mining rule or regulation. A right to hold and work a mining claim when acquired may be lost by a failure or neglect to comply with the rules or regulations of the miners, relative to acquisition and tenure of claims, in force in the bar or diggings where the claim is located; and if such rules and regulations are not complied with by those holding claims within the district, the ground becomes open to occupation of the next comer.[123]

LXVI. Fully Developed Mine.

A mine composed of ore containing so little precious metal that it would not pay for the mere crushing of the rock after it was taken out might never be fully developed in the sense that the ore, such as it is,

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[120] Book vs. Justice Co., *supra* (15); Meydenbauer vs. Stevens, 78 Fed. 787; see, generally, Waterloo Co. vs. Doe, 56 Fed. 685; Burns vs. Clark, 133 Cal. 634; 66 Pac. 12; Burns vs. Schoenfield, 1 Cal. A. 121, 81 Pac. 713; Robertson vs. Smith, 1 Mont. 410; Sullivan vs. Schultz, 22 Mont. 541, 57 Pac. 279.

[121] Allen vs. Goodwin, 92 Tenn. 385, 21 S. W. 761. The word "foreman" is generally understood to mean a laborer, with power to superintend the labor of those working with him. Peterson vs. Whitebreast Co., 50 Iowa 673.

[122] Goldberg vs. Bruschi, *supra* (3); Florence-Rae Co. vs. Kimbel, 85 Wash. 162, 147 Pac. 881. See, also, McCulloch vs. Murphy, *supra*.(75)

[123] St. John vs. Kidd, 26 Cal. 263. The state statutes are of no more force and effect than miner's rules and regulations. Stock vs. Plunkett, *supra*. (9) The failure of a party to comply with a mining rule or regulation can not work a forfeiture, unless the rule so provides. Emerson vs. McWhirter, 133 Cal. 510, 65 Pac. 1036, aff'd. 208 U. S. 30; see Stock vs. Plunkett, *supra*. For manner of proving forfeiture see Goldberg vs. Bruschi, *supra* (3); for manner of proving abandonment, see Trevaskis vs. Peard, 111 Cal. 599, 44 Pac. 246. The mere intention to abandon, if not coupled with yielding up possession or a cessation of user, is not sufficient; nor will the non-user alone without an intention to abandon be held to amount to an abandonment. Abandonment is a question of fact to be determined by a jury or the court sitting as such. Utt vs. Frey, 106 Cal. 397, 39 Pac. 807; Wood vs. Ettiwanda Co., 147 Cal. 233, 81 Pac. 512. See *supra*, § 1.

See Forfeiture.

would be sufficiently exposed and ready for extraction to permit active operations in the regular course of mining to begin, and in such condition it might be said to be fully developed, and yet owing to the barrenness of the ore, it would be impossible to work it with profit.[124]

LXVII. General Manager.

The term "general manager" imports general authority to perform all reasonable things in conducting the usual and customary business of his principal.[125]

LXVIII. Giant.

A "giant" is the nozzle of a pipe used to convey water for hydraulic mining and is used for the purpose of distributing or properly applying and increasing the force of the water.[126]

LXIX. Going Concern.

A "going concern" is one that continues to transact its ordinary business.[127]

LXX. Government Ownership.

The statutes asserting paramount title in the United States to mineral lands are in harmony with the laws of practice of other countries on the same subject.[128]

LXXI. Grizzlies.

"Grizzlies" are iron or steel bars used to sort or separate the rock or ore as it falls into the ore chutes.[129]

LXXII. Headers.

"Headers" are pieces of plank—longer than a cap—extending over more of the roof and supported by two props, one at each end.[130]

LXXIII. Held in Common.

The phrase "held in common" means a claim whereof there are more owners of a claim than one, while the use of the words "claims held in common" on which work done upon one of such claims so held shall be sufficient means that there must be more than one claim so held in order to make a case where work upon one of them shall answer the statutory requirement as to all of them.[131]

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[124] Peoples vs. Whalen, *supra*.(42)

[125] Hinton vs. D'Yarmett, —— Tex. C. A. ——, 212 S. W. 518; Producers Co. vs. Mifflin Co., 82 W. Va. 311, 95 S. E. 950, see Carroll Cross Co. vs. Abrams Creek Co., 83 W. Va. 205, 98 S. E. 151. The president, secretary, or general manager of a mining corporation has no power, by reason of his office alone, to buy, sell or contract for the corporation, nor to control its property, funds or management. Franklin vs. Havalena Co., 16 Ariz. 200, 141 Pac. 730; Simons vs. Inyo Co., 48 Cal. A. 524, 192 Pac. 144.

See § 574.

[126] Roseburg Bank vs. Camp, 89 Or. 67, 173 Pac. 316.

[127] White Co. vs. Pettes Co., 30 Fed. 865; Contra Costa Co. vs. Oakland, 159 Cal. 323, 113 Pac. 682.

[128] U. S. vs. San Pedro Co., 4 N. M. 294 17 Pac. 337. Under the common law of England mines of gold and silver were the exclusive property of the crown and did not pass under a grant by the king under the general designation of lands or mines. Hicks vs. Bell, 3 Cal. 219; Queen vs. Earl of Northumberland, 1 Plow. 310.

[129] Suborich vs. Alaska United Co., 251 Fed. 886.

[130] Big Branch Co. vs. Wrenchie, *supra*.(54)

[131] Chambers vs. Harrington, *supra* (69); Union Oil Co. vs. Smith, *supra*.(3) See Eberle vs. Carmichael, *supra*.(69)

LXXIV. High Grading.

The term "high grading" means the theft of ores.[132]

LXXV. Hydraulic Mining.

"Hydraulic mining" is the process by which a bank of gold-bearing earth and rock is excavated by a jet of water, discharged through the converging nozzle of a pipe under a great pressure, the earth or debris being carried away by the same water, through sluices, and discharged on lower levels into the natural streams and water courses below; where the gravel or other material of the bank is cemented, or where the bank is composed of masses of pipe-clay, it is shattered by blasting with powder.[133]

LXXVI. Improvement.

The word "improvement" means such an artificial change of the physical condition of the earth in, upon, or so reasonably near the mining claim as to evidence a desire to discover mineral therein or to facilitate its extraction, and in all cases the alteration must be permanent in character.[134]

LXXVII. Independent Contractor.

An "independent contractor" as applied in mining operations is one who exercises independent control over the mode and method by which he produces the results demanded by the contract.[135]

LXXVIII. Indian Title.

An Indian's right to occupancy of land, and that right recognized by the United States, constitutes "Indian title."[136]

LXXIX. Instrumentalities of Mining.

The true meaning of such expressions as "shafts," "tunnels," "levels," "uprises," "cross cuts," "inclines," "sump," etc., when applied to mines signifies instrumentalities whereby and through which such mines are opened, developed, prospected and worked.[137]

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[132] Atolia Co. vs. Industrial Accident Comm., 175 Cal. 691, 167 Pac. 148. Kerr vs. Milatovich, ____ Cal. A, 282 Pac. 968, s. c. ____ Cal. ____, 290 Pac. 289. See Goldfield Co. vs. Richardson, 194 Fed. 198; Daniels vs. Portland Co., 202 Fed. 637.

See The Public Domain, note 126.

[133] Woodruff vs. North Bloomfield Co., 18 Fed. 753; see, also, U. S. vs. North Bloomfield Co., 53 Fed. 625; U. S. vs. Lawrence, 53 Fed. 633.

See § 668.

[134] Fredericks vs. Klauser, 52 Or. 110, 96 Pac. 679. See Sheldon, 43 L. D. 156. The term "improvements" used in a contract of sale of a mine means such things as are placed thereon by way of betterment and which are of a permanent nature and which add to the value of the property as real property and aid in the extraction of mineral profitably and successfully. Seigloch vs. Bisbee, 106 Wash. 632, 181 Pac. 53. See Lewin vs. Telluride Co., 272 Fed. 597. There is a broad and distinctive difference as applied to the mining laws between the word "discovery" and the words "expenditures," "improvements" or "development," and the three latter are not synonymous with the first. Union Oil Co., 23 L. D. 223; see St. Louis Co. vs. Kemp, 104 U. S. 636; Jackson vs. Roby, 109 U. S. 440; Chambers vs. Harrington, *supra* [69]; Good Return Co., 4 L. D. 221.

[135] Wooton vs. Dragon Co., 54 Utah 459, 181 Pac. 597. See, generally, Alabama Co. vs. Smith, 203 Ala. 70, 82 So. 31; Coal Corp. vs. Davis, 17 Ala. A. 22, 81 So. 359.

[136] *Ex parte* Van Moore, 221 Fed. 954. This right of occupancy has always been held sacred, something not to be taken from him, except by his consent, and then only upon such considerations as should be agreed upon. Minn. vs. Hitchcock, 185 U. S. 389; Hallowell vs. U. S., 221 U. S. 317. See Nadeau vs. U. P. R. Co., 253 U. S. 442. Cramer vs. U. S., 262 U. S. 219; Sperry Oil Co. vs. Chisholm, 264 U. S. 488. Opinion, 50 L. D. 315.

[137] Hines vs. Miller, 122 Cal. 688, 55 Pac. 401. Woodward Co. vs. Jones, 80 Ala. 123. For "surface instrumentalities," see Cavanaugh vs. Corbin Co., 55 Mont. 173, 174 Pac. 185. Costigan Min. Law, p. 103, § 30.

LXXX. Lands Valuable for Minerals.

The term "lands valuable for minerals" as used in the mining law applies to all lands chiefly valuable for nonmetalliferous deposits, such as alum, asphaltum, borax, guano, diamonds, gypsum, marble, mica, slate, amber, petroleum, limestone, and building stone, rather than for agricultural purposes.[138] Such lands are subject to disposition by the United States under the mining laws only.[139]

LXXXI. Lapsed.

The word "lapsed" is unknown to mining usage or laws and is not equivalent to the term "forfeited" nor does it mean a technical forfeiture.[140]

LXXXII. Lead.

The word "lead" applied to mines may have a more extensive meaning than the word "lode" or "ledge".[141]

LXXXIII. Lease by Federal Government.

In its control and disposition of its public mineral lands, the United States acts in its proprietary capacity, and not in virtue of any attribute of sovereignty. As paramount proprietor, it has the same right of control and disposition as is incident to absolute ownership in an individual.[142]

LXXXIV. Located.

The word "located" means delimited by having the boundaries ascertained and monumented on the ground, identified by having a notice of location posted upon the land, and further proclaimed to the public by having such notice of location recorded in the manner customary under the rules for recording mining claims. It has long been recognized, particularly in California, commencing with Miller vs. Chrisman, *supra* (142a); that a claim so located, whether discovery shall have been

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[138] Webb vs. American Co., 157 Fed. 205; see N. P. R. Co. vs. Soderberg, *supra* (72); Pacific Coast Co. vs. N. P. R. Co., *supra*.(99) See *supra*, note 90.

[139] Deffeback vs. Hawke, *supra* (18); Davis vs. Weibbold, *supra*.(23) Lands known to be valuable for mineral can not be acquired for any purpose other than for mining and under the mining statute, and the term "lands known to be valuable for mineral" means that there must be knowledge of the presence of mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end; but there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them, and it is not as to such lands that the term "mineral" in the sense of the statute applies. The term "known to be valuable" has reference to the time of purchase, and if land so purchased is not so known to be valuable at the time doubt can not be cast upon the title by any subsequent discovery of minerals, however valuable. Diamond Coal Co. vs. U. S., *supra* (90). See Meyers vs. Pratt, 255 Fed. 765.

[140] Contreras vs. Merek, 131 Cal. 211, 63 Pac. 336; *but see* U. S. vs. California Midway Oil Co., *supra* (49); Thornton vs. Phelan, *supra*.(3)

[141] Inimitable Co. vs. Union Co., 1 Cal. Unrep. 599. The term "lode" is an alteration of the verb "lead." Eureka Co. vs. Richmond Co., 8 Fed. Cas. 819, whatever a miner would follow with the expectation of finding ore has been adopted and may be regarded as a practical test of what is considered a lode. Henderson vs. Fulton, 35 L. D. 661; King Solomon Co. vs. Mary Verner Co., 22 Colo. A. 528, 127 Pac. 129; Ambergris Co. vs. Day, 12 Ida. 115, 85 Pac. 109; see Eureka Co. vs. Richmond Co., 103 U. S. 839. Any body of mineralized rock is a lode. Book vs. Justice Co., *supra* (15); Shoshone Co. vs. Rutter, 87 Fed. 801.

[142] Mid-Northern Oil Co. vs. Walker, 65 Mont. 414, 211 Pac. 353.

[142a] *Supra*.(58)

made or not, is property and the subject of conveyance and the passing of rights therein from one to another.[143]

LXXXV. Location.

A "location" is the act of taking or appropriating a parcel of mineral land.[144] It includes the posting of notices, the record thereof when required, and marking the boundaries[145] so that they can be readily traced.[146] The terms "location" and "mining claim" are synonymous, although a "mining claim" may consist of several "locations."[147]

LXXXVI. Location and Patent.

The "location" of a mining claim and a "patent" for a mining claim are not governed by the same rules. The mining statutes expressly provide for the location of surface ground that must include the lode or claim as discovered; and a patent can not grant any greater extent of surface ground than the location as made and marked by the surface boundaries.[148]

LXXXVII. Location and Record.

A "location and its record" are different things. The federal and state statutes distinguish between them, the former even in authorizing local rules "governing the location and manner of recording." The statutory object is to protect and reward discoverers of mines. Discovery with intent to claim is the principal thing and vest an estate—an immediate fixed right of present and exclusive enjoyment in the discoverer. The record is incidental machinery to secure to the discoverer his reward and to give notice to others. The spirit of all recordation acts is notice to protect others against secret equities. If the record is not necessary to create the estate (as it is in the matter of homestead exemptions and mechanic's liens), the statute providing for recording is but a direction to do certain acts and does not create conditions subsequent; and if the statute provides no forfeiture for failure to record, by failure the estate is not divested.[149]

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[143] Union Oil Co. vs. Smith, *supra*.[(3)] See, also, Weed vs. Snook, 144 Cal. 439, 77 Pac. 1023; Merced Co. vs. Patterson, 153 Cal. 625, 96 Pac. 90 in Id. 162 Cal. 358, 122 Pac. 920; McLemore vs. Express Oil Co., *supra*[(37)]; *compare* Cole vs. Ralph, *supra*[(7)]; U. S. vs. Sherman, 288 Fed. 498.

An eighty-acre tract of land in process of development as an oil mine is a mining claim within the meaning of the lien law, regardless of whether oil has been discovered therein or not. Berentz vs. Belmont Oil Co., 148 Cal. 582, 84 Pac. 47.

[144] St. Louis Co. vs. Kemp, *supra*,[(134)] Cole vs. Ralph, *supra*[(7)]; see, also Creede Co. vs. Unita Co., *supra*.[(106)]

A valid and subsisting location of mineral lands made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. Gwillim vs. Donnellan, 115 U. S. 49; Manuel vs. Wulff, *supra*[(61)]; *compare* White Star Co. vs. Hultberg, 220 Ill. 578, 77 N. E. 327. See Butte City S. H. L. Cases 6 Mont. 397, 12 Pac. 858.

[145] Smith vs. Union Oil Co., 166 Cal. 217, 135 Pac. 966, aff'd. 249 U. S. 337; Sharkey vs. Candiani, 48 Or. 112, 85 Pac. 219.

[146] Cole vs. Ralph, *supra*[(7)]; Erwin vs. Perego, 93 Fed. 611; Walton vs. Wild Goose Co., 123 Fed. 209.

[147] Del Monte Co. vs. Last Chance Co., 171 U. S. 74.

[148] Whilden vs. Maryland Co., *supra*,[(119)]; see Silver King Co. vs. Conkling Co., *supra*.[(95)] The only distinction between a patentee of a mining claim and a mineral locator is in the ownership of the fee. Forbes vs. Gracey, *supra*[(21)]; Duggan vs. Davey, *supra*.[(95)] The placer mining laws, which originally provided for the patenting of a fee estate in both the surface and the mineral deposits of public lands have been modified by various acts of congress to permit of the issuance of separate patents for the reserved mineral deposits under the mining laws. See Report XX of the State Mineralogist, July, 1924, "Oil and Gas Rights" Part IV, page 212.

[149] Clark-Montana Co. vs. Butte & S. Co., 233 Fed. 547 aff'd. 248 Fed. 609; aff'd. 249 U. S. 12; see Stock vs. Plunkett, *supra*.[(9)]

LXXXVIII. Lode Location.

Among practical miners the terms "lode," "lode location" and "mining claim" are used interchangeably.[150]

LXXXIX. Maps.

A "map" is a drawing upon a plane surface representing a part of the earth's surface, and the relative position of objects thereon. It may also be so drawn as to show the geological structure and other physical facts necessary to a complete understanding of the matter at issue.[151]

XC. Markings.

Stakes, posts, piles of stone, boulders, blazing trees along the boundaries of the claim or at the corners thereof, cutting away undergrowth, making a trail through the timber along the sides or ends of the claim, putting up a stake at the point of discovery, blazing stumps, posting a notice at the point of discovery, posting a notice upon the ground, placing such notice in a tin can and attaching it to a stake, fastening such notice to a tree or placing it in a box, are all "markings."[152]

XCI. Master and Servant.

One who represents and carries out the will of the master or of a mine operator in the prosecution of the work not only as to the result to be accomplished but also as to the means to be employed, is a servant and not an independent contractor.[153]

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[150] Buckeye Co. vs. Carlson, 16 Colo. A. 446, 66 Pac. 168.

[151] Montana Co. vs. Boston Co., 27 Mont. 288, 70 Pac. 1114.

Areal geology is that branch of geology which pertains to the distribution, position and form of the areas of the earth's surface occupied by different sorts of rock or different geological formations and to the making of geologic maps. Lewis vs. Carr, 49 Nev. 366; 246 Pac. 695.

A map in itself proves nothing, unless it is shown by completed evidence to be a correct representation of the relative positions of the objects it purports to delineate. Daggett vs. Yreka Co., 149 Cal. 357, 86 Pac. 988; Duncan vs. Eagle Rock Co., 48 Colo. 569, 111 Pac. 588. A copy of a map certified by the register of and on file in the land office is admissible in evidence. Goodwin vs. McCabe, 75 Cal. 584, 17 Pac. 705; see Patrick vs. Nance, 26 Tex. 298. A map made by a surveyor showing a description and location of a mining claim in controversy is sufficiently supported where the surveyor testifies that he found fixed monuments on certain corners and on one side line of the claim and that in surveying he considered both the data on the ground as well as that given in the notice of location. Batt vs. Stedman, *supra* [9].

In case of an unpatented mining claim, a map purporting to show the lines of the location is of no probative value unless supported by the evidence of some one who knows the position of the monuments which defined those lines; for it is by the location monuments alone that their beginning and direction can be determined. Miller vs. Grunsky, 141 Cal. 441, 66 Pac. 858; Daggett vs. Yreka Co., *supra*, see Blake vs. Doherty, 5 Wheat. 359; U. S. vs. Montana Co. 196 U. S. 573; Duncan vs. Eagle Rock Co., *supra*. But a map based upon a fabricated public survey may be referred to in aid of the description of a mining claim. Gird vs. California Oil Co. *supra* [82].

When a witness refers to a map, he should be required to designate thereon, or by language to what reference is made, and in such manner that the whole testimony can be considered from the record. Oberstock vs. United Co., 68 Or. 197, 137 Pac. 195.

[152] Meydenbauer vs. Stevens, *supra* [120]; Ledoux vs. Forester, 94 Fed. 602; Walsh vs. Erwin, 115 Fed. 532; Oregon King Co. vs. Brown, 119 Fed. 51, 52; Holdt vs. Hazzard, *supra* [10]; Madeira vs. Sonoma Co., 20 Cal. A. 719, 130 Pac. 175; Allen vs. Dunlap, 24 Or. 236, 33 Pac. 675; see Book vs. Justice Co., *supra* [15]; Tiggeman vs. Mrzlak, 40 Mont. 23, 105 Pac. 77. Posted notices may constitute a part of the marking and may aid in determining the situs of the monuments marking the claim, and they constitute a part of the marking, and while on account of the temporary nature may be of minor significance, yet this is not so where the location is followed by the actual and continued working of the claim. Eaton vs. Norris, 131 Cal. 565, 63 Pac. 826; see Jupiter Co. vs. Bodie Con. Co., 11 Fed. 666. See *infra* CXVII.

[153] Clinton Co. vs. Bradford, 200 Ala. 308, 76 So. 79. The term "workman" or "workingman" means one whose time is at the disposal of his employer. Peo vs. Alvarez, 28 Porto Rico 890.

XCII. Meander Line.

A "meander line" is a line run in a survey of a mining claim bordering upon a stream or other body of water, not as a boundary of the tract surveyed, but for the purpose of defining the sinuosities of the bank or shore of the water, and as a means of ascertaining the quantity of land within the surveyed area.[154]

XCIII. Metallic.

The term "metallic" is used to indicate the condition of a metal in which it exists by itself, and is not mineralized nor combined with those substances which take away its metallic character and convert it into an ore.[155]

XCIV. Metallic Ore.

From a strictly scientific point of view, the terms "metallic ore" and "ore deposits" have no clear significance. They are purely conventional expressions, used to describe those metalliferous minerals or bodies of mineral having economic value, from which the useful metals can be advantageously extracted. In one sense rock salt is ore of sodium, and limestone an ore of calcium, but to term beds of those substances "ore deposits" would be quite outside of current usage.[156]

XCV. Metalliferous.

The term "metalliferous" is not one admitting of precise definition. It means yielding or producing metals: as a metalliferous ore of deposit; a metalliferous district. But the metals and nonmetals are not subject, chemically or scientifically, to a conclusive definition or classification.[157]

XCVI. Mine.

A "mine" is variously defined: an opening or excavation in the earth for the purpose of extracting minerals; a pit or excavation in the earth from which metallic ores or other mineral substances are taken by digging; an opening in the earth made for the purpose of taking out minerals, and in case of coal mines, commonly a worked vein; an excavation properly underground for digging out some usual product, as ore, metal, or coal, including any deposit of any material suitable for excavation and working as a placer mine; the underground passage and workings by which the minerals are gotten together with these minerals themselves.[158]

A "mine" is a work for the excavation of minerals by means of pits, shafts, levels, tunnels, etc., as opposed to a "quarry," where the

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[154] Alaska United Co. vs. Cincinnati Alaska Co., 45 L. D. 340. See Savard, 50 L. D. 381.

[155] Hempstead & Son vs. Thomas, 122 Fed. 540.

[156] Con. Ores Co., *supra*.[(55)]

[157] Id. See Montague vs. Dobbs, 9 C. L. O. 165; Overman Co. vs. Corcoran, 15 Nev. 152.

[158] N. P. R. Co. vs. Mielde, 48 Mont. 287; 137 Pac. 386.

In Rice Oil Co. vs. Toole County, 86 Mont. 427, 284 Pac. 145, the court said: "It is true that the term 'mine' means mining property so developed as to yield, or to be capable of yielding, a profit, and this regardless of how the title to the land in which the mineral is found has been acquired. (Northern Pacific Ry. Co. vs. Musselshell County, 54 Mont. 96, 169 Pac. 53.)"

whole excavation is open.[159] In general the existence of a mine is determined by the mode in which the mineral is obtained, and not by its chemical or geological character.[160] The term "mine" also is defined as including only mines valuable for their minerals or valuable mineral deposits.[161] The term "mine" as used in the mining act appears to be synonymous with the term "vein or lode."[162] It also is used as synonymous with the term "mining claim."[163] There is a lack of unanimity in the decisions of the courts as to the status of an oil well. In some instances it is held to be a mine; and in other cases that it is not a mine.[164]

XCVII. Miner.

A "miner" is one who mines, a digger for metals and other minerals. He is not necessarily a mechanic, handcraftsman or artisan, and the term imports neither learning nor skill.[165]

XCVIII. Mineral.

In its broadest and scientific meaning, a "mineral" is any inorganic species having a definite chemical composition.[166] In its commercial sense the term "mineral" has been defined as any organic substance found in nature having sufficient value separate from its situs as part of the earth to be mined, quarried, or dug for its own sake or its own specific use.[167] When used in grants or in reservations or instruments of conveyance the term "mineral" is not limited to metals nor metalliferous deposits, whether contained in veins that have well-defined

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[159] Murray vs. Allred, 100 Tenn. 100, 43 S. W. 355, see People vs. Bell, 237 Ill. 332, 86 N. E. 593; Escott vs. Crescent Coal Co., 56 Or. 192, 106 Pac. 452; see, also, Darvill vs. Roper, 3 Drewry 294; see Jacobs Law Dict.

The distinction between underground mines and open workings was expressly repudiated in Midland Co. vs. Haunchwood Co., L. R. 20 Ch. Div. 552, and in Hext vs. Gill, L. R. 7 Ch. App. 699.

[160] Johnson vs. California Lustral Co., 127 Cal. 283, 59 Pac. 595; see, also, Rex vs. Dunsford, 2 Adol. & Ell., 568.

[161] Davis vs. Weibbold, *supra* (23); Dower vs. Richards, 151 U. S. 658; aff'd. 81 Cal. 44, 22 Pac. 304; Barden vs. N. P. R. Co., 154 U. S. 288; Callahan vs. James, 141 Cal. 291, 74 Pac. 853; Nephi Co. vs. Juab County, 33 Utah 114, 93 Pac. 53. "Mines" as the term is known to the mineral laws of the United States, "embrace nothing but deposits of valuable mineral ores, and do not include mere masses of nonmineralized rock, whether rock in place or scattered through the soil." Wheeler vs. Smith, 5 Wash. 704, 32 Pac. 784.

[162] Bullion Beck Co. vs. Eureka Co., 5 Utah 3, 103 Pac. 881. An unpatented location is a "mine" within the purview of the mining act. A mine upon a patented homestead is not less a mine because the title from the government was acquired under the laws providing for the disposition of agricultural lands only. An undeveloped body of ore is not a "mine" though the title to it was secured under the mineral laws, but it is merely a part of the real estate itself. NPR. Co. vs. Mjelde, *supra*.(158)

[163] Idaho Co. vs. Davis, 123 Fed. 396; Hamilton vs. Delhi Co., 118 Cal. 148, 50 Pac. 378; Phillips vs. Salmon River Co., 9 Ida. 149, 72 Pac. 886.

The word "mine" as used in the mining law, may be used to designate "the whole claim or body of mining ground." Smith vs. Sherman Co., 12 Mont. 524, 31 Pac. 72; Tredinnick vs. Red Cloud Co., 72 Cal. 78, 12 Pac. 152, *but see* Shaw vs. Wallace, 25 N. J. L. 461.

[164] Berentz vs. Belmont Oil Co., 148 Cal. 577, 84 Pac. 47; Mid-Northern Co. vs. Walker, *supra* (42); see Burke vs. S. P. R. Co., 234 U. S. 967; *compare* Hollingsworth vs. Berry, 107 Kan. 544, 192 Pac. 763; Kreps vs. Brady, 37 Okla. 754, 133 Pac. 216; Carter vs. Phillips, 88 Okla. 202, 212 Pac. 747; J. M. Guffey Co. vs. Murrel, 127 La. 483, 53 So. 705.

See § 2, subdivision XX, note 26.

[165] Watson vs. Lederer, 11 Colo. 577, 19 Pac. 602. A laborer at an oil well is not a miner. J. M. Guffey Co. vs. Murrel, *supra*.(164)

[166] See Glasgow vs. Farie, L. R. 13 A. C. 657. The term "mineral" should not be confined to metals or metallic ores. All metals are minerals, but all minerals are not metals. N. P. R. Co. vs. Soderberg, *supra*.(72)

[167] Rockhouse Fork Co. vs. Raleigh Co., 83 W. Va. 20, 97 S. E. 684.

walls or in beds or deposits that are irregular and are found at or near the surface or otherwise.[168]

XCIX. Mineral Interests.

"Mineral interests" in land means all the minerals beneath the surface. Such interests are a part of the realty and the estate in them is subject to the ordinary rules of law governing the title to real property.[169]

C. Mineral Lands.

The term "mineral lands" includes land which is worth more for mining than for agriculture. The fact that the land contains some gold or silver would not constitute it "mineral land" if the gold and silver did not exist in sufficient quantities to pay to work.[170] Land not mineral in character is subject to entry and patent as a homestead however limited its value for agricultural purposes.[171]

CI. Mineral Right.

A "mineral right" imports a title or right to all that is mineral in the land.[172]

CII. Minerals Crude.

"Minerals crude" is a term used in the classification of ores under the tariff act of 1897 and embraces "minerals, crude or not advanced

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[168] It can not be said that the term "minerals" includes only such substances as are procured by tunnelling and shafting, as much gold is procured by placer mining, and rich deposits of manganese and other like ores are found upon the surface of the earth and sometimes are obtained without either quarrying or mining. Byron vs. Utah Co., 53 Utah 151, 178 Pac. 53; Rock House Co. vs. Raleigh Co., *supra* (167); see Glasgow vs. Farie, *supra* (166). The word "mineral" includes petroleum rights. Lovelace vs. S. W. Pet. Co., 267 Fed. 504, 514. See Burke vs. S. P. R. Co., *supra* (164). Mineralized matter is crushed and loose rock material containing minerals irregularly deposited from solution. It may be in beds, or in fissures. Eureka Co. vs. Richmond Co., Fed. Cas. 4548; Doe vs. Waterloo Co., 54 Fed. 943; aff'd. 82 Fed. 48.

See Minerals and Mineral Lands.

[169] Hoilman vs. Johnson, 164 N. C. 268, 80 S. E. 249; see, also, Riggs vs. Board, 181 Ind. 172, 103 N. E. 1077. Mining rights and interests in minerals are the subject of horizontal severance from the surface and taxable as real estate. Riggs vs. Board, *supra*.

[170] Deffeback vs. Hawke, *supra*.(18) In Davis vs. Weibbold, *supra*.(23) the whole question of mineral lands is fully discussed. See, also, Donnelly vs. U. S., 228 U. S. 266; U. S. vs. N. P. R. Co., 1 Fed. (2d) 57. In Cameron vs. U. S., 250 Fed. 943, the court said: "Nothing is better settled than the facts in respect to the character of public land applied for under the laws authorizing its disposition, as well as the facts in respect to the performance of the acts required by the law to be performed by the applicant are for the exclusive determination of the land department. Very many decisions of the supreme and other federal courts to that effect might readily be cited, but we think it is needless to do so. And even though it be conceded that the land department was without jurisdiction to order, as it did in the instant case, the cancellation of the applicant's mining location, yet its determination of the fact that the ground applied for was not mineral land in effect cut up by the roots every step taken by the applicant under the mining laws, necessarily including his mining location; and such was the decision of the Supreme Court of Arizona in the case of Cameron vs. Bass (19 Ariz., 246), 168 Pac 645, regarding in part the very ground here in controversy." Lands, although containing deposits of mineral, will be considered as nonmineral in character, where the cost of extracting is shown to be so large that a prudent man would not be warranted in expending his time and money thereon in the reasonable expectation of success in developing a paying mine. U. S. vs. Bullington on rehearing, 51 L. D. 604. See U. S. vs. Rossi, 133 Fed. 382.

[171] See U. S. vs. Kostelak, 207 Fed. 450. Peoples Dev. Co. vs. S. P. Co., 277 Fed. 794. See also, U. S. vs. S. P. R. Co., 251 U. S. 1, citing Benjamin vs. S. & C. P. R. Cos., 21 L. D. 390.

[172] McGraw vs. Lakin, 67 W. Va. 385, 68 S. E. 27. The right to mine upon land gives the right to all the incidents for the purpose of mining. Clark vs. Duval, 15 Cal. 86; Hodgson vs. Field, 7 East 613; Sheppard's Touchstone, 89; Dand vs. Kingscote, 6 Mees. & W. 174; Broom's Legal Max. 362, 365, 369.

in value or condition by refining or grinding, or by other processes not especially provided for in the act; or metallic mineral substances in a crude state and metals unwrought, not specifically provided for in this act."[173]

CIII. Mineral Surveyor.

A "mineral surveyor" is an officer or employee of the general land office within the scope of section 452 of the Revised Statutes of the United States.[174]

CIV. Miners' Devices.

Miners use various devices to protect the posted notice from destruction by the elements, such as covering it with glass, or folding it in a box and placing the box in a conspicuous place, or putting the notice upon a mound of rocks, folding it and partially covering it with a rock[175] or putting the notice in a tin can.[176] A substantial compliance with the law is sufficient.[177]

CV. Miner's Inch.

The term "miner's inch" is not definite without specification of the head or pressure. It has no fixed meaning and in one locality sometimes is a very different quantity according to "miner's measurement" in another locality. It has been defined as "the amount of water that will pass in twenty-four hours through an opening one inch square under a pressure of six inches."[178]

CVI. Miner's Lien.

A "miner's lien" is a creature of statute to which the miner must look for the right and authority to file any such lien.[179]

CVII. Miner's Weight.

The term "miner's weight" used in a coal mining lease as the basis for the price per ton to be paid for mining, is not a fixed, unvarying

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[173] Hempstead & Son vs. Thomas, *supra* (155); see U. S. vs. Graser-Rothe Co., 164 Fed. 205; U. S. vs. Brewster, 167 Fed. 122; Myers vs. U. S., 178 Fed. 468; Con. Ores Co., *supra*,(55). See, also, Carothers vs. Mills, —— Tex. —— 233 S. W. 155.

[174] U. S. vs. Havenor, 209 Fed. 989. The matter of employment and the manner and amount of payment of a mineral surveyor are left wholly to the option of the mineral claimant and such officer. Fish & Hunter Co. vs. New England Homestead Co., 28 S. Dak. 590, 134 N. W. 798.

[175] Donahue vs. Meister, 88 Cal. 121, 25 Pac. 1096. It can not be said as a matter of law that a notice of location of a mining claim is insufficient where the notice was written on a piece of white paper and placed on a stick leaning up against a side cut upon the surface rock, and another rock being put on top of the paper so that it would not blow away, the paper being large enough to show under the rock, but the writing itself was not exposed. Emerson vs. Akin, 26 Colo. A. 40, 140 Pac. 482. In Hagan vs. Dutton, 20 Ariz. 476, 181 Pac. 581, the posting of the notice of location between the rocks of one of the location monuments of stone, although hidden from view by dirt and gravel, was held sufficient; *but see* Buckeye Co. vs. Powers, 43 Ida. 532, 257 Pac. 833.

[176] Gird vs. California Oil Co., *supra*.(52)

[177] Donahue vs. Meister, *supra*.(175)

[178] Longmire vs. Smith, 26 Wash. 439, 67 Pac. 246; Dougherty vs. Haggin, 56 Cal. 522. In California, by statutory enactment, "the standard miner's inch of water shall be equivalent or equal to one and one-half cubic feet of water per minute, measured through any aperture or orifice;" Stats. 1901, p. 660. See Gardner vs. Wright, 49 Or. 609, 91 Pac. 286. An "inch" is estimated on the basis of forty inches to one second foot. Hough vs. Porter, 51 Or. 318, 98 Pac. 1083. "Head of water" is the quantity entering the intake of any canal or ditch. Ulrich vs. Pateros, 67 Wash. 328, 121 Pac. 818. See, also, 27 Cyc. 515. For an interesting case see Lillis vs. Clear Creek Co., 32 Cal. A. 668, 163 Pac. 1041; see, also, Morrison's Mining Rights (15th ed), p. 702. In cases of ambiguity oral evidence may explain what is meant by the term "miner's inch." Ulrich vs. Pateros, *supra*; see Logan vs. Guichard, 153 Cal. 592, 114 Pac. 989; Gardner vs. Wright, *supra*.

[179] Bishop vs. Henry, 84 Or. 389, 165 Pac. 239.

quantity of mine-run material, but is such a quantity of material as operators and miners may, from time to time, agree as being necessary or sufficient to produce a ton of prepared coal.[180]

CVIII. Mining.

The word "mining" includes placer mines in which the workings are open, and hence the question whether an enterprise is mining or not can not be determined by an inquiry as to whether the workings are open or underground.[181]

CIX. Mining and Milling.

"Mining and milling" would seem to be, taken together, one industry, having for its object "to obtain possession of material products in the state in which they were fashioned by nature." Mining the process of extracting from the earth the rough ore, would seem to be the first step in the process, milling or reducing the second step, to wit: the further separating of the materials found together, the one from the other, and extracting from the mass the particular product desired.[182]

CX. Mining Claim.

As the term "mining claim" is used in the mining act, a "mining claim" is that portion of a vein or lode and of the adjoining surface, or of the surface and subjacent material to which a claimant has acquired the right of possession by virtue of a compliance with such statute and the local laws and rules of the district within which the location may be situated.[183] Independent of acts of Congress providing a mode for the acquisition of title to the mineral lands of the United States, the term "mining claim" has always been applied to a portion of such lands to which the right of exclusive possession and enjoyment by a private person or persons, has been asserted by actual occupation, or by a compliance with the local mining laws, or district rules.[184]

2. Distinction between Mining Claim and Location. The terms "mining claim" and "location" are not always synonymous and may often mean different things, as a mining claim may refer to a parcel of land containing precious metal in its soil or rock, while location is the act of appropriating such land according to certain established rules.[185] A "mining claim" may include as many adjoining locations as the locator may make or purchase, and the ground covered

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[180] Drake vs. Berry, 259 Pa. St. 8, 102 Atl. 320; see, also, Drake vs. Lacoe, 157 Pa. St. 17, 27 Atl. 538. For a case involving specific gravity and cubic feet requisite to make a ton of ore; see Silver King Co. vs. Conkling Co., 255 Fed. 744.

[181] Burdick vs. Dillon, 144 Fed. 741. One engaged in the construction of shafts, tunnels, and the like, for prospecting and developing a mine, is engaged in mining as much as he who extracts ore or gravel from the mine. Johnson vs. California Lustral Co., *supra.*(160) The process of mining is a "business." Stratton's Independence vs. Howbert, 231 U. S. 399; Twenty One Co. vs. Original Sixteen Mine, 255 Fed. 660; Sutter Co. vs. Nichols, 152 Cal. 688, 93 Pac. 872. But the business of mining is not a public utility in the absence of a local constitutional provision. See Con. Channel Co., 51 Cal. 269; Amador Queen Co. vs. DeWitt, 73 Cal. 482, 15 Pac. 74. See generally, Clark vs. Nash, 198 U. S. 361; aff'g. 27 Utah 158, 75 Pac. 371; Strickley vs. Highland Boy Co., 200 U. S. 527; aff'g. 28 Utah 215, 78 Pac. 296; Goldfield Con. Co. vs. Old Sandstorm Co., 38 Nev. 426, 150 Pac. 313.

[182] Rollins, 102 Fed. 985.

[183] Trinity Co. vs. Beaudry, *supra* (75); Morse vs. DeArdo, 107 Cal. 622, 40 Pac. 1018.

[184] Mt. Diablo Co. vs. Callison, Fed. Cas. 9886; Argonaut Co. vs. Kennedy Co., 84 Fed. 2; Escott vs. Crescent Co., *supra.* (159)

[185] St. Louis Co. vs. Kemp (134); Peabody Co. vs. Gold Hill Co., 97 Fed. 661; McFeters vs. Pierson, 15 Colo. 203, 24 Pac. 1076. The words "claim" and "location" are used interchangeably. Del Monte Co. vs. Last Chance Co., *supra.*(147)

by all, though constituting what he claims for mining purposes will constitute a "mining claim" and will be so designated.[186]

CXI. Mining District.

A "mining district" is a section of country usually designated by name, having described or understood boundaries within which mineral is found and which is worked under rules and regulations prescribed by the miners therein.[187] There is no limit to its territorial extent [188] and its boundaries may be changed if vested rights are not thereby interfered with.[189]

No certain number of persons are necessary to effect its organization.[190]

A corporation may take part in the formation of a mining district.[191]

The regularity of the mode in which the district was organized will not be inquired into by the courts unless some fraud be shown.[192]

The officers of a district are usually limited to a "Mining Recorder," who is elected by the miners thereof and therein, for a specified term.

He should keep proper books for recording instruments therein.[193] Errors of recordation are not necessarily fatal.[194]

The organization of mining districts is entirely optional with the miners, as there is no law requiring such organization.[195]

CXII. Mining Ground and Mining Land.

No land can be a "mining claim" unless based upon a location; otherwise it may be "mining ground" or a "mine." [196] For instance, the bed of a navigable river is not subject to mining location, but if mining is conducted thereon by dredging, it is mining ground; [197] or, where land is covered by an agricultural patent and worked for its mineral deposits, it is "mining ground" and not a "mining claim." [198] Hence, land from which a mineral substance is obtained from the earth by the process of mining may, with propriety, be called "mining ground" or "mining land" [199] although the terms "valuable for minerals" and "valuable for mineral deposits" are not equivalent to the term "mining ground." [200]

CXIII. Mining Purposes.

The phrase "mining purposes" as used in connection with mill-site locations, is very comprehensive, and may include any reasonable use

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[186] St. Louis Co. vs. Kemp, *supra* (134); Carson City Co. vs. North Star Co., 83 Fed. 664; see U. S. vs. Brookshire Oil Co., *supra* (82); Con. Mutual Oil Co. vs. U. S., *supra*.(49)

[187] U. S. vs. Smith, 11 Fed. 487; see Campbell vs. Rankin, 99 U. S. 261.

[188] King vs. Edwards, 1 Mont. 235.

[189] Id.

[190] *But see* Fuller vs. Harris, 29 Fed. 814.

[191] McKinley vs. Wheeler, *supra*.(62)

[192] Gore vs. McBrayer, 18 Cal. 583.

[193] Fuller vs. Harris, *supra* (190); McCann vs. McMillan, 129 Cal. 350, 62 Pac. 31.

[194] Myers vs. Spooner, 55 Cal. 257; Weese vs. Barker, 7 Colo. 178, 2 Pac. 219.

[195] Rose Claim, 22 L. D. 83.

[196] Forbes vs. Gracey, *supra* (21); Williams vs. Santa Clara Ass'n., 66 Cal. 193, 5 Pac. 85; Bewick vs. Muir, 83 Cal. 368, 23 Pac. 389; Morse vs. De Ardo, *supra* (183); Ball vs. Tolman, 119 Cal. 358, 51 Pac. 546.

[197] Ball vs. Tolman, *supra*.(196)

[198] Morse vs. De Ardo, *supra*.(196)

[199] People vs. Bell, *supra*.(159) Oil is a mineral substance obtained from the earth by a process of mining, and lands from which it is procured may with propriety be called mining lands. Burke vs. S. P. R. Co., *supra* (104); Gill vs. Weston, 110 Pac. St. 417, 1 Atl. 921.

[200] Johnson vs. California Lustral Co., *supra*.(160)

for mining purposes which the quartz lode mining claim may require for its proper working and development. This may be very little, or it may be a great deal. The locator of a quartz lode mining claim is required to do only one hundred dollars worth of work each year until he obtains a patent therefor. But if he does only this amount, and uses the mill-site in connection therewith, is not this the use of a mill-site for mining purposes in connection with the mine? Who shall prescribe what shall be the kind and extent of the use under the statute so long as it is used in good faith in connection with the mining claim for a mining purpose.[201]

CXIV. Mining Right.

A "mining right" upon a specific piece of ground is a right to enter upon and occupy the ground for the purpose of working it, either by underground excavations or open workings, to obtain from it the mineral ores which may be deposited therein.

By implication the grant of such right carries with it whatever is incident to it, and necessary to its beneficial enjoyment.[202]

There is a clear distinction between an absolute conveyance of minerals in place and the grant of a "mining right" to another upon certain described land to convert the mineral into personalty and dispose of it. In the former case there is a severance of the title to the realty; in the latter, there is not, although the "mining right" entitles the grantee to extract every particle of the mineral, but the grant is not of the mineral in place, but only of the mineral rights and privileges.[203]

The working of a mine under a bare "mining right" uniformly has been considered by courts of equity as a species of trade.[204] The legal relation existing between two or more persons interested in such a right is that of a qualified partnership and the remedies relating to a mining partnership are available for the assertion or violation of any right arising out of it.[205]

It has been decided that a mere "mining right" is not an estate which can be made the subject of a partition.[206]

CXV. Mining Title.

The term "mining title" as employed in Revised Statutes (§ 910) means the title which the miner obtains by his discovery and location, followed by a compliance with the statutory regulations to preserve the right of possession, and in possessory actions between persons the case shall be adjudged by the law of possession, though the paramount title is in the United States.[207]

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[201] Hartman vs. Smith, 7 Mont. 28, 14 Pac. 648; see, also, S. P. Mines vs. Valcalda, 79 Fed. 890; aff'd. 86 Fed. 90.

[202] Smith vs. Cooley, 65 Cal. 46, 2 Pac. 880; People vs. Bell, *supra* (190); see Last Chance Co. vs. Bunker Hill Co., 131 Fed. 579; Armstrong vs. Maryland Co., 67 W. Va. 589; 69 S. E. 195; see Carothers vs. Mills, *supra*.(173)

In every private grant there passes by implication that which is reasonably necessary to the enjoyment of the thing granted. Washburn on Easements, (4th ed.) 49, 54. Hence a grant of the minerals under the surface of the land implies a right to mine them by the sinking of shafts or boring of tunnels and the removal of them through such openings. Himrod vs. Ft. Pitt Co., 220 Fed. 82.

[203] Chandler vs. French, 73 W. Va. 658, 81 S. E. 825; see McGraw vs. Lakin, 67 W. Va. 385, 68 S. E. 27.

[204] Smith vs. Cooley, *supra*.(202)

[205] Id.

[206] Id. See, also, Musick Oil Co. vs. Chandler, 158 Cal. 13, 109 Pac. 613.

[207] Gillis vs. Downey, 85 Fed. 486; see, also, Belk vs. Meagher, 104 U. S. 284; Del Monte Co. vs. Last Chance Co., *supra* (184); Price vs. McIntosh, 1 Alaska 292.

In a possessory action contemplated by the above section no greater proof of a right to recover can be required in a state court than would be required in a court of the United States, unless made so by a statute of the state.[208]

CXVI. Models.

A "model" is a *facsimile* in three dimensions—a reproduction in miniature of the underground workings of a mine, showing the shafts, tunnels, drifts, crosscuts, etc., in all their details. From its very nature, it does not fall within any definition of the word "map" and it is a misapplication of the term to call it a map, though it may far better serve the purpose in hand.[209]

CXVII. Monuments.

"Monuments" are permanent landmarks established for the purpose of indicating boundaries.[210]

CXVIII. Mucker.

A "mucker" is a miner whose duty it is to load ore in the heading on cars after the ore has been extracted by the miners.[211]

CXIX. Name of Lode.

The "name of the lode" is that by which it is designated in the notice of location;[212] and subsequent addition thereto is immaterial.[213] The same vein or lode may have different names in different mining locations.[214]

CXX. Negligence.

"Negligence" in a legal sense is a failure upon the part of a mine operator to observe for the protection of the interests of the miner that degree of care, precaution, and vigilance which the circumstances justify demand, whereby the miner suffers injury.[215]

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[208] Harris vs. Kellogg, 117 Cal. 499, 49 Pac. 708; see Haws vs. Victoria Co., 160 U. S. 317 aff'g. 7 Utah 515, 27 Pac. 695.

[209] Montana Co vs. Boston Co., *supra*.(151) The practice of admitting maps, models and photographs in evidence in all proper cases should be encouraged. Such evidence usually clarifies some issue, and gives the jury and court a clearer comprehension of the physical facts than can be obtained from the testimony of witnesses. Kelly vs. City, 83 Wash. 55, 145 Pac. 57.

[210] Thompson vs. Hill, 137 Ga. 308, 73 S. E. 640. Marking the boundaries of the surface claim as required by statute is one of the first steps towards a location. It serves a double purpose. It operates to determine the right of the claimant as between himself and the general government and to notify third persons of his right. Another seeking the benefits of the law, going upon the ground, is distinctly notified of the appropriation and can ascertain its boundaries. He may thus mark his own location with certainty, knowing that the boundaries of the other can not be changed so as to encroach on grounds duly appropriated prior to the change. The prevention of fraud by swinging or floating is one of the purposes served. Willeford vs. Bell, 5 Cal. Unrep. 679, 49 Pac. 6; Pollard vs. Shively, *supra*.(80) See *supra* XC. See Natural Objects and Permanent Monuments.

[211] Republic Co. vs. Harris, 202 Ala. 344, 80 So. 426.

[212] Phillpotts vs. Blasdel, 8 Nev. 61.

[213] Doe vs. Waterloo Co., 55 Fed. 11.

[214] Philpotts vs. Blasdell, *supra*.(212) The name of the lode may be changed by amendatory proceedings. Butte Co. vs. Barker, 35 Mont. 327, 89 Pac. 302, Id. 90 Pac. 177.

[215] Darby vs. Shoop, 116 Va. 848, 83 S. E. 412. An oil well company is liable on the ground of negligence for using an old, worn, and unsafe "bull rope," and by reason of the defective condition of such rope an employee was injured, where it appears that he has no knowledge of the defective condition of the rope. Producers Oil Co. vs. Eaton, 44 Okla. 55, 143 Pac. 9. "First aid" as applied to an injured miner is defined to be immediate attention given to him with the object of arresting hemorrhage, relieving pain, and preserving life until the services of a physician can be obtained. Hunicke vs. Meramic Co., *supra*(26); see Cushman vs. Cloverland Co., *supra*.(26)

CXXI. Not Previously Known to Exist.

The words "not previously known to exist" refer to the time of the location and commencement of the tunnel and not to the respective times of the discoveries of the various veins in the tunnel.[216]

CXXII. Obliterated Corner.

An "obliterated corner" is one where no visible evidence remains of the work of the original surveyor.[217]

CXXIII. Occupant.

An "occupant" of a tract of land, as the word ordinarily is used, is one who has the "use and possession" thereof, whether he resides upon it or not.[218]

CXXIV. Occupation.

The term "occupation" as used in the mining law, is equivalent to possession, and the right to locate is included in the right to occupy, and incident to a location is the right of possession;[219] but mere occupancy of the public lands and making improvements thereon gives no vested right therein as against a location[220] made in pursuance of law.[221]

CXXV. Official Plat of Survey.

The expression in a patent "according to the official plat of the survey of the land returned to the general land office by the surveyor-general" refers to the description of the land as well as to the quantity conveyed.[222]

CXXVI. Oil Flotation.

The object of "oil flotation" is to separate metalliferous matter from gangue by means of oils and fatty acids that have a preferential affinity

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[216] Enterprise Co. vs. Rico-Aspen Co., 66 Fed. 205; aff'd. 167 U. S. 112.

[217] Fellows vs. Willett, 98 Okla. 248, 224 Pac. 298. If the evidence establishes to a reasonable certainty the point of location of the obliterated corner the court will not direct the establishment of a corner under the rule of lost corners, since the latter rule establishes the corner where the former surveyor actually located it, and not where it ought to have been located by a correct survey in the first instance. Hale vs. Baugh, 70 Wash. 435, 126 Pac. 942.

[218] Johnson, L. D. 537.

[219] Tibbitts vs. Ah Tong, 4 Mont. 539, 2 Pac. 761; see, also, Collins vs. Bull, 73 Fed. 739; U. S. vs. Nelson, Fed Cas. 86; Ladda vs. Hawley, 57 Cal. 55; Hullins vs. Butte Co., 25 Mont. 531, 65 Pac. 1004. To constitute foundation of title, the occupancy must be with the intent or design to acquire the ownership of the thing occupied. No title to mineral land can be acquired by occupancy, unless for the purpose of mining or extracting the mineral. Burns vs. Clark, *supra*.[(120)]

Mere possession and occupancy of a mining claim, upon which there has been no discovery of mineral, are insufficient grounds for the lawful exclusion from the land of others who seek to make mineral discoveries and development thereon. It is only when such occupancy and possession are accompanied by diligent prosecution of work leading to discovery of mineral that the exclusion of others from the land is justified. Cole vs. Ralph, *supra* [(7)]; Clark and Ohio Oil Co., 48 L. D. 631.

[220] Sparks vs. Pierce, 115 U. S. 408; Hays vs. U. S., 175 U. S. 260; S. P. R. Co. vs. Purcell, 77 Cal. 71, 18 Pac. 886; see Bonner vs. Meikle, 82 Fed. 697; Chism vs. Price, 54 Ark. 251, 15 S. W. 883, 1031.

[221] Hopkins vs. Noyes, 4 Mont. 556, 2 Pac. 280. Possession is good against mere intruders, but it is not as against one who has complied with the mining laws. Garthe vs. Hart, 73 Cal. 543, 15 Pac. 93. See, also, Nevada Sierra Oil Co. vs. Home Oil Co., 98 Fed. 673; Thallman vs. Thomas, 111 Fed. 277; Malone vs. Jackson, 137 Fed. 878; Miller vs. Chrisman, *supra*.[(58)]

See § 731, note 60.

[222] Sala vs. Crane, 31 Ida. 191, 170 Pac. 94; see, also, Niles vs. Cedar Point Club, 175 U. S. 300; Foss vs. Johnstone, 158 Cal. 119, 110 Pac. 294; Round Mt. Co. vs. Round Mt. Co., *supra* [(20)]; and see Schwartz vs. Dibblee, 51 Cal. A. 451, 197 Pac. 125. Where lands are granted "according to the official plat of the survey of said lands" the plat itself with all of its notes, lines, description and landmarks become a part of it. Cragin vs. Powell, 128 U. S. 691; Weaver vs. Howatt, 161 Cal. 77, 118 Pac. 519; Pittsmont Co. vs. Vanina, 71 Mont. 44, 227 Pac. 46; see Hedrick vs. Eno, 42 Iowa 411.

for such metalliferous matter, the principal feature of which is "agitating the mixture to cause the oil-coated mineral to form a froth.[223]

CXXVII. Oral Agreement to Locate.

An agreement to locate need not be in writing. If a party, in pursuance of an "oral agreement to locate" at the expense of another, locates the claim in his own name, he holds the legal title to the ground in trust for the benefit of the party for whom the location was made. Such a party could, upon making the necessary proofs, compel the locator of the mining claim to convey the title to him, although the agreement so to do was not in writing. Such an agreement is not within the statute of frauds.[224]

CXXVIII. Ore.

"Ore" is a compound of metal and other substance,[225] as oxygen, sulphur or arsenic, called its mineralizer, by which its properties are disguised or lost. The term is applied usually to a mineral from which the metal can profitably be extracted, but sometimes is extended also to nonmetallic minerals such as sulphur ore.[226]

CXXIX. Ore Dressing.

When the miner hoists his ore to the surface, the contained metal may be either in the native uncombined state, as, for example, native gold, native silver, native copper, or combined with other substances forming minerals of more or less complex composition, as, for example, telluride of gold, sulphide of silver, sulphide of copper. In both cases the valuable mineral is always associated with minerals of no value. The province of the ore dresser is to separate the "values" from the waste; for example, quartz, feldspar, calcite, by mechanical means, obtaining thereby "concentrates" and "tailings." The province of the metallurgist is to extract the pure metal from the concentrates by chemical means with or without the aid of heat.[227]

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[223] Hyde vs. Minerals Sep. Co., 214 Fed. 109; see 242 U. S. 261; Minerals Sep. Co. vs. Miami Co., 237 Fed. 616; Id. 244 Fed. 752; Butte & S. Co. vs. Minerals Sep. Co. 250 Fed. 241, reversed in part and affirmed in part in 250 U. S. 336. See Id. 207 Fed. 956; Minerals Sep. Co. vs. British Syn., 27 R. P. C. 33. A number of patents have been granted in this and other countries, aiming to make practical use of the property of oil and of oil mixed with acid in the treatment of ores, all of which consists of mixing finely crushed or powdered ore with water and oil and sometimes with acid added, and then in variously treating the mass or pulp thus formed so as to separate the oil when it becomes impregnated or loaded with the metal and metalliferous bearing particles from the valueless gangue, and from the resulting concentrate the minerals are recovered in various ways. Minerals Sep. Co. vs. Hyde, 242 U. S. 264. See Minerals Separation vs. Butte & S. Co., 250 U. S. 338; in which case 250 Fed. 241, is reversed in part and affirmed in part.

[224] Book vs. Justice Co., *supra* (15); Lockhart vs. Washington Co., 16 N. M. 223, 117 Pac. 833. The mining laws do not prohibit a person from initiating a location of a mining claim by an agent, as it is not necessary that he should personally act in taking up a mining claim, or in doing acts required to give evidence of an appropriation, or to perfect the appropriation. McCulloch vs. Murphy, 125 Fed. 149; see, also, U. S. vs. California Midway Oil Co., *supra*.(140)

[225] Marvel vs. Merritt, 116 U. S. 11; Hemstead & Son. vs. Thomas, *supra*.(135) Ore is described as metal or metal unrefined—metal yet in its fossil state. Atty. Gen. vs. Morgan, 1 Ch. 432. Ore is a metal separated from the rock. Id. 1 Ch. 462, 60 L. J. Ch. 130, 1 Ch. 449, 59 L. J. Ch. 779. Courts can not take judicial notice of what percentage of mineral can be extracted from a particular class of ore. This is a matter of proof in each particular case. Dixon vs. S. P. Co., 42 Nev. 73, 172 Pac. 370.

[226] The Santa Clara, *supra*.(74)

[227] Id.

Courts will take judicial knowledge of the fact that processes of crushing, amalgamating and cyaniding ores will not effect an extraction of one hundred per cent of the metallic content. What will be a reasonable percentage of extraction will depend largely upon the process used and the character of the ore. Dixon vs. S. P. Co., *supra*.(225)

CXXX. Ore in Sight.

"Ore in sight" means ore-bearing rock so separated and blocked off by being worked around on two or more sides that it is subject to examination and measurement.[228] Prospective purchasers have a right to rely upon statements as to the amount of ore in sight.[229]

CXXXI. Ore Personal Property.

"Ore," or other mineral product, becomes personal property when detached from the soil in which it is imbedded.[230]

CXXXII. Other Valuable Deposits.

The term "other valuable deposits" includes nonmetalliferous as well as metalliferous deposits.[231]

CXXXIII. Ouster.

An entry by one on the land of another is an "ouster" of the legal possession arising from the title, or not, according to the intention with which it is done. If made under claim and color of right, it is an ouster; otherwise it is a mere trespass. In legal language, the intention guides the entry and fixes its character.[232]

CXXXIV. Outstroke and Instroke.

The term "outstroke" means the raising or removal of ore from a mine adjoining the demised premises through a shaft or opening on the latter. The term "instroke" means the right to raise or take ore from a leased mine through the shaft or tunnel of an adjoining mine.[233]

CXXXV. Pedis Possessio.

The term "pedis possessio" means actual possession.[234]

CXXXVI. Photographs.

Where a plain picture or representation produced by the art of photography is verified as a correct representation of the locality in question,[235] it is admissible in evidence to enable the court or a jury to

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[228] Mudsill Co. vs. Watrous, *supra* (42); see Green vs. Turner, 86 Fed. 837. As to measurement of ore under water, see Ward vs. Eastwood, 3 Cal. A. 437; 86 Pac. 742.

[229] Green vs. Turner, *supra* (228); see Southern Nevada Dev. Co. vs. Silva, 125 U. S. 247; see, also, Johnson vs. Withers, 9 Cal. A. 52, 98 Pac. 42.

[230] Forbes vs. Gracey, *supra* (21); see Waskey vs. McNaught, 163 Fed. 929; Kelvin Co. vs. Copper State Co., —— Tex C. A. ——; 203 S. W. 68.

[231] Harry Lode, *supra*.(7)

[232] Zerres vs. Vanina, 134 Fed. 613; aff'd. 150 Fed. 564. When another enters upon a mining claim asserting ownership therein, by virtue of an alleged superior title based upon a location, and exercises dominion over it to the exclusion of the rights of the owner this amounts to an ouster. Bramlett vs. Flick, 23 Mont. 95, 57 Pac. 869.

[233] Percy Co. vs. Newman Co., 300 Fed. 142. The right to mine by instroke goes to the lessee by implication, but the right to mine by outstroke is excluded except where specially covenanted for in the lease, because in outstroke working, on the other hand, the lessee makes use of lessor's mine for a purpose not implied in the lease. Such a right can not be inferred. White on Mines and Mining Remedies, § 136; Stewart on Mines and Mining, pages 115, 116; McSwinney on Mines. (5th ed.), page 443; see, also, Barringer & Adams, Mines and Mining, page 578. See, generally, Sharum vs Whitehead Co., 223 Fed. 282; Schobert vs. Pittsburgh Co., 254 Ill. 474, 98 N. E. 945; Trustees vs. Lehigh Co., 236 Pa. St. 945, and see Bagley vs. Republic Co., 193 Ala. 219, 69 So. 67.

[234] Southern Ry. Co. vs. Hall, 145 Ala. 224, 41 So. 136; Goldberg vs. Bruschi, *supra*.(3) The actual possession of a mining claim is sufficient evidence of title as against a mere intruder. Campbell vs. Rankin, *supra* (187); see, also, Del Monte Co. vs. Last Chance Co., *supra*.(147)

[235] Delerich vs. Salt Lake Co., 14 Utah 137, 46 Pac. 656.

understand and apply the established facts to the particular case. Such photographic scenes are admissible as appropriate aids to the jury in applying evidence, whether it relates to things or places.[236]

Testimony that a "photograph" is a correct representation of the object sought to be shown is a sufficient foundation for its admission. Such testimony need not neeessarily be given by the photographer who took or finished the "photograph" but may be given by any witness having sufficient knowledge of the object to say that the "photograph" is a faithful representation thereof.[237]

It is a common practice to use maps, models and photographs to illustrate evidence.[238]

CXXXVII. Pillars or Stumps.

"Pillars" or "stumps" are the natural supports left in the mine for the purpose of supporting the roof.[239]

CXXXVIII. Placers.

The term "placers" as used in the mining act, means ground within defined boundaries chiefly valuable for its deposits, metallic or non-metallic, in earth, sand or gravel, not in place, that is, in a loose state, upon or near the surface or occupying the bed of ancient rivers or valleys and may, in most instances, be collected by washing or amalgamation without milling.[240] In other words, the term "placers" includes all forms of deposit excepting veins or lodes of quartz or other rock in place.[241]

CXXXIX. Placer Location.

A "placer location" is a location of a tract of land for the mineral-bearing or other valuable deposits upon or within it that are not found within lodes or veins in rock in place, and is a claim of a tract of land for the sake of the loose deposits on or near its surface.[242]

CXL. Placer Mining.

"Placer mining" simply is extracting the gold from placers, wherever situated—in dry channels and in channels for the time filled with water. It does not make the process any the less "placer mining" that the gold is found in deep channels, in navigable streams, or in estuaries or creeks and rivers where the sea ebbs and flows.[243]

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[236] Harris vs. Seattle Co., 65 Wash. 27, 117 Pac. 601; Hassam vs. Safford, 82 Vt. 444, 74 Atl. 197.

[237] Berkovitz vs. American River Co., 191 Cal. 195, 215 Pac. 675.

[238] Delerich vs. Salt Lake Co., *supra*.(235)

"We may assume that everyone now understands the limitations upon the use of the photograph. It presents but one view, and may sometimes make an unfair representation of the point at issue. Like any other diagram, its value must be determined by the jury from all the evidence." People vs. Crandall, 125 Cal. 133, 57 Pac. 785; Gregoriev vs. N. W. P. Co., 95 Cal. A. 436, 273 Pac. 76.

[239] Northeast Co. vs. Hunley, 163 Ky. 817, 174 S. W. 732.

[240] U. S. vs. Iron Co., 128 U. S. 673; N. P. R. Co. vs. Soderberg, *supra*,(72) Clipper Co. vs. Eli Co., *supra* (110); Cole vs. Ralph, *supra* (5); Gregory vs. Pershbaker, 73 Cal. 109, 14 Pac. 401; Moxon vs. Wilkinson, 2 Mont. 421; Sullivan vs. Schultz, 22 Mont. 541, 57 Pac. 279.

[241] Cosmos Co. vs. Gray Eagle Co., 104 Fed. 20, aff'd. 112 Fed. 4, aff'd. 190 U. S. 301; Webb. vs. American Co., *supra* (138); Gregory vs. Pershbaker, *supra* (240). See Placers, *infra*, § 186.

[242] Webb vs. American Co., *supra* (138); see Clipper Co. vs. Eli Co., *supra* (110); Duffield vs. San Francisco Co., 205 Fed. 486; Gregory vs. Pershbaker, *supra* (240); Bay vs. Oklahoma Co., 13 Okla. 429; 73 Pac. 936. The rights conferred and the conditions upon which they are held are different in placer claims and lode claims. U. S. vs. Iron Co., *supra*.(240)

[243] Ball vs. Tolman, *supra*.(117) See, also, Richen vs. Davis, 76 Or. 311, 148 Pac. 1130.

CXLI. Pop Shots.

A "pop shot" is a shot by which a boulder in a mine is broken up by placing a stick of dynamite on top of the boulder and exploding it.[244]

CXLII. Preference.

The term "preference" is a familiar one under the public land laws and means "exclusive."[245]

CXLIII. Proceedings.

The term "proceedings" is broader than the term "action" yet the term "proceedings" in the mining law is used in the sense of "action" and refers to the commencement of an action. And the term "proceedings" is used to enable a party to institute such proceedings under the different forms of actions allowed by the state and federal courts.[246]

CXLIV. Process of Mining.

The "process of mining" is the prospecting or developing of ground by shaft, tunnel, or other opening, whether mineral is extracted at a profit or at all; by quarrying; or by dredging the bed or banks of a water-way for the purpose of obtaining mineral therefrom.[247]

CXLV. Prospect Hole.

A "prospect hole" adds nothing to the value of the land but only tends to show its actual condition.[248]

CXLVI. Prospecting and Mining.

"Prospecting" and "mining" are generic terms which include the whole mode of obtaining metals and minerals.[249]

CXLVII. Protestant.

A person who has filed no "adverse claim" during the period of publication and comes forward and presents objections to the granting of a patent is a "protestant."[250]

CXLVIII. Provisional Locations.

A location can not depend for its validity upon the subsequent forfeiture or abandonment of the claim by the present claimant.[251]

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[244] Batesel vs. American Zinc Co., 190 Mo. A. 231, 176 S. W. 447.

[245] Morrison, 36 L. D. 128; see U. S. vs. Forrester, 211 U. S. 403.

[246] Mars vs. Oro Fino Co., 7 S. D. 617, 65 N. W. 19, see Chambers vs. Harrington, *supra* (131); Cronin vs. Bear Creek Co., 3 Ida. 614, 32 Pac. 204; Mattingly vs. Lewisohn, 13 Mont. 508, 19 Pac. 310; Golden Fleece Co. vs. Cable Con. Co., 12 Nev. 312.

[247] Johnson vs. California Lustral Co., *supra*.(160) "When a company is digging pits, sinking shafts, tunneling, drifting, stoping, drilling, blasting and hoisting ores, it is employing capital and labor in transmuting a part of the realty into personalty, and putting it into marketable form. The very process of mining, is in a sense, equivalent in its results to a manufacturing process." Stratton's Independence vs. Howbert, *supra* (181); Munro vs. Smith, 243 Fed. 659.

Oil is a mineral and the process of extracting it from the rocks is mining. Rice Oil Co. vs. Toole County, 86 Mont. 427, 284 Pac. 145.

[248] Tyson Creek Co. vs. Empire Mill Co., 31 Ida. 580, 174 Pac. 1006. For the value of a prospect hole for oil, caused to be drilled by a lessee of oil and gas lands, but not completed, see North Healdton Co. vs. Skelley, 59 Okla. 128, 158 Pac. 1182.

[249] Williams vs. Toledo Co., 25 Or. 426, 36 Pac. 426; see Bishop vs. Baisley, *supra*.(179) See *supra* CXLIV.

[250] Smuggler Co. vs. Trueworthy Lode, 19 L. D. 356; see Tilden vs. Intervenor Co., 1 L. D. 572.

[251] Mason vs. Washington-Butte Co., 214 Fed. 32; Rooney vs. Barnette, 200 Fed. 700; see, also, Slavonian Co. vs. Perasich, 7 Fed. 232.

CXLIX. Public Domain.

The term "public domain" is equivalent to the term "public land." [252]

CL. Public Land.

The term "public land" as used in the legislation of congress means such lands as are subject to appropriation as a mining claim [253] or subject to sale, or other disposition, under the general laws.[254]

CLI. Public Mineral Land.

"Public mineral land" is land belonging to the United States containing a deposit of mineral in some form, metalliferous or nonmetalliferous, in quantity and quality sufficient to justify expenditures in the effort to extract it and subject to occupation and purchase under the mining laws.[255]

CLII. Public Land and Public Use.

There is a clear distinction between public lands and lands that have been severed from the public domain and reserved from sale or other disposition under general laws. Such reservation severs the land from the mass of the public domain and appropriates it to a "public use." [256]

CLIII. Pusher—Jigger Boss.

"Pusher" or "jigger boss" is a term used in mining parlance to designate one who is engaged for the purpose of encouraging or hastening the miners.[257]

CLIV. Quarry.

A "quarry" in its proper significance is a "stone mine" [258] and may be located as a placer claim.[259] It is distinguished from a mine in the fact that usually it is open at the top and front, and in the ordinary acceptation of the term, in the character of the material extracted.[260]

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[252] Barker vs. Harvey, 181 U. S. 490.
See § 15.

[253] 5 U. S. Comp. St., p. 5414, § 4614. See Erhardt vs. Boaro, *supra* (9); Deffeback vs. Hawke, *supra* (18); see, also, South End Co. vs. Tinney, *supra*.(108) Land not known to be mineral is not "public mineral land" within the meaning of the statute. Smith vs. Hill, 89 Cal. 129, 26 Pac. 644. See Gold Hill Co. vs. Ish, 5 Or. 109.

[254] Newhall vs. Sanger, 92 U. S. 761; Barden vs. N. P. R. Co., 154 U. S. 288; U. P. R. Co. vs. Harris, 215 U. S. 388; McFadden vs. Mt. View Co., 97 Fed. 670; U. S. vs. Blendauer, 122 Fed. 703.
In the legislation concerning the public lands it has been the practice of congress to make a distinction between mineral lands and other lands, to deal with them along different lines and to withhold mineral lands from disposal save under the laws specially including them. U. S. vs. Sweet, 245 U. S. 567.
See § 15.

[255] Pacific Coast Co. vs. N. P. R. Co., *supra* (90); see Deffeback vs. Hawke, *supra* (18); Alford vs. Barnum, 45 Cal. 482. Federal statutes opening mineral lands to entry apply to only such lands as the United States has indicated are held for disposal under land laws. Oklahoma vs. Texas, 258 U. S. 574.

[256] U. S. vs. Tygh Co., 76 Fed. 693.
See § 630.

[257] Ryan vs. Manhattan Co., 38 Nev. 92, 145 Pac. 908.

[258] In re Kelso, 147 Cal. 609, 82 Pac. 241; see Quincy Co., 147 Fed. 279; see, generally, Nephi Co. vs. Juab County, 33 Utah 114, 93 Pac. 53.

[259] Pacific Coast Co. vs. N. P. R. Co., *supra* (90); Meiklejohn vs. Hyde, 42 L. D. 147; Freezer vs. Sweeney, 8 Mont. 233, 21 Pac. 20; see Clark vs. Ervin, 17 L. D. 550. See, generally, Burdick vs. Dillon, 144 Fed. 741, U. S. vs. Ohio Oil Co., 240 Fed. 996.

[260] In re Kelso, *supra* (258); see, generally, Bell vs. Wilson, L. R. 1 Ch. 309; Darvill vs. Roper, 24 L. J. Ch. 779; Glasgow vs. Fairie, *supra* (166); American Onyx Co., 42 L. D. 417; Marvel vs. Merritt, 116 U. S. 11, Heysradt vs. Delaware Co., 151 Fed. 321; J. M. Guffey Co. vs. Murrel, *supra* (164); Shaw vs. Wallace, 25 N. J. Law 462; Miller vs. Chester Co., *supra* (93); Rutledge vs. Kress, Penn. Superior Ct. 495; Murray vs. Allred, *supra*.(159)

CLV. Real Property.

The term "real property" includes mining claims,[261] dumps,[262] water rights,[263] and ditches.[264]

CLVI. Relinquishment.

A "relinquishment" turns the land back to the United States, and with it every right, possessory or otherwise, that the relinquisher enjoyed.[265]

CLVII. Rule of Approximation.

The "rule of approximation" now is applicable to placer mining locations and entries upon surveyed lands, to be applied on the basis of ten-acre legal subdivisions.[266]

CLVIII. Saddle.

A "saddle" is a peculiar formation of sand slate found in shale or sand rock and may be surrounded by soapstone. The under or exposed side of a saddle looks like natural rock, but its upper side is smooth, having no particular bond with the sand rock with which it is embedded, and is liable to fall out of its place; a fall, however, producing no other derangement of the surrounding parts of the room from which it falls.[267]

CLIX. Salines.

Salt mines of rock salt, mineral springs, salt springs, salt beds and salt rock all come within the meaning of the general term "salines."[268]

CLX. Salting.

"Salting" consists in surreptitiously placing valuable mineral from a foreign source in such form and place within the claim as the characteristics of the latter may require, or, in like manner, tampering with the samples of ore or mineral taken therefrom or with the assays thereof, or the amalgam or other matter in the mill or other reduction works, with the intent and for the purpose to thereby give increased apparent, but misleading and inflated value to the property, which is the subject of the option or contract of sale thereof and so induce its sale at a price greater than its mineral value warrants.[269]

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[261] Bradford vs. Morrison, 212 U. S. 395; see Jones vs. Peck, *supra*,[(19)] and see Van Ness vs. Rooney, 160 Cal. 131, 116 Pac. 392.

[262] Savage vs. Nixon, *supra* [(97)]; Steinfeld vs. Omega Co., *supra*,[(97)] see, also, Manson vs. Dayton, 153 Fed. 263.

[263] Bree vs. Wheeler, 4 Cal. A. 109, 61 Pac. 782.

[264] Gest vs. Packwood, 34 Fed. 368; Smith vs. O'Hara, 43 Cal. 371; Burnham vs. Freeman, 11 Colo. 601, 17 Pac. 761.

[265] Moss vs. Dowman, 176 U. S. 413; Robinson vs. Lundrigan, 227 U. S. 180; Kendall vs. Bunnell, 56 Cal. A. 112, 205 Pac. 78. For insufficient form of a relinquishment see Bojorques vs. Heihn, 50 L. D. 165.

[266] McKittrick Oil Co., 44 L. D. 340; following Borgwardt vs. McKittrick Oil Co., 164 Cal. 650, 130 Pac. 417; see Ventura Oil Co., 42 L. D. 455, overruling Chicago Claim, 34 L. D. 11.

[267] Lehigh Valley Co. vs. Wasko, 231 Fed. 42, 48.

[268] Southwestern Co., 14 L. D. 603. The term "mineral lands" is one of broader significance than the words "lands on which are situated any known salines or mines," and the former refers to a class of lands rather than to specified tracts easily ascertainable, not only by the Land Department, but by the applicants themselves. Old Dominion Co. vs. Haverly, 11 Ariz. 254, 90 Pac. 333; see Cosmos Co. vs. Gray Eagle Co., *supra*.[(241)]

[269] See Shamel Mining Law, p. 316; Mudsill Co. vs. Watrous, *supra*.[(42)] See also, Southern Nevada Co. vs. Silva, *supra* [(229)]; Cook vs. Johnson, 3 Alaska 519; Healey vs. Rupp, *supra*.[(42)]

CLXI. Salt Lick.

A "salt lick" is so-called in the western country from the fact that deer and other wild animals resort to it, and lick or drink the brackish water. And in this respect no distinction is perceived between a "lick" as frequently used as a "salt spring." [270]

CLXII. Safe Appliances.

The term "safe" when used in respect to appliances to be furnished by an employer to an employee means "reasonably safe," and "reasonably safe" means such tools as are in general use among employers of ordinary caution and prudence in the same line of business under the same circumstances.[271]

CLXIII. Safe Place.

The rule that a mine operator or other employer must exercise reasonable care to furnish a miner or an employee with a "safe place" in which to work does not apply where the miner or employee is himself creating the place in which he works, or where the danger was such as was created by the miner or employee in the progress of his work.[272]

CLXIV. Scrip.

"Scrip," sometimes called "indemnity certificates" and sometimes "land warrants," is a document created by legislative enactment, whereby the holder thereof is entitled to acquire public nonmineral land, in the certain quantity therein named upon its surrender to the officers of the land office for the district of lands subject to sale and wherein the selected lands may lie, or as otherwise provided by the law authorizing its creation.[273]

The "scrip" may be laid upon unoccupied surveyed or unsurveyed nonmineral land [274] as the terms of the particular act providing for

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[270] Indiana vs. Miller, 13 Fed. Cas. 7022; see, also, New Mexico, 35 L. D. 5.

[271] Lively vs. American Co., 137 Tenn. 261, 191 S. W. 977.

[272] New Hughes Co. vs. Gray, 173 Ky. 337, 191 S. W. 79; see, also, Big Vein Co. vs. Repass, 238 Fed. 334, Decatur vs. Tompkins Co., 25 Fed. (2d) 526.

[273] See Opinion, 28 L. D. 472. Valentine scrip was issued by the government to right a wrong, in payment of a just obligation which the government owed the grantee. In this respect it differs from the ordinary land scrip issued to soldiers, agricultural colleges, etc., which represents merely gifts or gratuities on the part of the government. The satisfaction of the government's obligation to Valentine by the issue of this scrip gave him a vested right to the selection of any unsettled or unappropriated public land in the United States in quantity equal in acreage to that which he had conveyed to the government. Consequently, when he, or his assigns, made a selection of unappropriated public lands, he was merely exercising the vested right which he had already acquired from the government, and the vested right acquired, when completed in a valid selection, relates, not merely to the date of selection, but back to the date of the issuance of the scrip. West vs. Lyders, 36 Fed. (2d) 108.

[274] Weise, 2 C. L. O. 130; Valle, 2 C. L. O. 178; Letter, 3 C. L. O. 83; see Burgess, 20 L. D. 502; Florida, 45 L. D. 469; Martin, 48 L. D. 277; Van Dyke Co. vs. Malott, 50 L. D. 326.

its issuance may permit. When the entry is made the land is withdrawn from the public domain.[275]

The "scrip," generally, is subject to assignment and sale in the open market. Its price per acre is governed by the law of supply and demand.

The seller of the "scrip" should, properly, guarantee its acceptance by the government, as the doctrine of "bona fide purchaser" does not apply to one who purchases the "scrip."[276]

CLXV. Seam.

In geology a thin layer or stratum of rock is called a "seam." The term also is applied to coal. "Vein of coal," "coal bed" and "coal seam" are equivalent terms.[277]

CLXVI. Shift.

The word "shift" means a set of workmen who work in turn with other shifts, as a night shift.[278] It means, also, a day's work.[279]

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[275] James vs. Germania Co., 107 Fed. 597. In the case of Wilcox vs. Jackson, 13 Pet. 513, the court said: "But we go further, and say, that whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment, the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it; although no reservation were made of it." And, in the case of Leavenworth Co. vs. U. S., 92 U. S. 733, the court, quoting with approval the language given in the Wilcox Case, added: "It may be said that it was not necessary * * * in deciding the case to pass upon this question; but, however this may be, the principle asserted is sound and reasonable, and we adopt it as a rule of construction."

This rule of construction has been followed in numerous cases, and was reaffirmed in Payne vs. C. P. R. R. Co., 255 U. S. 228, where an injunction was sought to restrain the secretary from canceling a selection of indemnity land under a railroad land grant. The department defended on the ground that the land had been included in a subsequent withdrawal for power site purposes. The court, however, sustained the selection, with the observation that "the rule applicable in such a situation is that 'A person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof.' Wirth vs. Branson, 98 U. S. 121; Benson Co. vs. Alta Co., 145 U. S. 432." See, also, Schulz, 52 L. D. 601, upon this point and also for a citation and review of numerous cases bearing upon scrip locations.

[276] Pettigrew, 2 L. D. 598; see James vs. Germania Co., *supra* [275]; Van Dyke Co. vs. Malott, *supra*.[274] For case involving "scrippers" and oil locators, see McLemore vs. Express Oil Co., *supra*.[37]

[277] Chapman vs. Mill Creek Co., 54 W. Va. 193, 46 S. E. 263. The discovery of seams containing mineral-bearing rock similar in character to seams or veins of mineral matter that had induced other miners to locate claims in the same district, and which by development were found to be a part of a well-defined lode or vein containing ore of great value, constitutes a discovery. Jefferson-Montana Co., 41 L. D. 320 *supra* [141]; see Harper vs. Hill, *supra*.[10]

A discovery made in running a tunnel where there were small seams of iron oxide, quartz, and small quantities of carbonate of lead, and where the indications were of a character which the miners of that district would follow in the expectation of finding ore, and where the rock in such seams was different from the country rock, and where such seams were similar in character to the seams or veins of mineral matter that has induced other miners to locate claims in the same district, is a sufficient discovery to justify a belief in the existence of a lode or vein of great value, and to show that the location was made in good faith and not upon a conjectural or imaginary existence of a vein or lode, which can not be permitted. Shoshone Co. vs. Rutter, *supra* [141]; see King vs. Amy Co., 152 U. S. 227; rev'g. 9 Mont. 543, 24 Pac. 202; Lange vs. Robinson, 148 Fed. 802; Jefferson-Montana Co., 41 L. D. 322. In any case it may be an open question whether a location includes lands valuable for minerals or whether it is based upon a barren seam or fissure. Montana Co. vs. Migeon, 68 Fed. 814; Rough Rider Claims, 41 L. D. 253; see Madison vs. Octave Oil Co., *supra*.[42]

[278] Johnson vs. Butte & S. Co., *supra*.[53]

[279] Haney vs. Texas Co., —— Tex. C. A. ——, 207 S. W. 375.

CLXVII. Shift Boss.

The term "shift boss" means a master workman who directs the work of the set of men engaged upon a particular shift; that is, the set of workmen who work in turns with other sets.[280]

CLXVIII. Shoestring Location.

A "shoestring location" is a location of a long and narrow strip of mineral land.[281]

CLXIX. Skips.

"Skips" or cars are operated from the surface by cables attached to a drum which in turn is operated by an engine. The cars or "skips" are used by the employees of the mine owner to enter and leave the mine and also for the lowering of supplies into and the taking of ore from the mine.[282]

CLXX. Slag.

"Slag" is a refuse from metallic ores after being smelted.[283]

CLXXI. Slope.

The term "slope" in a mining statute or in mining parlance means an inclined way, passage, or opening used for the same purpose as a shaft and is sometimes used as embracing the main haulage passageway, whether inclined or level.[284]

CLXXII. Smelter Returns.

The phrase "smelter returns" in a contract means returns from the ore, less the smelting charges, without deducting transportation charges.[285]

CLXXIII. Smelting.

"Smelting" by its derivation is synonymous with "melting." When metallic ores are exposed to heat, and such reagents as develop the metal, it is called "smelting" in contradistinction from the mere application of heat, causing the ore to become fluid, which is called "melting."[286]

CLXXIV. Stabber.

The term "stabber" is employed in the work of tubing oil and gas wells to the person whose duty it is to guide the joints suspended by a rope from the derrick to connect with other joints, placed in the well.[287]

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[280] Johnson vs. Butte & S. Co., *supra*.(53)

[281] Hanson vs. Craig, 170 Fed. 65, Snow Flake Fraction, 37 L. D. 250. See Dripps vs. Allison's Co. 45 Cal. A. 95, 187 Pac. 448.

[282] Moreno vs. New Guadalupe Co., 35 Cal. A. 744, 170 Pac. 1088.

[283] Baltimore Co. vs. Carnegie Co., 251 Fed. 685. The term "tailings" has been construed as including slag. Boston Co. vs. Montana Co., 121 Fed. 526. The owner of material like slag, the refuse of mineral deposit dug from the earth, run through a mill, and then dumped upon the surface of contiguous land, may be treated and dealt with as mere personalty, which the owner may sell and deliver as any other personal property susceptible of manual delivery. Manson vs. Dayton, *supra*.(262)

[284] Roberts vs. Tennessee Co., 255 Fed. 471.

[285] Frank vs. Bauer, 19 Colo. A. 445, 75 Pac. 930; see, also, Guild Co. vs. Mason, 115 Cal. 95, 46 Pac. 901; Con. Kansas Co. vs. Gonzales, 50 Tex. A. 79, 109 S. W. 946; Blanck vs. Pioneer Co., 98 Wash. 261, 159 Pac. 1077.

[286] Lowrey vs. Cowles Co., 79 Fed. 331, rev'g. 68 Fed. 354.

The business of smelting is a part of the operation of mining, although it may be a distinct branch from that of digging or mining the ore. U. S. vs. Gratiot, 39 U. S. 538. The distinction between the smelting and roasting of ores is shown in U. S. vs. United Verde Co., 196 U. S. 212; U. S. vs. Richmond Co., 40 Fed. 415.

[287] Long vs. Foley, 82 W. Va. 502, 96 S. E. 794.

CLXXV. Sludge.

"Sludge" is a murky colored sediment flowing from the operations of a lead and zinc mining plant.[288]

CLXXVI. Stake.

A "stake" is not a post. The latter signifies more permanence, and to stick it in the ground requires more effort and outlay than to drive down a stake. It suggests larger proportions, is more readily seen than a stake.[289]

CLXXVII. Stope.

The term "stope" is defined as the working above and below a level where the mass of the orebody is broken—also an excavation for the extraction of ore. A stope is the very antithesis of a shaft, tunnel, drift, winze or other similar excavation in a mine. [290]

CLXXVIII. Strikes.

A "strike" is a combined effort among workmen to compel the employer to the concession of a certain demand by preventing the conduct of his business until compliance with the demand.[291]

A "strike" is lawful. It only becomes unlawful when the means employed to carry it out are unlawful, or when it maliciously is originated to attain an unlawful end.[292]

An employee, or any number of employees, in the absence of a contract to work a definite time, has a right to quit the service of the employer without any reason, or for any reason he may regard satisfactory to himself. The employees of a mining company have a right to protest to the employer against the employment or retention of a nonunion employee and to make the discharge of such nonunion

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[288] Dickensheet vs. Chouteau Co., 200 Mo. A. 150, 202 S. W. 625.

[289] U. S. vs. Sherman, *supra*.(143) See Upton vs. Larkin, 7 Mont. 419, 17 Pac. 728. Parol evidence in case of uncertain and disputed boundaries is not admissible to show a stump as a monument where the record calls for a post. Pollard vs. Shively, *supra* (89); Duncan vs. Eagle Rock Co., *supra*.(151)

[290] Creede Co. vs. Hawman, 33 Colo. A. 125, 127 Pac. 926; Mesich vs. Tamarack Co, 184 Mich. 363, 151 N. W. 565. In Fisher vs. Central Co., 156 Mo. 479, 56 S. W. 1107, the word "stope" is defined to mean "the excavation made in a mine to remove the ore which has been rendered accessible by the shaft or drift." Mr. Shamel, in his work on Mining Law (page 19), says: "The idea of a stope implies that the excavation is temporary and only kept open until the ore is removed, after which it is allowed to cave in or become filled with waste rock, etc., while shafts or drifts are permanent openings for passing to and from the place where mining is being done and for transporting the mineral."

"Overhand stoping" is a method of working out the contents of a vein by advancing from below upward, the miner being thus always helped by gravity. It is the method most commonly employed. That part of the material thrown down which is worth saving is raised to the surface, and the refuse rock (attle or deads) resting on the stulls remains in the excavation, helping to support the walls of the mine, and giving the miner a place on which to stand. Cent. Dict.

"Underhand stoping" is excavating the ore by working from above downward. In underhand stoping everything loosened by blasting has to be lifted up to be got out of the way. The advantage of this method is that in case the ore is very valuable less of it need be lost by its getting so mixed with the attle that it can not be picked out. Cent. Dict.

A "filled stope" may be defined as one where waste rock is left on the floor of the stope, thus raising the floor as the work proceeds. Creede Co. vs. Hawman, *supra*.

[291] Farmers Co. vs. N. P. R. Co., 60 Fed. 802; see, also, Longshore Co. vs. Howell, 26 Or. 527, 38 Pac. 547. The term "legal strike" has been said to mean a strike declared in pursuance of the rules of the order. Toledo Co. vs. Penn. Co., 54 Fed. 733. The interruption of operations by strikes is provided for in § 7 (2 Supp. U. S. Comp. St., p. 1406, § 4640¼ee,) and § 11 (Id. p. 1408, § 4640¼ee) of the Land Leasing Act.

[292] Kolley vs. Robinson, 187 Fed. 415. To instigate a sympathetic strike in aid of a boycott is not permissible under the Clayton Act, prohibiting injunctions in certain cases. Pacific Co. vs. International Typo. Union, 125 Wash. 273, 216 Pac. 358. The right of an employee to strike does not give an outsider a right to instigate a strike. Montgomery vs. Pacific Electric Co., 293 Fed. 683.

employee a condition to their continuation in his employment. That unless such nonunion employee is discharged the union employees will strike, or the equivalent, will simultaneously cease to work. If, under such circumstances, the nonunion employee is discharged by the common employer he has no cause of action against either the union as an organization or the members thereof as individuals.[293]

The growth and necessities of the great labor organizations have brought affirmative legal legislation of their existence and usefulness and provision for their protection, which their members have found it necessary. Their right to maintain "strikes," when they do not violate the law or the rights of others, has been declared.[294]

When officers and agents of the United Mine Workers of America attempt to reorganize and unionize a mine the operator is entitled to an injunction restraining them from acts and conduct: (1) Interfering or attempting to interfere with his miners for the purpose of unionizing the mine without his consent, by representing to the miners employed that they will suffer, or are likely to suffer some loss or trouble in continuing in or in entering the employment of the operator by reason of his not recognizing the union or because he runs a nonunion mine; (2) interfering or attempting to interfere with the operator's miners employed for the purpose of unionizing the mine without his consent and in aid of such purpose knowingly and wilfully bringing about the breaking by the miners of contracts of service known to exist with the employer and present and future employees; (3) knowingly and wilfully enticing the operator's employees to leave his service on the ground that he does not recognize the United Mine Workers of America or runs a nonunion mine; (4) interfering or attempting to interfere with the operator's employees so as knowingly and wilfully to bring about the breaking by the employees of their contracts of service known to exist, especially from knowingly and wilfully enticing the employees to leave the employer's service without his consent; (5) trespassing on or entering upon the grounds and premises of the employer or his mine for the purpose of interfering therewith or hindering or obstructing the business or with the purpose of compelling or inducing by force, intimidation, violence, or abusive language or persuasion, any of the employer's employees to refuse or to fail to perform their duties as such; (6) compelling or inducing or attempting to compel or induce by threats, intimidation, or abuse or violent language, any of the employer's employees to leave his service or to fail or refuse to perform their duties as such employees or compelling or attempting to compel by like means any person desiring to

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[293] Roddy vs. United Mine Workers of America, 41 Okla. 621, 139 Pac. 126; see, also, Mitchell vs. Hitchman, 245 U. S. 229; Bittner vs. West Virginia Co., 214 Fed. 717; It is the right of every man to engage to work for or to deal with any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without being held in any way accountable therefor. Parkinson vs. Building Trades, 154 Cal. 599, 98 Pac. 1027; Pierce vs. Stablemen's Union, 156 Cal. 75, 103 Pac. 364, These rights may be exercised in association with others so long as they have no unlawful object in view. Overland Co. vs. Union Lith. Co., 57 Cal. A. 366, 207 Pac. 412.

[294] United Mine Workers of America vs. Coronado Co., 259 U. S. 385.

Union miners have a right by peaceful methods to persuade other miners not to work in a nonunion mine; but they have no right to attempt such results by violence or intimidation. A mining company is within its rights in refusing to employ union men and in discharging those who join a union, and the company is entitled to protection against unlawful invasions of such rights. Tosh vs. West Kentucky Co., 252 Fed. 44. For a discussion of the relative rights of mine owners and miners, see Mitchell vs. Hitchman Co., 214 Fed. 715; Bittner vs. West Virginia Co., *supra*.[293]

seek employment at the employer's mine and works from so accepting employment therein.[295]

An injunction is binding not only upon the particular persons named, but upon all persons participating in the acts charged and mentioned therein who have actual knowledge of the injunction; and all such persons may properly be punished as for contempt of court in violating the injunction.[296]

CLXXIX. Superintendent.

A "superintendent" is one who superintends; a director; an overseer.[297]

CLXXX. System.

The term "system" or "general system of work" means simply this: that the work as it is commenced on the ground is such that, if continued, will lead to a discovery and development of the veins or orebodies that are supposed to be in the claim, or, if these are known, that the work will facilitate the extraction of the ores and mineral.[298]

CLXXXI. Taking Timber Necessary to Support Their Improvements.

The term "taking timber necessary to support their improvements" applied to a miner means all the timber he might need to make the working of his mine possible.[299]

CLXXXII. This Vein.

A notice claiming a location upon "this vein" has only one meaning.[300] It raises an inference that the notice was posted upon or in close proximity to a vein or lode;[301] although, as a fact, no vein or lode then was exposed.[302]

CLXXXIII. Timbering.

By "timbering" is meant the protecting against falls of roof formation of a mine, by means of horizontal timbers or caps extending across

[295] Mitchell vs. Hitchman Co., *Supra.*(293) A restraining order against picketing will advise labor's earnest advocates that the law does not look with favor on an enforced discussion of the merits of the issue between individuals who wish to work, and the groups of those who do not, under conditions which subject the individuals to work to a severe test of their nerve and physical strength and courage. American Foundries vs. Tri-State Council, 257 U. S. 206. The "Clayton Act," (§20) is discussed and compared with English Trades Dispute Act of 1906, from which said statute was taken, in Great Northern Ry. Co. vs. Brosseau, 286 Fed. 414. Where an injunction against certain union miners has been issued, restraining violence against the property and non-union employees of a mining company, language or conduct intended to incite others to violence and to a violation of the court's order constitutes a punishable contempt. U. S. vs. Colorado, 216 Fed. 654. For a case involving "boycotting" see Truax vs. Corrigan, 257 U. S. 312 rev'g. 20 Ariz. 7. See, also, Duplex Co. vs. Deering, 254 U. S. 443; also 16 A. L. R. 196.

For a discussion of state laws requiring corporations to issue to employees when discharged from or voluntarily leaving their service, letters setting forth the nature of the services rendered by such employees, and its duration, with a true statement of the cause of discharge or leaving, see Prudential Co. vs. Cheek, 259 U. S. 530; Chicago Co. vs. P. R. Co., 259 U. S. 548.

[296] In re Lennon, 166 U. S. 548; Tosh vs. Kentucky Co., *supra.*(294)

[297] St. Louis Co. vs. Deford, 38 Kan. 299, 16 Pac. 442.

[298] Nevada Ex. Co. vs. Spriggs, 41 Utah 181, 124 Pac. 770.

[299] Instructions, 1 L. D. 602; see Teller vs. U. S., 113 Fed. 280; and see, Benson Co. vs. Alta Co., *supra* (103); U. S. vs. Rizzinelli, 182 Fed. 681.

[300] Phillpotts vs. Blasdell, *supra* (212); see Daggett vs. Yreka Co., *supra.*(151) See East Tintic Co., 41 L. D. 256.

[301] Daggett vs. Yreka Co., *supra* (151)

[302] Book vs. Justice Co., *supra* (15); see Willeford vs. Bell, *supra* (210); Daggett vs. Yreka Co., *supra.*(151)

the passageway just under the roof, the ends of such timbers resting upon the vertical timbers or posts.[303]

CLXXXIV. Tool Nipper.

"Tool nipper" is a term applied to a person whose duty it is to carry powder and sharpen drills and tools used in a mine down to the various levels of the mine and to bring back such tools and drills as have been dulled by use to the surface.[304]

CLXXXV. Top and Apex.

The words "top" and "apex" as applied to mineral veins were not a part of the miner's terminology prior to the adoption of the federal mining law, but were words used by legislators to convey the intent of the formulators of that law.[305]

CLXXXVI. To the Same Extent.

The clause "to the same extent as if discovered from the surface" is used in section 2323 Revised Statutes in its natural and customary sense, and it measures the extent, the distance along the vein or lode to which the right of possession given by the statute extends, and not to the general benefits conferred by the discovery.[306]

CLXXXVII. Trap.

"Trap" or "trap rock," a general name for dark, fine-grained rock, found in broken-up fragments within a limited area, which is particularly suitable and can be profitably marketed for ballast, is, when the land within which it is contained is chiefly valuable for such, a valuable mineral deposit subject to appropriation and patent under the placer-mining laws.[307]

CLXXXVIII. Trespass.

An intrusion upon land occupied by another for the purpose of locating a mining claim is but a naked trespass and initiates no right;[308] although the occupant has no other valid title than posession.[309]

CLXXXIX. Tungsten.

"Tungsten," in the metallic state, is one of the rare elements, occurring neither in nature nor the arts. In the pure metallic state the metal

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[303] Eagle Co. vs. Patrick, 161 Ky. 333, 170 S. W. 961.

[304] Moreno vs. New Guadalupe Co., *supra*.(282)

[305] Jim Butler Co. vs. West End Co., *supra*.(39) The question of the ownership of a vein or lode depends upon whether the top and apex of such vein or lode is in one place or another. Stevens vs. Gill, Fed. Cas. 13; see Stevens vs. Williams, Fed. Cas. 40, and see Iron Co. vs. Cheesman, 116 U. S. 533; King vs. Amy. Co., 152 U. S. 227 rev'g. 9 Mont. 543, 24 Pac. 200; Black vs. Elkhorn Co., *supra*.(1)

[306] Enterprise Co. vs. Rico-Aspen Co., 66 Fed. 204; Ellet vs. Campbell, 18 Colo. 510, 33 Pac. 521; aff'd. 167 U. S. 119.

[307] Day, *supra*,(58) citing and applying the cases of N. P. R. Co. vs. Soderberg *supra* (72); Castle vs. Womble, 19 L. D. 455; Pacific Coast Co. vs. N. P. R. Co., *supra*,(90) and Cataract Co., 43 L. D. 248, and distinguishing the cases of Zimmerman vs. Brunson, 39 L. D. 340; Stanislaus Co., 41 L. D. 655.

[308] Atherton vs. Fowler, 96 U. S. 513; Nevada Sierra Co. vs. Home Oil Co., *supra* (221); see, also, Campbell vs. Rankin *supra* (187); Haws vs. Victoria Copper Co., *supra*.(208)

[309] Hosmer vs. Wallace, 97 U. S. 579; Clipper Co. vs. Eli Co., *supra* (110); Cowell vs. Lammers, *supra* (60); Field vs. Gray, 1 Ariz. 407, 25 Pac. 793; McBrown vs. Morris, 59 Cal. 72; Rourke vs. McNally, 98 Cal. 291, 33 Pac. 62. See, also, *supra*, note 221.

is considered only as a curiosity. Metallic tungsten is obtained by reducing. It is inorganic. It has a definite chemical composition. Its properties as a metal are disguised and lost in its mineralizer compound. Tungsten ore has none of the characteristics of metals. It has neither elasticity, ductibility, malleability, resonance, nor luster. It is aptly described by the term "mineral crude." [310]

CXC. Tunnel Claim.

A "tunnel claim" is not a mining claim; it only is a means of exploration and discovery. When a lode or vein is discovered in the tunnel the tunnel owner is called upon to make a location of the ground containing the vein or lode and thus create a mining claim.[311]

CXCI. Tunnel Right.

A grant of a "tunnel right" through a specific piece of ground is a right to enter upon and occupy the ground for the purpose of prosecuting the work in the tunnel, and to extract therefrom waste rock or earth necessary to complete the running of the tunnel, and making such use thereof, after completion, as may be necessary to work the mining ground or lode owned by the party running the tunnel. By implication the grant of such a right carries with it every incident and appurtenant thereto, including the right to dump the waste rock at the mouth of the tunnel on the land owned by the grantor at the time of the conveyance of the tunnel right; such right or easement being necessary for the full and free enjoyment of the tunnel right.[312]

CXCII. Tunnel Sites.

There is no distinction between a tunnel claim under which a tunnel is run for the development of veins or lodes already located, and one pursuant to which a tunnel is projected for blind veins or lodes.[313]

CXCIII. Unavoidable Casualties.

The term "unavoidable casualties" means that which could not be avoided by the exercise of reasonable diligence and skill.[314]

CXCIV. Unoccupied and Unappropriated Land.

The terms "unoccupied" and "unappropriated" refer to land that is not in the possession of one who claims the right of possession thereto by virtue of a compliance with the law.[315]

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[310] Hempstead & Son vs. Thomas, *supra*.(155)
See § 116, Note 250.

[311] Creede Co. vs. Uinta Co., *supra* (106); see Primeau vs. Acton, 66 Colo. 603, 185 Pac. 255. The use of a part of the public land for the construction of a tunnel and for buildings to aid in the working of a mine does not initiate any right to such ground as an independent mining claim. Waterloo Co. vs. Doe, *supra*.(120)

[312] Scheel vs. Alhambra Co., 79 Fed. 821; Himrod vs. Ft. Pitts Co., *supra* (202); see, also, Sparks vs. Hess, 15 Cal. 196; Cave vs. Crafts, 53 Cal. 138; Farmer vs. Water Co., 56 Cal. 13; Smith vs. Cooley, *supra* (204); Jackson vs. Trullinger, 9 Or. 398.

[313] Adams, 42 L. D. 457. A tunnel driven for the development of veins or lodes can be credited as an improvement common thereto, whether the purpose is to claim any blind veins or lodes on the line of the tunnel or not. Dawson, 40 L. D. 20. Work done in such a tunnel may be counted as annual assessment work. Hain vs. Mattes, 34 Colo. 345, 83 Pac. 127, *compare* Royston vs. Miller 76 Fed. 50.

[314] Bennett vs. Howard, 175 Ky. 797, 195 S. W. 118.

[315] Conn vs. Oberto, 32 Colo. 313, 76 Pac. 369. Every competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable adverse entry upon it while it is in the possession of those who have no superior right to acquire the title or to hold the possession. Any other rule would make the wrongful occupation of public land by a trespasser superior in right to a lawful entry of it under the acts of congress by a competent locator. Thallman vs Thomas, *supra* (221); Malone vs. Jackson, *supra* (221); see, also, Nevada Sierra Oil Co. vs. Home Oil Co., *supra* (221); Miller vs Chrisman, *supra*.(58)

CXCV. Usual Mining Privileges.

By the term "usual mining privileges" in a deed the grantee has and may enjoy the right to go upon the land and explore for, open and operate mines, take out and sell the product, and do all things incident to that work.[316]

CXCVI. Vacant Land.

Land is not "vacant" when occupied as a mining claim without discovery by one who is diligently prospecting it for minerals which it may contain.[317]

CXCVII. Veins and Lodes.

The fact that the terms "veins" and "lodes" have been used by congress in connection with each other is suggestive that it was intended to avoid any limitation in the application of the mining acts which might be imposed by a scientific definition of either term.[318]

CXCVIII. Wash.

The term "wash" belongs neither to the terminology of geology nor of law. The wash of a stream is the sandy, rocky, gravelly, boulder-bestrewn part of a river bottom. The "cone" of the stream is not synonymous with "wash" of the stream; nor conterminous with it.[319]

CXCIX. Water Rights.

When one has legally acquired a "water right," he has a property right therein that can not be taken from him for public or private use except by due process of law and upon just compensation being paid therefor. One who has acquired a legal water right can only be deprived of it by his voluntary act in conveying it to another, by abandonment, forfeiture under some statute, or by operation of law. A "water right" is an independent right and is not a servitude upon some other thing, and is an incorporeal hereditament, being neither tangible nor visible.[320]

CC. Waste.

"Waste," is the doing of those acts which cause lasting damage to the freehold or inheritance or the neglect or omission to do those acts which are required to prevent lasting damage to the freehold or inheritance. The term is not an arbitrary one, however, to be applied inflexibly, without regard to the quality of the estate or the relation to it of the person charged to have committed the wrong, but the question as to whether it has been committed in a given case is to be determined in view of the particular facts and circumstances appearing in that case.[321]

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[316] Imperial Co. vs. Webb, 190 Ky. 41, 225 S. W. 1076.

[317] Cosmos Co. vs. Gray Eagle Co., *supra* (241); McLemore vs. Express Oil Co., *supra* (37). Vacant lands are such as are absolutely free, unclaimed, and unoccupied. Donley vs. Van Horn, 49 Cal. A. 391, 193 Pac. 514.

[318] Hayes vs. Lavagnino, 17 Utah 196, 53 Pac. 1029. By the term "veins or lodes" as used in the mining statutes is meant lines or aggregations of minerals embedded in quartz or other rock in place. U. S. vs. Ohio Oil Co., 240 Fed. 1000.

[319] Haack vs. San Fernando Co., 177 Cal. 140, 169 Pac. 1021.

[320] Bennett vs. Twin Falls Co., 27 Ida. 643, 150 Pac. 339.

[321] Chapman vs. Cooney, 25 R. I. 657, 57 Atl. 929. As was said in McCord vs. Oakland Co., 64 Cal. 140, 127 Pac. 863: "The law on this subject must be applied with reasonable regard to the circumstances."

CCI. Who Are and Who Are Not Co-owners.

Tenants in common are "co-owners" of the substance of the estate. They may make such reasonable use of the common property as is necessary to enjoy the benefit and value of such ownership. Since an estate of a "co-owner" in a mine or oil well can only be enjoyed by removing the product thereof, the taking of mineral from a mine and the extraction of oil from an oil well are the use and not the destruction of the estate.[321a]

A person having merely an inchoate title, such as the holder of a sheriff's certificate of purchase, is not a "co-owner."[322] A stockholder who has no title separate and distinct from that of the corporation which is the owner of a mining claim is in no sense a "co-owner" with the corporation nor with the other shareholders of such corporation.[323]

See Tenancy in Common.

CCII. Withdrawals.

"Withdrawals" are a law made, a joint resolution passed by congress, a proclamation made by the President, or an order issued by officers of the land department, or other proper officer.

Thereby public lands are withdrawn from location, sale and entry under the laws affecting the public domain. They sometimes are made in recognition of what is about to occur and sometimes in recognition of what has occurred.[324] A withdrawal by proclamation of the President takes effect from its date. An executive withdrawal operates from the time it is made or when received at the local land-office, as its terms may dictate.[325]

Under the Withdrawal Act of June 25, 1910,[326] a homestead entry on withdrawn lands secures no right to the oil below the surface, nor the right to prospect therefor. These rights are reserved to the United States.[327]

Under the provisions of the act of September 30, 1913, public lands which have been excluded from national forests or released from withdrawals may be disposed of by such methods as the President may provide.[328]

CCIII. Working a Claim.

To "work" a mining claim is to do something toward making it productive, such as developing or extracting an ore body after it is discovered.[329]

[321a] Prairie Co. vs. Allen, 2 Fed (2d) 566 and cases therein cited; *but see* Zeigler vs. Brenneman, 237 Ill. 15, 86 N. E. 597; Gulf Ref. Co. vs. Carrol, 145 La. 299, 82 So. 597; South Penn Co. vs. Haught, 71 W. Va. 720, 78 S. E. 759.

[322] Repeater Claims, 35 L. D. 56; see Turner vs. Sawyer, 150 U. S. 578.

[323] Repeater Claims, *supra* (322); Yard, 38 L. D. 68.

[324] See 5 U. S. Comp. St., pp. 2320, 2321, 2322. §§ 4523, 4524, 4526; U. S. vs. Midwest Oil Co., 236 U. S. 459, rev'g. 206 Fed. 141; U. S. vs. Ohio Co., *supra* (318); U. S. vs. Stockton Midway Oil Co., 240 Fed. 1006; U. S. vs. North American Oil Co., 242 Fed. 723; U. S. vs. Thirty-two Oil Co., 242 Fed. 730; U. S. vs. Record Oil Co., *supra* (105); U. S. vs. Caribou Oil Co., 242 Fed. 746; Con. Mutual Oil Co. vs. U. S., *supra* (49); for a collation of cases, see 48 L. D. 97; and see Wood vs. Beach, 156 U. S. 648; U. S. vs. Hodges, 218 Fed. 87; Knudsen vs. Omanson, 10 Utah 124, 37 Pac. 250; see, also, U. S. vs. McCutchen, 217 Fed. 650; Johnson, (on rehearing) 48 L. D. 18.

[325] Smith, 33 L. D. 677; N. P. R. Co. vs. Pettit, 14 L. D. 591; U. P. R. Co. vs. Peterson, 28 L. D. 32.

Under the Act of June 30, 1919, no lands may now be withdrawn or Indian reservation established except by act of congress, 2 Supp., U. S. Comp. St., p. 1358, § 4529*b*.

[326] 5 U. S. Comp. St., p. 5320, § 4523.

[327] Son vs. Adamson, 188 Cal. 99; 204 Pac. 392.

[328] 5 U. S. Comp. St., p. 5322, § 4528. For opening of lands restored by the Secretary of the Interior after withdrawal, see Id. § 4529, 40 L. D. 656; Donley vs. West, 31 Cal. A. 937; 189 Pac. 1052.

[329] Cole vs. Ralph, *supra* (7); see Bailey vs. Bond, 77 Fed. 406; Mt Diablo Co. vs. Callison, Fed. Cas. 9886.

CCIV. Workmen's Compensation Acts.

The object of workmen's compensation laws is to substitute for the imperfect and economic wasteful common-law system by private action by an injured employee for damages for negligence on the part of the employer, a system by which every employee in a hazardous industry might receive compensation for any injury suffered by him arising out of and in the course of the employment. Under the common-law action the injured employee could only recover by proof of negligence on the part of the employer and by proof of freedom from contributory negligence on his own part. Under workmen's compensation laws it is not necessary to prove either negligence on the part of the employer nor freedom from negligence on the part of an injured employee. The theory of such legislation is the loss occasioned by reason of injury to employees shall not be borne by the employees alone, as under the common-law system, but directly by the injury itself and indirectly by the public. This class of legislation has been formulated after the most patient study and investigation by the most eminent men in professional and industrial walks of life in order to avoid any obstructions or limitations as might be encountered under the written constitution, as such laws now in force in a great number of the states have in almost every instance been held constitutional.[330]

CCV. Zone.

A metal zone is equivalent to a mineral zone yet the terms "mineral" and "metal" are not synonymous.[331]

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[330] Shea vs. North-Butte Co., 55 Mont. 522, 179 Pac. 501; see Arizona Copper Co. vs. Hammer, 250 U. S. 400; aff'g. 19 Ariz. 151, 166 Pac. 278, 19 Ariz. 182, 165 Pac. 1101; Cudahy P. Co. vs. Parramore, 263 U. S. 418.

For a case involving scope of employment and the right to compensation, see Atolia Co. vs. Industrial Accident Com., *supra*.(132)

[331] Mt. Diablo Co. vs. Callison, *supra* (329); see N. P. R. Co. vs. Soderberg, 99 Fed. 9886. A belt or zone, in order to constitute a lode, must bear some of the minerals or valuable deposits mentioned in the statute. Meydenbauer vs. Stevens, *supra*.(152)

"Kidneys" is a term applied by miners to a mineral zone which narrows down until very thin and then suddenly expands and again suddenly contracts. Meydenbauer vs. Stevens, *supra* (120); Rough Rider Claims, *supra*.(277)

CHAPTER II.

§ 2. OIL MINING TERMS AND PHRASES.

I. As Long as Gas or Oil is Found in Paying Quantities.

The term, "as long as gas or oil is found in paying quantities" means, not merely that those minerals shall be found in paying quantities, but also that either oil or gas shall actually be discovered and produced in paying quantities within the term named in the lease, and if neither oil nor gas is being produced at the end of the term of years named in the lease, the lease ends.[1]

II. Casing Line.

A casing line is a large, strong rope used in oil-well drilling to raise and lower the casing.[2]

III. Commencing Operations.

To commence operations is the performance of some act which has a tendency to produce an intended result.[3]

IV. Completed Well.

The term "completed" as used in a lease means finished or sunk to the depth necessary to find oil or gas in paying quantities, or to such a depth as in the absence of such oil or gas would reasonably preclude the probability of finding oil or gas at a further depth. It can not be construed to mean that the lessee bound himself, under penalty of forfeiture, to sink a producing well or in the absence of oil or gas to bore through to China.[4]

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[1] Union Co. vs. Adkins, 278 Fed. 854. See, also, Brown vs. Fowler, 65 Ohio St. 507, 63 N. E. 76; Thomas vs. Hukill, 34 W. Va. 385, 12 S. E. 522.

It is for the lessee to determine whether the product is in paying quantities. Young vs. Forest Oil Co., 194 Pa. St. 243, 45 Atl. 121; McGraw Co. vs. Kennedy, 65 W. Va. 595, 64 S. E. 1027.

[2] Long vs. Foley, 82 W. Va. 502, 96 S. E. 794.

[3] Flemming Co. vs. South Penn Co., 37 W. Va. 645; 17 S. E. 203; Terry vs. Texas Co., —— Tex. C. A. ——, 228 S. W. 1019; Duffield vs. Russell, 13 Ohio C. C. 266; see Henderson vs. Farrell, 183 Pa. St. 547, 38 Atl. 1018; and see Henning vs. Wichita Co., 100 Kan. 255, 164 Pac. 297; Solberg vs. Sunburst Co., 70 Mont. 177, 235 Pac. 761.

[4] Frost vs. Martin, — Tex. C. A. —, 203 S. W. 72. The term "completion of well" for the purpose of operating and testing of the amount of production, as used in a drilling contract, means the clearing of the well after reaching the specified depth, so that the sand reached may give that flow of production, by its own force or by pumping, which would result from a well so prepared in the ordinary and usual manner for making preparation for such test. Twin States Co. vs. Westerly Co., 93 Okla. 297, 220 Pac. 839; see Parish Fork Co. vs. Bridgewater Co., 51 W. Va. 558, 42 S. E. 655. In Chapman vs. Ellis, — Tex. C. A. —, 254 S. W. 616, it is said that the word "completed" is ambiguous, and where ambiguity in the terms of a contract exists, the testimony of experts in matters of the kind called for in the contract is admissible to explain the ambiguity. That a well may not be completed until it is "shot," see Uncle Sam Co. vs. Richards, 76 Okla. 277, 175 Pac. 749. California Co. vs. California Co., 178 Cal. 337, 177 Pac. 852. In Unity Oil Co. vs. Hill, 200 Ky. 651, 255 S. W. 151, the well was cased, and showed what was called a "rainbow of oil." It was not shot and was not a producing well; that is, one from which oil in profitable quantities could be taken. It was contended that it was not a completed well within the terms of the contract since it was not shot. It was not shown that the evidence of oil was such as to indicate to a reasonably prudent man that the shooting of the well would result in the production of oil. There was not a pipe line close enough to justify shooting at that time. It was held that in view of the evidence as to the prospects of oil it was

V. Diligence.

To prosecute drilling with due diligence to success or abandonment means, that there must be a product capable of division between the parties in the proportions mentioned in the lease. Unless this is done, drilling is not prosecuted to success.[5] The rule is that whatever, under the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interest of both lessor and lessee, is what is required.[6]

VI. Fixtures.

A fixture is an article which may or may not actually be affixed to the freehold,[7] and, if the subject of a conditional sale, may be a chattel as between the vendor and the vendee, although affixed to the realty.[8] Whether property affixed to land comes within the definition of "fixtures" is a question to be determined in each case by its own particular facts.[9] By legislative enactment in several of the mining states all machinery or tools used in working or developing a mine, whether they are attached to it or not, are to be deemed affixed to the mine.[10] It is immaterial whether the fixtures be attached to property held by an invalid,[11] a possessory or a fee-simple title.[12]

VII. Gasoline.

Gasoline is a colorless, inflammable fluid, the first and highest distillant of crude oil, is extracted from it by distillation; and being the

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not necessary to shoot the well or that the shooting of it could reasonably be expected to make it a producing well; see, also, Rice vs. Ege, 42 Fed. 661. It will be deemed "completed" when the contract depth is reached. Key vs. Big Sandy Co., — Tex. C. A. —, 212 S. W. 300. In Taylor vs. Stanley, 4 Fed. (2d) 279, an oil well which started as a gusher, but immediately sanded up and spouted mud and water, and was bailed and pumped until it produced sixty barrels a day and then declined, necessitating side tracking and redrilling was held not "completed" within requirement of lease that new well be commenced within sixty days of completion of well.

[5] Kennedy vs. Crawford, 138 Pa. St. 561, 21 Atl. 19.

[6] Eastern Oil Co. vs. Beatty, 71 Okla. 275, 177 Pac. 104; see Hall vs. South Penn Co., 71 W. Va. 82, 76 S. E. 124. That there may be a too strenuous as well as a too dilatory operation see Wellsville Oil Co. vs. Miller, 44 Okla. 493, 145 Pac. 344.

[7] Merritt vs. Judd, 14 Cal. 59; Watterson vs. Cruse, 179 Cal. 379, 176 Pac. 870; Conde vs. Sweeney, 16 Cal. A. 157; Breyfogle vs. Tighe, 58 Cal. A. 306, 107 Pac. 1036, 116 Pac. 319; Washburn vs. Inter-Mt. Co., 56 Or. 578, 109 Pac. 382; see Midland Oil Co. vs. Rudneck, 188 Cal. 265, 204 Pac. 174.

[8] Arnold vs. Goldfield Co., 32 Nev. 447, 109 Pac. 718; Montana Co. vs. Northern Valley Co., 51 Mont. 266, 153 Pac. 1017.

[9] Bond Co. vs. Blakeley, 83 Cal. A. 696, 257 Pac. 189.

[10] Malone vs. Big Flat Co., 76 Cal. 583, 18 Pac. 772; Britannia Co. vs. U. S. Co., 43 Mont. 93, 115 Pac. 46; see Hamilton vs. Delhi Co., 118 Cal. 153, 50 Pac. 378.

[11] Watterson vs. Cruse, *supra*.[7]

[12] Merritt vs. Judd, *supra* [7]; Roseville Co. vs. Iowa Co., 15 Colo. 29, 24 Pac. 920; *but see* Alberson vs. Elk Creek Co., 39 Or. 552, 65 Pac. 978. The authorities clearly distinguish between the word "improvements" and the word "fixtures," holding that under the former term much will pass which would be excluded under the latter. Where the contract provides that the owner shall retake possession upon default the term "improvements" would seem to mean improvements of the realty; that is to say, such things as are placed thereon by the way of betterment which are of a permanent nature and which add to the value of the property. This would include buildings and structures of every kind; and also such machinery as was placed thereon of a permanent nature and which tended to increase the value of the property for the purpose for which it was used. Much can pass thereunder which, strictly speaking, can not be denominated fixtures and which in the absence of such a condition might be taken away. Siegloch vs. Iroquois Co., 106 Wash. 632, 181 Pac. 51; see, also, Conde vs. Sweeney, *supra* [7]; and see American Fork Co., 291 Fed. 746. The object in placing machinery and fixtures on the land is to enable the lessees to develop the leased property. It is for the benefit of the lessees, and not to enhance the value of the land by permanent improvements thereon. Engines, derricks, oil tanks, casing and pipes are not permanent fixtures, nor parts of the freehold, and do not, upon the forfeiture or other termination of the lease, necessarily vest in the lessor. Gartland vs. Hickman, 56 W. Va. 85, 49 S. E. 14.

See §§ 560 to 567 and §§ 641 to 646.

most volatile compound of petroleum, it readily separates from it and in the process of distillation is the oil drawn off at the lowest temperature.[13]

VIII. Gas Well.

The words "gas well" used in an oil lease mean a well having such a pressure and volume of gas, taking into account its proximity to market, as could be operated profitably and the gas utilized or disposed of commercially.[14]

IX. Good Clean Hole.

As applied to oil well drilling a "good clean hole" is one free from those things the presence of which would render the well incapable of use as a well.[15]

X. Kill.

The word "kill" as applied to an oil or gas well means to shut off the flow of oil or gas temporarily or to destroy the well entirely so that neither oil nor gas can flow.[16]

XI. Minerals Ferae Naturae.

Water and oil, and still more gas, may be classed as "minerals *ferae naturae*."[17]

XII. Natural Gas.

Natural gas is a fluid mineral substance, subterraneous in its origin and location, possessing in a restricted degree the properties of underground waters, and resembling water in some of its habits. Unlike water it is not generally distributed. Its physical occurrence is in limited quantities only within circumscribed areas of greater or less extent. But the difference between natural gas and underground waters, whether flowing in channels or percolating the earth, is so marked that the principles which the courts apply to questions relating

[13] Locke vs. Russell, 75 W. Va. 602, 84 S. E. 498; Bubb vs. Parker Co., 252 Pa. St. 26, 97, Atl. 144; see Hammett Co. vs. Gypsy Oil Co. 95 Okla. 235, 218 Pac. 501. Casing head gas is a component part of oil. It is not made from dry gas. It is a product of wet gas which exists only with oil. Twin Hills Co. vs. Bradford Corporation, 264 Fed. 440. Natural-gas gasoline (also known as casing-head gasoline) is a manufactured product. The value of this product is contingent upon the value of the raw material and the cost of its manufacture. 52 LD 11. For a case involving the method of manufacturing gasoline from casing-head gas, see Hammett Co. vs. Gypsy Co., *supra*; Musselim vs. Magnolia Co., 107 Okla. 183, 131 Pac. 526; Gilbreath vs. States Oil Corp., 4 Fed. (2d) 232.

[14] Prichard vs. Freeland Co., 80 W. Va. 787, 84 S. E. 945; see Hammett Co. vs. Gypsy Co., *supra* [13].

[15] Bain vs. White, 256 Fed. 432. A contract to drill an oil well provided that it should be completed to a certain prescribed depth and "shall be a good, clean hole." When the well reached the contracted depth a piece of pipe had been left in such condition that either the withdrawal of the drill stem or the mere lapse of a short period of time would result in the hole being obstructed by the pipe. By a "good, clean hole" is not to be understood one which is free from mud, but one which is free from those things which would render the hole incapable of the uses for which it was designed. Under these circumstances when the well was tendered by the driller for measurement the conditions were such that it did not meet the requirements of the contract. Bain vs. White, *supra;* see Gates vs. Little Fay Co., 105 Kan. 191, 182 Pac. 184.

[16] Department vs. Louisiana Co., 144 La. 962, 181 So. 454.

[17] Jones vs. Forest Co., 194 Pa. St. 379, 44 Atl. 1074; see Manufacturers' Co. vs. Indiana Co., 155 Ind. 545, 58 N. E. 851. For a discussion of the analogy between animals *ferae naturae* and mineral deposits of oil and gas, see Ohio Oil Co. vs. State, 177 U. S. 190; Dunlap vs. Jackson, 92 Okla. 246, 219 Pac. 314.

to the latter are not adapted to the adjustment of the difficulties arising from conflicting interests in the former.[18]

XIII. Net Profits and Net Proceeds.

An oil and gas lease provided that the net profits were to be determined by deduction from the gross income only the royalties and operating expenses, as distinguished and considered apart from "capital expenses." A modifying clause providing for a change in the payment of royalty based on the "net proceeds" provided for in the modifying clause was not dependent upon the cost of capitalization but only upon the sum total of royalties and operating expenses and in estimating the net proceeds the lessee could not deduct capital expenses in addition to operating expenses.[19]

XIV. Oil.

The word "oil" as used in an oil and gas lease, has always been

[18] Manufacturing Co. vs. Indiana Co., *supra*.(17) The term "natural gas" is interpreted by the land department to mean either gas from gas wells or so called "casing head gas" or "trapped gas" produced by oil wells. The term "dry natural gas" applies to natural gas containing so little gasoline that its extraction is not commercially feasible or to natural gas from which gasoline has already been extracted. 52 LD 9.

A point of great interest to the natural gas operator has arisen in connection with the forms of leases in cases where part of the gas is used in extracting gasoline. Leases drawn at this time provide for a royalty on the gasoline, if the gas is used for its extraction; but in the old leases the working interest is generally required to pay for gas only. Some companies secure gasoline from casing-head gas obtained by pumping oil from old wells with a strong vacuum. The gas goes to operating the oil pumps. Gilbreath vs. States Oil Corp., *supra* (13). In an action for the recovery of royalties on products made from casing-head gas, where the lease sued upon contains a specific provision for royalties on oil products from oil wells, and royalties on gas produced from gas wells, and a stipulated price for gas produced from oil wells, such latter provision is sufficiently broad to cover all rights which the lessor may have in the casing-head gas coming from oil wells. Pautler vs. Fanchot, 108 Okla. 130, 235 Pac. 209.

Natural gas is found at pronounced depths in porous strata—usually sand rock—constituting a natural reservoir and is brought to the surface and reduced to possession through wells drilled into the containing strata. When a surface owner reduces it to possession he becomes its owner and it becomes a subject of commerce, like any product of the forest, field or mine. Penna. vs. W. Virginia, 262 U. S. 586; City of Erie vs. Public Service Com., 278 Pa. St. 512, 123 Atl. 475. Natural gas is a commodity as much so as coal, and like coal it is a fuel and as such is used for domestic and industrial purposes. It is a subject marketable, either within the state wherein it is produced or in the state to which it is transported. Suttle vs. Hope, 82 W. Va., 729, 97 S. E. 429. Natural gas is land. West vs. Kansas Co., 221 U. S. 229; Haskell vs. Sutton, 53 W. Va. 206, 44 S. E. 533; Reynolds vs. Whitescarver, 66 W. Va. 392, 66 S. E. 518. The owner of the land owns everything that goes to make up the realty. Natural gas beneath the surface is a part of the realty and the owner of the land is the owner of the gas. By reason of the fugitive character of natural gas the landowner is the owner of the gas only in a qualified sense. He owns it only while it remains beneath the surface of his land. If by its natural tendency to flow it escapes to the lands of an adjoining proprietor such ownership then ceases. But this qualified ownership in the gas authorizes the owner of the land to reduce it to possession by sinking wells upon his own land and thus permit it by natural means or its own ordinary pressure to flow to the surface and into a receptacle he may prepare to receive the same. When thus reduced to possession through a well and regardless of whether it came from beneath his own land or remotely from the lands of an adjoining proprietor, the natural gas becomes personal property, the absolute ownership of which is in the owner of the land upon which it is reduced. Fairbanks vs. Warrum, 56 Ind. A. 337, 86 S. E. 883. Operations for gas can not be measured by the same rule applied in the same manner as in the case of operations for oil. The peculiar characteristics of the business of producing and transporting gas being such as to distinguish it for some purposes from operations for oil. McKnight vs. Manufacturing Co., 146 Pa. St. 185, 23 Atl. 164. The rule of property right in natural gas and oil in all the states save Indiana is stated in Brown vs. Spilman, 155 U. S. 665; see Gas Co. vs. Rankin, 68 Mont. 372, 207 Pac. 998.

[19] Nathan vs. Porter, 36 Cal. A. 356, 172 Pac. 170. The word "profits" signifies an excess of the value of advances, People vs. Savings Union, 72 Cal. 199, 13 Pac. 499, or as the word is defined in Connolly vs. Davidson, 15 Minn. 519, it means the excess of receipts over expenditures; or, in Eyster vs. Centennial Board, 94 U. S. 500, it is the receipts of a business deducting current expenses; it is the equivalent to net receipts; see, also, Blanck vs. Pioneer Co., 93 Wash. 26, 159 Pac. 1077. For a definition of "gross proceeds," see Sweeney vs. Hanley, 126 Fed. 101.

referred to by the courts and understood to designate the oil produced from a well, or crude petroleum in its natural state.[20]

XV. Oil and Gas Real Estate.

Oil and gas are minerals, and in their places are real estate and part of the land.[21]

XVI. Oil as Personal Property.

Oil in place is a part of the land in which it is found or from which it is obtained, but when brought to the surface or reduced to possession, it ceases to be real estate and becomes personal property, and as such may be subject to partition among its joint owners.[22]

XVII. Oil Operations.

The courts take judicial notice of the fact that oil and natural gas are mined by means of deep wells drilled into the earth.[23]

XVIII. Oil Seepage.

While it is possible that at times oil may be found issuing from the surface of the ground, known in practice as seepage, in which case discovery may be made without difficulty or expense, it is a matter of common knowledge that almost always drilling is essential to such discovery, and in many sections drilling to a great depth, involving heavy cost.[24]

XIX. Oil Territory.

Oil territory does not necessarily imply a real issue of fact as the phrase has no fixed nor well-recognized meaning and may well be used

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[20] Hammett Co. vs. Gypsy Co., *supra* (13). Oil shale is a valuable mineral deposit and a source of petroleum oil. Reed vs. Doyle, 47 L. D. 548; see, also, McCombs vs. Stephenson, 154 Ala. 109, 44 So. 867; Dean vs. Omaha-Wyoming Co., 21 Wyo. 133, 128 Pac. 881.

[21] McKinney vs. C. K. G. Co., 134 Ky. 239, 120 S. W. 314. Kennedy vs. Hicks, 180 Ky. 562, 203 S. W. 318; DeMoss vs. Sample, 143 La. 243, 78 So. 482; Rich vs. Doneghey, 71 Okla. 204, 177 Pac. 86; see, also, Daughetee vs. Ohio Co., 263 Ill. 518, 105 N. E. 308. Oil and gas within the ground are minerals. The fact that they have attributes not common to other minerals because of their fugitive nature or vagrant habits, and the disposition to percolate, and the possibility of their escape from beneath one part of the surface to another, does not remove them from the class of minerals. Texas Co. vs. Daugherty, 107 Tex. C. A. 876 S. W.; see, also, United Co. vs. Meredith, — Tex. C. A. —, 258 S. W. 550. "Oil and gas in place are 'minerals' and realty subject to ownership, severance, and sale while imbedded beneath the soil in like manner and to the same extent as coal or any other solid mineral." Caulk vs. Miller, — Tex. C. A. —, 18 S. W. (2d) 200. But oil and gas are not synonymous terms. A lease of oil does not embrace the right to take the gas and vice versa. While they usually are found together, or near to each other in the same strata, though not always so, they are regarded as separate minerals, or mineral substances. Of course either would be a proper subject of reservation in a lease of the land. Murphy vs. Vanvoorhis, 94 W. Va. 475, 119 S. E. 297; see, also, Arnold vs. Garnett, 103 Kan. 477, 174 Pac. 1027; Palmer vs. Truby, 136 Pa. St. 563, 20 Atl. 516. Oil and gas are furtive, migratory and self-transmissive minerals, and because of these characteristics or qualities contracts and rights relating thereto require the application of principles different in many respects from those applicable to other minerals that are not affected with such characteristics. Rechard vs. Cowley, 202 Ala. 337, 80 So. 419; see Kimbley vs. Luckey, 72 Okla. 217, 179 Pac. 928.

[22] Warren vs. Boggs, 83 W. Va. 89, 97 S. E. 589; see, also, Kimbley vs. Luckey, *supra*.(21)

[23] Con. Mutual Oil Co., vs. U. S., 245 Fed. 525; Weed vs. Snook, 144 Cal. 439, 77 Pac. 1023; McLemore vs. Express Oil Co., 158 Cal. 559, 112 Pac. 59; Kemp vs. Barr Co., 103 Kan. 595, 175 Pac. 988. Nothing is more uncertain than the production of oil wells and any representation as to future production is a mere expression of opinion as to exploitation and probabilities and will not constitute fraud even though it should turn out to be untrue. Engemann vs. Allan, 201 Ky. 483, 257 S. W. 25; see, also, Cooper vs. Gasteiger, 278 Pa. St. 544, 123 Atl. 506.

[24] Con. Mutual Oil Co. vs U. S., *supra* (23); see Nevada Sierra Oil Co. vs. Home Oil Co., 98 Fed. 673; Butte Oil Co., 40 L. D. 602; Bay vs. Oklahoma Co., 13 Okla. 425, 73 Pac. 963.

in one sense and understood in another. But it may mean territory where the observable geological conditions are such as to justify expenditures in prospecting by those who are able to take the chance.[25]

XX. Oil Well.

An oil well is a "mine." [26]

XXI. One-eighth.

An instrument conveying the oil and gas under certain land but reserving title to one-eighth of the oil and gas is a covenant running with the land.[27]

XXII. Original Package.

The term "original package" properly is applied to natural gas transported by pipe lines.[28]

§ XXIIa. Overriding Royalty.

The term "overriding royalty" is one applied to a royalty reserved in a sublease or assignment over and above that reserved in the original lease.[28a]

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[25] S. P. Co. vs. U. S., 249 Fed. 786. Oil fields become definitely defined by boundaries established through the exploration of operators so that those who are engaged in operating or speculating with reference to them rely upon the defined area as a known fact. The expression "proven territory" has a fixed meaning in the business. It means territory so situated with reference to known producing wells as to establish the general opinion that, because of its location in relation to them, oil is contained in it. Of course, no particular area can be known to contain oil until the wells actually are drilled and the oil thus is discovered. Such are the uncertainty, irregularity, and elusiveness which characterize the deposit of oil lying beneath the surface in the average oil field that barren areas are not infrequently found to exist in what is regarded as proved territory. Minchew vs. Morris - Tex. C. A.—, 241 S. W. 215.

[26] Mid-Northern Co. vs. Walker, 65 Mont. 414, 211 Pac. 353; Rice Oil Co. vs. Toole County, 86 Mont. 427, 284 Pac. 145; see Burke vs. S. P. R. Co., 234 U. S. 907; Escott vs. Crescent Coal Co., 56 Or. 190, 106 Pac. 452; *but see* Hollingsworth vs. Berry, 107 Kan. 544, 192 Pac. 763; J. M. Guffey Co. vs. Murrell, 127 La. 483, 53 So. 705; Kreps vs. Brady, 37 Okla. 754, 133 Pac. 216; Carter vs. Phillips, 88 Okla. 202, 212 Pac. 747. In the case of J. M. Guffey Co. vs. Murrel, the court said: "A productive oil well or aggregation of them is always universally and invariably known as an 'oil field.' Whoever heard of such being called a mine? If an oil well was a 'mine' in the usual signification of the word, surely sometime, somewhere, some intelligent person would be heard to designate it by that term; but it is never done. Now a 'mining operation' must certainly be something having to do with a mine, and if an oil well is never known in the ordinary and customary use of language as a 'mine' then neither the making nor operating of one could possibly be considered a mining operation in the ordinary signification of the word. He who works in a mine is termed a 'miner,' but no one ever heard of a laborer at an oil well being called a 'miner.' It is shown by the testimony that an oil well is too small for a man to get into, even if such was necessary or desirable, which it is not. We think it absolutely clear that the words 'mine' or 'mining operation' never refer to oil wells or oil production in ordinary parlance." See *supra*, Chapter I, XCVI.

[27] Pierce Ass'n vs. Woodrum. — Tex. C. A. —, 188 S. W. 245; see Spence vs. Lucas, 138 La. 763, 70 So. 796; and see Con. Arizona Co. vs. Hinchman, 212 Fed. 813.

For the meaning of the term "one-eighth" see Winemiller vs. Page, 75 Okla. 278, 183 Pac. 501.

In Reynolds vs. McMann Co., 11 S. W. (2d) 778, rehearing denied 14 S. W. (2d) 819, rev'g. 279 S. W. 939, it was held that a reservation of one-eighth of all "oil produced" from leased premises entitles the lessor to one-eighth of casing head gas, and to a share of the gasoline made therefrom, though originally this gas was considered by both lessor and lessee as waste.

The measure of damages for failing to account for this gas and gasoline made from it is not one-eighth of the gasoline manufactured, but one-eighth of the value of the casing head gas—the conversion not having been proved to be "wilful."

[28] W. Virginia Co. vs. Towers, 134 Md. 137, 106 Atl. 265; Landon vs. Public Utilities Co., 249 U. S. 236; s. c. 242 Fed. 658, 245 Fed. 950; State vs. Flannelly, 96 Kan. 372, 152 Pac. 22; see 26 A. L. R. 971, note.

[28a] Birnbach vs. Wesson, 179 Ark. 128, 14 S. W. (2d) 243; McNamer vs. Sunburst Co., 76 Mont. 332, 247 Pac. 166; Sunburst Co. vs. Callender, 84 Mont. 178, 274 Pac. 834. See, also, Eagle-Picher Co. vs. Fullerton, 28 Fed. (2d) 472.

An overriding royalty can not be transferred nor surrendered except in the same manner as a lease and it binds the assignees. Homestead Co. vs. Schoregge, 81 Mont. 604, 264 Pac. 388.

Example: Lease $\frac{1}{8}$ ($16\frac{2}{3}\%$) royalty from lessee; $\frac{1}{6}$ (20%) to sublessee or assignee reserved. Overriding royalty $3\frac{1}{3}\%$.

XXIII. Paying Quantities.

The phrase "paying quantity" is to be construed with reference to the operator, and by his judgment when exercised in good faith.[29] There must also be taken into consideration the distance to market and the expense of marketing in determining whether oil can be marketed at a reasonable profit.[30] This phrase is also defined as meaning in sufficient quantities to pay a reasonable profit on the necessary sum required to be expended, including the cost of drilling, equipment, and operation of the well.[31] It may be defined in a lease, by the parties thereto.[32] As a general rule the determination of the lessee, acting in good faith, is the controlling factor.[33]

XXIV. Rent and Royalty.

In mining leases the words "rent" and "royalty" are used interchangeably to convey the same meaning.[34]

XXV. Royalty.

The word "royalty" as used in an oil and gas lease, generally refers to a share of the product or profit reserved by the owner for permitting another to use the property.[35] A lease by which the owner or lessor grants to the lessee the privilege of mining and operating the land in consideration of the payment of a certain stipulated royalty on the mineral produced, creates the relation of landlord and tenant and when that relation is created whatever is paid for the occupation and use of the premises, whether it be in money or kind, is equally in substance rent, and under such circumstances the royalties received are rentals.[36]

See Overriding Royalty.

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[29] Young vs. Forest Oil Co., 194 Pa. St. 243, 45 Atl. 121; Summerville vs. Apollo Co., 207 Pa. St. 334, 56 Atl. 876; Manhattan Co. vs. Carrell, 164 Ind. 526, 73 N. E. 1084; Hennessy vs. Junction Oil Co., 75 Okla. 220, 182 Pac. 666; see Tucker vs. Watts, 25 Ohio C. C. 320.

[30] Iams vs. Carnegie Co., 191 Pa. St. 72, 45 Atl. 54.

[31] Keechi Co. vs. Smith, 81 Okla. 267, 198 Pac. 588; see, also, Aycock vs. Paraffine Co., — Tex. C. A. —, 210 S. W. 851; Lowther Co. vs. Miller-Sibley Co., 53 W. Va. 508, 44 S. E. 433; Summerville vs. Apollo Co., *supra*. [29]

Where an oil-driller agreed to drill to a certain depth unless petroleum in paying quantities was found at a lesser depth, the provision that "a well producing oil in paying quantities shall be deemed a well which produces" a certain amount, is not a guaranty to produce petroleum in paying quantity nor at all, but merely is a definition of what quantity of oil should be deemed adequate to warrant the well-driller in ceasing to drill short of the stated depth. Bartholomae Oil Corp. vs. Associated Co., 203 Cal. 176, 263 Pac. 516.

[32] McLean vs. Kishi, — Tex. C. A. —, 173 S. W. 502; see Hennessy vs. Junction Oil Co., *supra* [29]; Lowther Co. vs. Miller Co., *supra*.[31]

[33] Barbour Co. vs. Tompkins, 81 W. Va. 116, 93 S. E. 1038; Hennessy vs. Junction Oil Co., *supra* [29]; Summerville vs. Apollo Co., *supra* [29]. If a well, being down, pays a profit, even a small one, over the operating expenses, it is producing in "paying quantity," though it may never repay its cost, and the operation as a whole may result in a loss. Few wells, except the very largest, repay cost under a considerable time, and many never do; but that is no reason why the first loss should not be reduced by profits, however small, in continuing to operate. The phrase "paying quantities," therefore, is to be construed with reference to the operator, and by his judgment when exercised in good faith. Young vs. Forest Co., *supra* [29]; Lowther Co. vs. Miller-Sibley Co., *supra* [31]; see Reynolds vs. White Plains Co., 199 Ky. 243, 250 S. W. 975.

[34] Nelson vs. Republic Co., 240 Fed. 293; Campbell vs. Lynch, 81 W. Va. 374, 94 S. E. 739.

[35] Saulsberry vs. Saulsberry, 162 Ky. 486, 172 S. W. 932.

[36] Von Baumbach vs. Sargent Co., 242 U. S. 503. Under an oil and gas contract giving the privilege of drilling and developing the land for oil, until severance takes place, the lessee has no title and on severance and not earlier when the royalty in oil is payable. At that time the oil or gas is personal property after alienation or disposition of which no deed or other solemn instrument of conveyance is necessary. It is personal property in the hands of the lessee. He has bound himself to deliver a portion of it called royalty to the lessor as rent in kind for occupation, use, and operation of the lessor's land. The royalty is a rent susceptible of division as if it were a rent payable in money. While the lease does not actually pass the title to the oil or gas, it confers a right to take it. Where there is a severance of or a partition of the leased lands, the divided tracts go into the hands of their owners subject to such right, whether they are acquired by deed, will, or a decree of partition. Campbell vs. Lynch, *supra*.[35]

XXVI. Spudding in.

The phrase "spudding in" as employed and understood by oil operators, denotes the first abrasion of the soil by the drill, or that of first entrance of drill into the ground.[37]

XXVII. Surface.

The word "surface" in mining controversies means that part of the earth or geologic section lying over the minerals in question, unless otherwise defined by the deed or conveyance. It is not merely the top of the glacial drift, soil, or the agricultural surface. The owner of a higher stratum is entitled to the same rights to surface support as the actual surface owner.[38] When the landowner grants the underlying minerals, reserving the surface to himself, his grantee is entitled only to so much of the mineral as he can extract without injury to the superincumbent soil.[39]

XXVIII. Test Well.

A test well is one that determines not only the presence of petroleum oil, but its commercial value, considering its abundance and accessibility. The information resulting should be such as a prudent and experienced investor would desire to know before expending his capital in labor, or improvements for the profitable working of the property.[40]

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[37] Solberg vs. Sunburst Co., *supra*.[3]

[38] Marquette Co. vs. Oglesby Co., 253 Fed. 111. It includes whatever earth, soil or land lies above and superincumbent on the mine. Yandes vs. Wright, 66 Ind. 319. The general rule is that possession of the surface is deemed to be held for the owner of a severed mineral right. Con. Coal Co. vs. Yonts, 25 Fed. (2d) 406.

[39] Id.; see Lloyd vs. Catlin Co., 210 Ill. 460; 71 N. E. 335; Coleman vs. Chadwick, 8 Pa. St. 81; Morner vs. Watson, 79 Pa. St. 251; Zinc Co. vs. Franklinite Co., 13 N. J. Eq. 342; Harris vs. Ryding, 5 Mees. & Wel. 59; Smart vs. Morton, 5 Ellis & Black 30; *compare* Oberly vs. H. C. Frick Co., 262 Pa. St. 83; 104 Atl. 864. A lessee of the assignee has no authority under his lease to commit waste by the removal of oil. Isom vs. Rex Co., 147 Cal. 659, 82 Pac. 317.

See §§ 1139–1151.

[40] Petroleum Co. vs. Coal Co., 89 Tenn. 381, 18 S. W. 65; Texas Co. vs. Davis, — Tex. C. A., 254 S. W. 307. A completed test well for oil and gas means one drilled to a specified depth or discovery of minerals or to geologic formation reasonably precluding probability of discovery. Cosden Co. vs. Moss, 131 Okla. 49, 267 Pac. 855. The authorities are uniform that where there is no provision in a lease providing what shall be done if the test well proves dry, there is an implied obligation on the lessee to proceed further with the exploration and development of the land with reasonable diligence according to the usual course of business. A failure to do so amounts to an abandonment, which will sustain a re-entry by the lessor. Aye vs. Philadelphia Co., 193 Pa. St. 451, 44 Atl. 555. An oil and gas lease provided that it should remain in force for the term of one year from its date and as long thereafter as oil or gas is produced from the premises by the lessee; and providing that "if said territory proves to be productive, then the party of the second part to complete this contract shall drill as many as eight wells on said premises, and said wells shall be drilled with due diligence and dispatch having in view the interest of both parties thereto, and so to produce all the oil or gas that may be reasonably produced from said premises." The lessee proceeded immediately and within thirty days drilled a productive well upon the leased premises. It then became his duty to proceed immediately to drill the eight wells as contemplated by the lease. The word "if," as used in the quoted clause, means "when" and the word "then" used in the quoted clause, is an adverb of time and means "at the time," that is, at the time the territory proved productive by drilling of the test well. It was then the duty of the lessee to drill as many as eight wells upon the leased premises and, within a year from the date of the lease, as a condition precedent to the extension of the lease beyond the term of one year. Whether such wells were by the lessee drilled with due diligence and dispatch, having in view the interest of both parties to the lease, and so as to produce all the oil and gas that may reasonably be produced from the premises as required by the lease, is a question of fact to be determined in connection with all the circumstances attending the operations. The fact that a test well was profitable and that there was, at its conclusion, a profitable market, make the failure of the lessee to drill as many as eight wells with due diligence sufficient ground for the forfeiture of the lease on the part of the lessor. Paraffine Oil Co. vs. Cruce, 63 Okla. 95, 162 Pac. 716; Lavery vs. Mid-Continent Co., 62 Okla., 206, 162 Pac. 737.

A "commercial producer" is a well that pays ever so little over the cost of operation, though it does not pay the cost of the well. Sunburst Co. vs. Callender, 84 Mont. 178, 274 Pac. 834.

XXIX. Wild Cat Territory.

The term "wild cat territory" is applied to land which is not proven but is thought to be susceptible of development as petroleum oil and natural gas producing land.[41]

XXX. Land Department Definitions.*

The following terms are used by the land department in its regulations governing the production of oil and gas.

"*Supervisor.*—An agent appointed by and with the power to act for the secretary of the interior under the direction of the director of the United States geological survey, in supervising all operations under these regulations within the district to which he is assigned.

"*Representative, local representative.*—Any employee of the department of the interior who is designated by a supervisor to act for him in any specified part or all of the supervisor's district.

"*Lessee.*—Any holder of an oil gas prospecting permit or lease issued under the general leasing act of February 25, 1920 (41 Stat. 437), the naval appropriation act of June 4, 1920 (41 Stat. 812, 813), or the act of March 4, 1923 (42 Stat. 1448), or under special agreement by the United States.

"*Permittee.*—The holder of an oil and gas prospecting permit and a potential if not actual lessee who is regarded as such and is subject to the provisions of these regulations in so far as they are applicable to his operations.

"*Leased lands, leased premises, leased tract.*—Any lands or deposits occupied under permit or lease granted to a lessee."

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[41] Downey vs. Gooch, 240 Fed. 531; see, also, S. P. Co. vs. U. S. 249 Fed. 786; Ringle vs. Quigg, 74 Kan. 581, 81 Pac. 724; Prowant vs. Sealy, 77 Okla. 245, 187 Pac. 235; Lone Star Co. vs. McCullough, — Tex. C. A. —, 220 S. W. 1114; Masterson vs. Amarillo Oil Co., — Tex. C. A. —, 235 S. W. 908.

* 52 L. D. 1. In matters pertaining to drilling and producing operations and to the handling and gauging of oil and gas the lessee should deal with the supervisor or his representative in the district where the land under permit or lease is located. Should the lessee not know with whom to deal he should inquire by letter to The Director, U. S. Geological Survey, Washington, D. C. Id. page 2.

CHAPTER III.

NATURAL OBJECTS AND PERMANENT MONUMENTS.

§ 3. Natural Objects.

A natural object is any permanent feature in the landscape,[1] as an arm of the sea,[2] bay,[3] inlet,[4] lake,[5] river,[6] stream,[7] the mouth of a stream,[8] the confluence of streams,[9] creek,[10] cascade,[11] waterfall,[12] mountains,[13] mountain peaks,[14] hill,[15] buttes,[16] boulder,[17] croppings,[18] gulch,[19] the point of intersection of well known gulches,[20] canyon,[21]

See § 6.

[1] Flavin vs. Mattingly, 8 Mont. 242, 19 Pac. 384. What are or are not natural objects or permanent monuments are matters of proof, and can not be decided by the court by simple reference to the location notice. Russell vs. Chumasero, 4 Mont. 309; 1 Pac. 713; Seidler vs. LaFave, 5 N. M. 44, 20 Pac. 789, overruling 3 N. M. 269, 3 Pac. 741.

In Ninemire vs. Nelson, 140 Wash. 511, 249 Pac. 991, the court said: "That learned author, Mr. Lindley, in his work on Mines, Vol. 2 (3d ed.), p. 908, states the rule as follows:

'*Natural Objects and Permanent Monuments.* The words "natural objects" and "permanent monuments" are general terms, susceptible of different shades of meaning, depending largely upon their application. What might be regarded as a permanent monument for one purpose might not be so considered with reference to a different purpose. The same rule applies to natural objects. There is no particular necessity for drawing a distinction between "natural objects," such as streams, rivers, ponds, highways, trees and other things, *ejusdem generis*, and "permanent monuments" which may imply an element of artificial construction, it being the manifest intent of the law that any object of a fairly permanent character, whether natural or artificial, may, if sufficiently prominent, serve for the purpose of reference and identification. As to whether a given notice or certificate of location contains such a description of the claim as located by reference to some natural object or permanent monument as will identify it, is a question of fact to be determined by the jury, and parol evidence is admissible for the purpose of proving that the thing named in the certificate is, in fact, a natural object or permanent monument. In the absence of evidence for or against the sufficiency of the reference in the notice, it will be presumed to be sufficient to identify the claim. The following cases indicate the views of the courts as to what are natural objects or permanent monuments: Prominent posts, or stakes, firmly planted in the ground; stones, if the proper size and properly marked; monuments, prospect holes, and shafts, a deposit and cliff of rocks, may be sufficient as permanent monuments within the meaning of the law. The boundary lines of well known claims have uniformly been held to be such, whether patented or not.'

[2] Meydenbauer vs. Stevens, 78 Fed. 787. The line of ordinary high water mark, Hunt vs. Barker, 27 Cal. A. 776, 151 Pac. 165, or a low water mark are sufficient natural objects. Walsh vs. Hill, 38 Cal. 486.

[3] Meydenbauer vs. Stevens, *supra* [2].

[4] Id.

[5] Id. Drummond vs. Long, 9 Colo. 538, 13 Pac. 543.

[6] Newsom vs. Pryor, 7 Wheat. 10; Watkins vs. King, 118 Fed. 536; Meydenbauer vs. Stevens, *supra* [2]; Jackson vs. Dines, 13 Colo. 90, 21 Pac. 918.

[7] Meydenbauer vs. Stevens, *supra* [2].

[8] Newsom vs. Pryor, *supra* [6]; Watkins vs. King, *supra* [6].

[9] Carter vs. Bacigalupi, 83 Cal. 187, 23 Pac. 361; Drummond vs. Long, *supra* [5].

[10] McKinley Creek Co. vs. Alaska Co., 183 U. S. 563; Watkins vs. King, *supra* [6]; Smith vs. Cascaden, 148 Fed. 792; *but see* Cloninger vs. Finlaison, 230 Fed. 100. Jackson vs. Dines, *supra* [6].

[11] Meydenbauer vs. Stevens, *supra* [2].

[12] Id.

[13] Id.; Walsh vs. Erwin, 115 Fed. 531; Vogel vs. Warsing, 146 Fed. 949; Craig vs. Thompson, 10 Colo. 517, 16 Pac. 84.

[14] Craig vs. Thompson, *supra* [13]. See Jackson vs. Dines, *supra* [6].

[15] Meydenbauer vs. Stevens, *supra* [2].

[16] Id.

[17] Id.; Gammer vs. Glenn, 8 Mont. 371, 20 Pac. 654.

[18] See Daggett vs. Yreka Co., 149 Cal. 357, 86 Pac. 968.

[19] Meydenbauer vs. Stevens, *supra* [2]; Drummond vs. Long, *supra* [5].

[20] Meydenbauer vs. Stevens, *supra* [2]; Credo Co. vs. Highland Co., 95 Fed. 911.

[21] Meydenbauer vs. Stevens, *supra* [2]; Huckaby vs. Northam, 68 Cal. A. 88, 228 Pac. 717. In this case the notice of location after stating the size and boundary marks of the claim, particularly described it as "commencing at a stake in canyon due south fifteen hundred feet to a stake marked P. C." The court said: "No reason is shown why the foregoing is not a sufficient compliance with the statute requiring that 'the location must be distinctly marked on the ground so that its boundaries can be readily traced.' U. S. Rev. St. § 2324, U. S. Comp. St. § 4620; McKinley Creek Co. vs. Alaska Co., 183 U. S. 563, see, also, Rose's U. S. Notes. In any event such marking on the ground and notice were sufficient to put a subsequent locator upon inquiry as to the nature and extent of Northam's claim. (Stock vs. Plunkett, 181 Cal. 193, 183 Pac. 657.)"

the mouth of a canyon,[22] the head of an arroyo,[23] ravine,[24] ridge,[25] hogsback,[26] rock,[27] pillar of rock,[28] cliff of rocks,[29] tree,[30] blazed tree,[31] forked tree,[32] tree when marked,[33] stump of tree,[34] snag.[35]

§ 4. Permanent Monuments.

A permanent monument may be any artificial distinctive mark or object of a lasting nature affixed to or carved from the soil or rock, as, for example, a named city[36] or town,[37] a depot,[38] a race track

[22] Id. Drummond vs. Long, *supra* (5); Flavin vs. Mattingly, *supra* (1). In Clearwater Co. vs. San Garde, 7 Ida. 106, 61 Pac. 137, it is said: "The mouth of 'Big Canyon' is the natural object or permanent monument to which is sought or attempted to tie the location, but no direction is given in the notice, no point or place in the mouth of the Big Canyon is designated and consequently the latitude of the area which might be covered by the locator in surveying or changing his location from the point of discovery is entirely indefinite—the location is void." See Morrison vs. Regan, 8 Ida. 291, 67 Pac. 958. In Vogel vs. Warsing, *supra* (13), it is held that a notice of location which describes the claim by metes and bounds and by a reference to stakes set in the ground, adding that the claim "lies about one mile" from a specified mountain in a southerly direction, is not defective because it fails to state any particular beginning point on the mountain. See, also, Farmington Co. vs. Rhymney Co., 20 Utah 363, 58 Pac. 832; Flavin vs. Mattingly, *supra* (1); Brady vs. Husby, 21 Nev. 453, 33 Pac. 801; *but see* Jackson vs. Dines, *supra* (6); Darger vs. LeSieur, 8 Utah 160, 30 Pac. 363, aff'd. 9 Utah 192, 33 Pac. 701.

[23] Spreckels vs. Ord, 72 Cal. 86, 13 Pac. 158. In this case the court said: "It was for the jury, or court sitting as a jury, to find as facts where was the head of the arroyo, and, where was the blazed tree; and inasmuch as the tree actually blazed by the parties to the deed, or adopted by them as the point of commencement, was a more certain object than the 'head' of the 'arroyo'—a place somewhat indefinite, and perhaps shifting—it was the duty of the court to determine, as matter of law, that such tree (if clearly identified) was the controlling monument. Evidence tending to identify the tree was admissible." See Lillis vs. Urrutia, 9 Cal. A. 557, 99 Pac. 992. See, also, County of Yolo vs. Nolan, 144 Cal. 448, 77 Pac. 1007.

[24] Meydenbauer vs. Stevens, *supra* (2); Drummond vs. Long, *supra* (5).

[25] Id.

[26] Meydenbauer vs. Stevens, *supra* (2).

[27] Temescal Oil Co. vs. Salcido, 137 Cal. 211, 69 Pac. 1010.

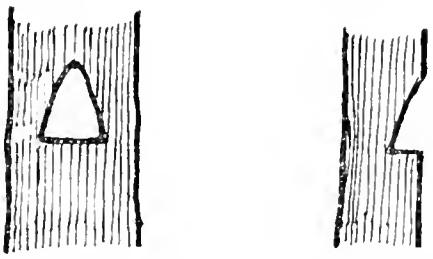
[28] Daggett vs. Yreka Co., *supra* (18).

[29] Farmington Co. vs. Rhymney Co., *supra* (22).

[30] Carter vs. Bacigalupi, *supra* (9); Quimby vs. Boyd, 8 Colo. 194, 6 Pac. 462; *compare* Pollard vs. Shively, 5 Colo. 309, with Upton vs. Larkin, 7 Mont. 449, 17 Pac. 728. See *supra*, note 23

[31] Walsh vs. Erwin, *supra* (15); Drummond vs. Long, *supra* (5); Allen vs. Dunlap, 24 Or. 236, 33 Pac. 675. See *supra*, note 23.

CORRECT FORM OF BLAZE ON TREES AS WITNESS MARK



From Stretch: "Prospecting, Locating and Valuing of Mines."

[32] Daggett vs. Yreka Co., *supra* (18).

[33] Quimby vs. Boyd, *supra* (30).

[34] McKinley Creek Co. vs. Alaska Co., *supra* (16).

[35] Id.

[36] McCann vs. McMillan, 129 Cal. 350, 62 Pac. 31; Jackson vs. Dines, *supra* (6). Permanent monuments may exist before a mining location is made, or may be erected for the purpose of tying the location to them, but courses or distances from such monuments of a discovery site, or to corner stakes or some other object upon the location, must be stated with reasonable accuracy. Brown vs. Levan, 4 Ida. 794, 46 Pac. 661; see Clearwater Co. vs. San Garde, *supra* (22), dist'g. Morrison vs. Regan, *supra* (22); Darger vs. LeSieur, *supra* (22); see Vogel vs. Warsing, *supra* (13); Farmington Co. vs. Rhymney Co., *supra* (22).

[37] Fissure Co. vs. Old Susan Co., 22 Utah 438, 63 Pac. 587.

[38] Farmington Co. vs. Rhymney Co., *supra* (22).

enclosure,[39] roads,[40] the intersection of roads,[41] a mineral monument,[42] a government monument,[43] a section corner,[44] a named well known mining claim,[45] permanent monuments of a mining claim,[46] monuments of stone,[47] permanent stakes or posts,[48] stakes firmly fixed in the ground,[49] a cut,[50] drift,[51] shaft,[52] tunnel,[53] prospect hole,[54] cabin, shaft house, dam or mill.[55]

[39] Tiggeman vs. Mrzlak, 40 Mont. 19, 105 Pac. 77.

[40] McCann vs. McMillan, *supra* [56].

[41] Drummond vs. Long, *supra* [5].

[42] The establishment of United States mineral monuments doubtless was to provide for more accurate description of mining claims and their locations than could be given by reference to natural objects merely in localities to which the regular surveys had not been extended, and the course and length of a line connecting the location with such mineral monuments should be given in the notice. Tennessee Lode, 7 L. D. 394; Wax 29 L. D. 592; see McKevitt vs. City of Sacramento, 55 Cal. A. 117, 203 Pac. 132; Jorgensen vs. McAllister, 34 Ida. 182, 202 Pac. 1059; Bell vs. Skillicorn, 6 N. M. 399, 28 Pac. 768; see, also, Min. Regs. pars. 139, 140 and 141.

[43] Gird vs. California Oil Co., 60 Fed. 531; Green vs. Gavin, 10 Cal. A. 330, 101 Pac. 931.

[44] Duncan vs. Fulton, 15 Colo. A. 140, 61 Pac. 294.

[45] Hammer vs. Garfield Co., 130 U. S. 291; Book vs. Justice Co., 58 Fed. 106; Carlin vs. Freeman, 19 Colo. A. 334, 75 Pac. 26. Mining claims may be referred to as permanent monuments and it is presumed that the named claims exist. Law vs. Fowler, 45 Ida. 1, 261 Pac. 667. It does not necessarily follow that a mining claim referred to in the location notice is a well known mining claim and therefore sufficient to constitute reference to some natural object or permanent monument as will identify the claim." U. S. vs. Sherman, 288 Fed. 498. Reference to a mining claim in a location notice casts upon the party attacking the notice the burden of showing that there is no such mining claim as referred to therein. Londonderry Co. vs. United Co., 38 Colo. 486, 88 Pac. 455; Kinney vs. Fleming, 6 Ariz. 263, 56 Pac. 723; Shattuck vs. Costello, 8 Ariz. 22, 68 Pac. 529. Law vs. Fowler, *supra*. See Gammer vs. Glenn, *supra* [17]. For instances of insufficient reference to mining claim see Gilpin Co. vs. Drake, 8 Colo. 586, 9 Pac. 787; Brown vs. Levan, *supra* [36].

[46] Hammer vs. Garfield Co., *supra* [45]; Credo Co. vs. Highland Co., *supra* [20]; Talmadge vs. St. John, 129 Cal. 430, 62 Pac. 79; Southern Cross Co. vs. Europa Co., 15 Nev. 383; Hansen vs. Fletcher, 10 Utah 266, 37 Pac. 480; *but see* Purdum vs. Laddin, 23 Mont. 387, 59 Pac. 153; Copper Globe Co. vs. Allman, 23 Utah 410, 64 Pac. 1020.

[47] Book vs. Justice Co., *supra* [45]; Meydenbauer vs. Stevens, *supra* [2]; Talmadge vs. St. John, *supra* [30]; see Holt vs. Hazzard, 10 Cal. A. 444, 102 Pac. 540. A location notice of a mining claim sufficiently complies with the law "where it calls for stone monuments at each corner of the claim; and describes it as bounded by four other claims." Southern Cross Co. vs. Europa Co., *supra* [46]; and see Howeth vs. Sullinger, 113 Cal. 547, 45 Pac. 841; *compare* Marshall vs. Harney Peak Co., 1 S. Dak. 350, 47 N. W. 290.

[48] Credo Co. vs. Highland Co., *supra* [20]; Bonanza Co. vs. Golden Head Co., 29 Utah 179, 80 Pac. 736; see Hammer vs. Garfield Co., *supra* [45]; Eaton vs. Norris, 131 Cal. 561, 63 Pac. 856; Huckaby vs. Northam, *supra* [21]; Brockbank vs. Albion Co., 29 Utah 369, 81 Pac. 863. It has been said that the boundaries of a location are sufficiently marked or designated by placing at one corner a substantial stake or monument, and by placing at each of the four corners and near the center of each end line good and substantial stakes, so that as marked upon the ground the boundaries could be readily traced, and in such case no reference need be made to natural objects or permanent monuments, as it is not always possible to connect a location with a natural object. McIntosh vs. Price, 121 Fed. 720; see Hammer vs. Garfield Co., *supra* [45]; Tiggeman vs. Mrzlak, *supra* [39]; but it also has been said that under some circumstances the marking of a location by substantial stakes at the four corners may not of itself be sufficient. Eaton vs. Norris, *supra* [48]; see Taylor vs. Middleton, 67 Cal. 656, 8 Pac. 594; Madeira vs. Sonoma Magnesite Co., 20 Cal. A. 731, 130 Pac. 175.

[49] Meydenbauer vs. Stevens, *supra* [2]; Credo Co. vs. Highland Co., *supra* [20]. Stakes driven into the ground are the most certain means of identification of mining claims where there are no permanent monuments or natural objects other than rocks or neighboring hills. Hammer vs. Garfield Co., *supra* [45]; Bennett vs. Harkrader, 158 U. S. 444; Vogel vs. Warsing, *supra* [13]; Worthen vs. Sidway, 72 Ark. 223, 79 S. W. 777. It is sufficient where the stakes and mounds at the corners of the location were prominent and permanent monuments by which, together with the description in the notice of location, the claim could readily be identified and where the markings were sufficient so that the boundaries can readily be traced. DuPrat vs. James, 65 Cal. 559, 4 Pac. 562; see also, Holdt vs. Hazard, *supra* [47]; and see Oregon King Co. vs. Brown, 119 Fed. 48; Howeth vs. Sullinger, *supra* [47]; Green vs. Gavin, *supra* [43]; Gleeson vs. Martin White Co., 13 Nev. 442; Southern Cross Co. vs. Europa Co., *supra* [46]; also see McPherson vs. Julius, 17 S. Dak. 98, 95 N. W. 528. In Bennett vs. Harkrader, *supra*, the location notice described five hill claims of two hundred feet by one thousand feet "running from a stake on the west bank of Ice Gulch to a similar stake one thousand feet distant, near the mouth of Quartz Gulch." The description of the location was held protected by § 8 of the Act of May 17, 1884, 23 Stats. 241, the court saying, "it is obvious that the description is quite imperfect." See, also, Vogel vs. Warsing, *supra* [13]; Bismark Co. vs. North Sunbeam Co., 21 Ida. 127, 120 Pac. 888; Jualpa Co. vs. Thorndyke, 4 Alaska 207.

See infra, Notes, 50 to 55.

§ 5. Purpose of the Law.

The purpose of the federal mining statute in requiring that the record of a mining location must contain such a description of the claim located by reference to some natural object or permanent monument as will identify the claim [56] was designed to secure a definite description of the location, a description so plain that such location could be readily ascertained and the naming of such object or monument is for that purpose.[57]

§ 5a. Presumptions.

The natural object or permanent monument referred to in the record of the location are not necessarily required to be upon the ground within the location.[58] In the absence of proof to the contrary it will be presumed that the natural object or permanent monument referred to in the record exists [59]; that it is well known [60] and serves to identify

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[50] Meydenbauer vs. Stevens, *supra* (2); Jackson vs. Dines, *supra* (6). A discovery cut may properly be recognized as a monument so far as to include it within a location, in the notice of location. McEvoy vs. Hyman, 25 Fed. 596.

[51] Meydenbauer vs. Stevens, *supra* (2).

[52] Id. Jackson vs. Dines, *supra* (6); Wilson vs. Triumph Co., 19 Utah 66, 56 Pac. 300; *but see* Drummond vs. Long, *supra* (5).

[53] Meydenbauer vs. Stevens, *supra* (2); Wilson vs. Triumph Co., *supra* (52).

[54] Drummond vs. Long, *supra* (5); Hansen vs. Fletcher, *supra* (36).

[55] Londonderry Co. vs. United Co., *supra* (45).

[56] 6 Fed. St. Ann. p. 523, § 2324. Butte City Co. vs. Baker, 196 U. S. 122; aff'g. 28 Mont. 222, 72 Pac. 617, Meydenbauer vs. Stevens, *supra* (2). Unless required by local law the posted notice need not refer to a natural object or permanent monument. It is the recorded notice that must contain the reference. Poujade vs. Ryan, 21 Nev. 449, 33 Pac. 659. A recorded notice of location is invalid if it contains no description of the location by reference to any natural object or permanent monument by which it may be identified. Faxon vs. Barnard, 4 Fed. 702; Fuller vs. Harris, 29 Fed. 814; Meydenbauer vs. Stevens, *supra* (2); Mutchmor vs. McCarty, 149 Cal. 603, 87 Pac. 85; see McIntosh vs. Price, *supra* (45), but the failure to make such tie may be cured by an amended notice of location. Nylund vs. Ward, 67 Colo. 108, 187 Pac. 314; see, generally, Walton vs. Wild Goose Co., 133 Fed. 209; Sturtevant vs. Vogel, 167 Fed. 448; Duryea vs. Boucher, 67 Cal. 141, 7 Pac. 421; McCann vs. McMillan, *supra* (36); Gilpin Co., vs. Drake, *supra* (42); Drummond vs. Long, *supra* (5); Londonderry Co. vs. United Co., *supra* (45). The reference is not intended to be as accurate and correct as if made by a competent surveyor. Bismark Co. vs. North Sunbeam Co., 14 Idaho 516, 95 Pac. 14; Humphreys vs. Idaho Co., *supra* (49); see, also, Copper Queen Co. vs. Stratton, 17 Ariz. 127, 149 Pac. 389; Independence Co. vs. Knauss, 32 Ida. 269, 181 Pac. 701. The reference, however, should be intelligible, not delusive, meaningless, nor misleading. Dillon vs. Bayless, 11 Mont. 171, 27 Pac. 725, but should identify the location with reasonable certainty. See North Noonday Co. vs. Orient Co., 1 Fed. 522. It is well established by numerous decisions that only where the insufficiency of the location notice, in its failure to make intelligent reference to a natural object or permanent monument land marks is apparent upon its face, the court may reject it. Morrison vs. Regan, *supra* (22), and cases cited therein.

[57] Hammer vs. Garfield Co., *supra* (45); see Bennett vs. Harkrader, *supra* (49); Book vs. Justice Co., *supra* (45); Walsh vs. Erwin, *supra* (13); Maderia vs. Sonoma Magnesite Co., *supra* (48). Although the requirement that the record shall contain a description of the location with reference to some natural object or permanent monument is mandatory, Worthen vs. Sidway, *supra* (49); Ware vs. White 81 Ark. 223, 108 S. W. 831, the rule applies only when such reference can be made. Hammer vs. Garfield Co., *supra*. See *supra*, note 42.

[58] Seidler vs. LeFave, *supra* (1). The statute does not indicate what the natural object or permanent monument shall be nor where either shall be located as to being upon or off the claim, nor at the point of beginning in the description nor any intermediate point, but a monument must be permanent in its character and referred to in such a manner as will identify the location so persons looking for mineral deposits may, with the aid of the notice of location, find the monument, and from it and the description in such notice trace out the extent of the location. Seidler vs. Lafave, 4 N. M. 171; Seidler vs. Lafave, *supra*; see North Noonday Co. vs. Orient Co., *supra* (56); Jupiter Co. vs. Bodie Con. Co., 11 Fed. 666; Quimby vs. Boyd, *supra* (30).

[59] Hammer vs. Garfield Co., *supra* (45); Smith vs. Cascaden, *supra* (10). Generally speaking, any object or monument that will serve to identify the location will be regarded as sufficient; but it is not conclusively presumed that the same exists or that the reference thereto sufficiently describes the location. Russell vs. Chumasero, *supra* (1); Deeney vs. Mineral Creek Co., 11 N. M. 179, 67 Pac. 725; Londonderry Co. vs. United Co., *supra* (45). Parol evidence is admissible to show that a natural object or permanent monument referred to in the location notice but not so designated therein, in fact is such, Metcalf vs. Prescott, 10 Mont. 283, 25 Pac. 1037; Ninemire vs. Nelson, *supra* (1); see, also, Carter vs. Bacigalupi, *supra* (9); Strepey vs. Stark, 7 Colo. 614, 56 Pac. 111; Seidler vs. Maxfield, 4 N. M. 374, 5 N. M. 197, 20 Pac. 794. In O'Donnell vs. Glenn, 8 Mont. 248, 19 Pac. 302, there was no natural object referred

the location,[61] whether it is upon or off the claim,[62] or was erected for the purpose of tying the location thereto.[63]

§ 6. Situs of Claim.

The rule in determining the exact locality of a mining claim or location may be said to be that recourse be had, first to natural objects,[64] second to artificial marks,[65] third to courses and distances.[66]

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to in the description of the claim, which was described as follows: "Beginning at a stake at the southeast corner, running west fifteen hundred feet; thence north six hundred feet; thence east fifteen hundred feet; thence south six hundred feet to the place of beginning," and the court said: "Whether that stake was of such size, and so planted in the ground as to come within the meaning of the words 'permanent monument' properly defined, was for the jury to find, under appropriate instructions from the court." See Meydenbauer vs. Stevens, *supra* (2).

[60] Hammer vs. Garfield Co., *supra* (45).

[61] McCann vs. McMillan, *supra* (36).

[62] North Noonday Co. vs. Orient Co., *supra* (56); Seidler vs. Lafave, *supra* (1). See *supra*, note 36.

[63] Brown vs. Levan, *supra* (36).

[64] Bell vs. Skillicorn, *supra* (42). "The most material and most certain calls shall control those which are less material and less certain. A call for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control both course and distance." Newson vs. Pryor, *supra* (6). The above rules were referred to in the case of Watkins vs. King, 118 Fed. 536, and the court used the following language: "It is quite well established, and is now, we think, the universal rule, that a call for a natural object, such as a river, a creek, the mouth of a stream, a hill, a dividing ridge between designated localities, a marked tree, shall control both course and distance. The reason for such a rule is quite apparent. The natural monuments referred to are objects indicating the boundary of the land, are generally easily found, and are, with few exceptions, indestructible. Course and distance are usually descriptive of the designated monuments, depending for their accuracy upon the skill and experience of the surveyor." See, also, Higueras vs. U. S., 72 U. S. 835; Garrard vs. S. P. Mines, 82 Fed. 585; Meyer Co. vs. Steinfield, 9 Ariz. 240, 80 Pac. 401.

[65] Jorgensen vs. McAllister, *supra* (42), citing Bell vs. Skillicorn, *supra* (42).

[66] Maxwell Land Grant, 48 L. D. 87. As a rule the description of the location as recorded is binding upon the locator, but if the calls as to distances and courses set out vary from the markings actually made upon the ground, the latter will prevail. Meydenbauer vs. Stevens, *supra* (2); Price vs. McIntosh, *supra* (49); S. P. R. Co., 50 L. D. 577. See Steen vs. Wild Goose Co. 1 Alaska 255. The principle that courses and distances give way to fixed monuments applies to the description of a mining claim, and the record of such claim is sufficient when it contains directions which, taken in connection with the marking of the claim upon the ground, will enable a person to distinguish the premises located from the public mineral lands open to appropriation. McEvoy vs. Hyman, *supra* (50); Garrard vs. S. P. Mines, 82 *supra* (64); Smith vs. Newell, 86 Fed. 58; see Zerres vs. Vanina, 134 Fed. 612.

The rule that in the location or description of a mining claim monuments shall control courses and distances is recognized only in cases where the monuments are clearly ascertained, but where there is doubt as to the monuments as well as to the courses or distances, then there can be no reason for saying that monuments shall prevail rather than the courses given in a patent. Thallman vs. Thomas, 102 Fed. 936, 111 Fed. 283; Duncan vs. Eagle Rock Co., 48 Colo. 569, 111 Pac. 593.

CHAPTER IV.

MINERALS AND MINERAL LANDS.

§ 7. Minerals.

The term "mineral" standing by itself might, under a broad, general, popular definition embrace the soil and all that is to be found beneath its surface; under a strict definition it might be limited to metallic substances, and, under a definition coupling it with mines, it covers all substances taken out of the bowels of the earth by the process of mining.[1]

§ 8. Valuable Mineral Deposits.

Whatever is recognized as a mineral, by the standard authorities on the subject, whether metallic or other substance, and is found in such quantity and quality as to render the land more valuable on that account than for agricultural purposes is a valuable mineral deposit within the purview of the mining act.[2]

§ 9. Controverted Cases.

In controverted cases as to whether the land is mineral or agricultural in character the rule of the land department is that it shall be considered agricultural or mineral according as it is more valuable for

[1] Brady vs. Smith, 181 N. Y. 178, 73 N. E. 963. The term "minerals" though frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines. In its enlarged sense it comprises all the substances which have formed a solid body of the earth. There is difference, both in common and scientific parlance between minerals and "ore," ore being a compound of a metal and some substance. Doster vs. Friedensville Co., 140 Pa. St. 147, 21 Atl. 251. The definition of the term "minerals" is quite fully discussed in N. P. R. Co. vs. Soderberg, 188 U. S. 526, aff'g. 99 Fed. 506. The term "mineral" in its commercial sense has been defined as any inorganic substance found in nature having sufficient value separate from its situs as part of the earth to be mined, quarried, or dug for its own sake or its own specific use. Rockhouse Fork Co. vs. Raleigh Co., 83 W. Va. 20, 97 S. E. 684, citing Hendler vs. Lehigh Co., 209 Pa. St. 256, 58 Atl. 486. All metals are minerals, but all minerals are not metals. Rose vs. Wainman, 15 L. 5 Ex. 67, 14 M. & W. 859; see, also, N. P. R. Co. vs. Soderberg, 99 Fed. 507; Hartwell vs. Camman, 10 N. J. Eq. 136; Murray vs. Allred, 100 Tenn. 100, 43 S. W. 355. In Darvill vs. Roper, 24 L. J. 782, it is said the best definition of a mineral is that which is worked by a mine. See Dingess vs. Huntington Co., 271 Fed. 867; Silver vs. Bush, 213 Pa. St. 195, 62 Atl. 832; Ramage vs. South Penn Co., 94 W. Va. 81, 118 S. E. 162.

[2] Pacific Coast Co. vs. N. P. R. Co., 25 L. D. 244.

Questions whether a given substance is locatable or enterable under the mining law are not resolved solely by the test of whether the substance considered has a definite chemical composition expressable in a chemical formula. Such a criterion would exclude a number of mineral substances of heterogeneous composition that have been declared to be subject to disposition under the placer mining law, for example, guano, granite, sandstone, vaulable clays other than brick clay, which may be made up of a number of minerals and not always the same minerals. Layman vs. Ellis, 52 L. D. 714, overruling Zimmerman vs. Brunson, 39 L. D. 310.

There is no certain well-defined, obvious line of demarcation between mineral and nonmineral land. Ah Yew vs. Choate, 24 Cal. 562. No land can be valuable mineral land unless it contains a deposit of mineral in some form, metalliferous or nonmetalliferous in quantity sufficient to justify expenditures in the effort to extract it: Deffeback vs. Hawke, 115 U. S. 392; N. P. R Co. vs. Soderberg, *supra* [1]; Brophy vs. O'Hare, 34 L. D. 596. The question of the character of the land can be raised only by the United States or those claiming under them. Ryan vs. Granite Hill Co., 29 L. D. 522; Standard Co. vs. Habishaw, 132 Cal. 115, 64 Pac. 115. Hence, a trespasser making no claim to the land under any of the public laws could not be heard to urge, against one who had made a discovery upon mineral land and performed the acts of location, that the land was more useful for purposes other than mining. Zeiger vs. Dowdy, 13 Ariz. 331, 114 Pac. 565. The question usually arises at the instance of some party connected with the paramount title, who claims the land to be nonmineral. Chrisman vs. Miller, 197 U. S. 313 aff'g. 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444; Mutchmor vs. McCarty, 149 Cal. 603, 87 Pac. 85.

mining than for agricultural purposes.[3] The question can only be determined by that department as the courts are not clothed with power to decide the question nor to restrain its officers in their proceedings in the matter.[4]

§ 10. Mineral Land.

The overwhelming weight of authority is to the effect that mineral lands include, not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture. It is immaterial, therefore, whether a deposit bears minerals of a metallic or non-metallic nature. If a mineral deposit exists in vein or lode formation—that is to say, if it be in place in the general mass of the mountain—it is, whether the mineral it bears be metallic or non-metallic, subject to disposition only under the provisions of the lode mining laws. If not then it must be located as a placer claim.[5]

§ 11. Mineral Substances.

The following deposits have been declared by congress to be of a mineral character, namely, any mineral in rock in place [6] or other form of deposit,[7] specifically, gold, silver, cinnabar, lead, tin, copper,[8] building stone,[9] petroleum and other mineral oils,[10] salt springs and other deposits of salt,[11] gilsonite, elaterite or other like substances,[12] kaolin, kaolinite, fuller's earth, china clay and ball clay,[13] phosphate, nitrate, potash, ashphaltic minerals,[14] phosphate rock,[15] phosphate, sodium, coal, oil, oil shale, gas and borax,[16] sulphur.[16a]

The American and English courts and the land department of the United States have declared the following substances to be minerals,

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[3] N. P. R. Co. vs. Soderberg *supra*.(1)

[4] Burfenning vs. Chicago Co., 163 U. S. 321.

[5] Mineral producing lands are divided into two classes—the one class embraces lands where the mineral matter is within "rock in place" or geologically speaking, "*in situ*" and the second includes placers and all forms of deposits excepting "rock in place." C. M. L. 62; see Cole vs. Ralph, 252 U. S. 286 rev'g. 249 Fed. 81. A placer location made for the purpose of securing title to lodes and veins known to exist in the land so located is in violation of law and void. Grosfield vs. Nigger Hill Co., 14 L. D. 685; Layman vs. Ellis, *supra* (2).

The ferm "mineral" or "mineral lands" is not applicable to lands within which minerals of different kinds are found, but not in such quantity as to justify expenditures. Deffeback vs. Hawke, *supra* (2); Warren vs. Colorado, 14 L. D. 204; Jones vs. Aztec Co., 34 L. D. 115; U. S. vs. San Pedro Co., 4 N. M. 294, 17 Pac. 337. Proof that neighboring or adjoining lands are mineral in character, or that the land in controversy may by possibility develop minerals in such quantity as will establish its mineral character rather than its agricultural character is not sufficient to show its present mineral character. U. S. vs. Reed, 28 Fed. 482; Madison vs. Octave Oil Co., 154 Cal. 772, 99 Pac. 176; see, also, W. P. R. Co. vs. U. S., 108 U. S. 510; Colorado Coal Co., 122 U. S. 307, Piatt, 33 L. D. 271; *compare* Diamond Coal Co., 233 U. S. 236; S. P. Co. vs. U. S., 251 U. S. 1; Freeman vs. Summers, 52 L. D. 201.

[6] 5 U. S. Comp. St. p. 5429, § 4615.

[7] 5 U. S. Comp. St. p. 5654, § 4628. See *infra* § 13.

[8] 5 U. S. Comp. St. p. 5429, § 4615. That copper in solution is a mineral see Utah Copper Co. vs. Montana Co., 69 Utah 423, 255 Pac. 672.

[9] 5 U. S. Comp. St. p. 5678, § 4633.

[10] 5 U. S. Comp. St. p. 5678, § 4635; see, also, Id p. 5681, § 4637.

[11] 5 U. S. Comp. St. 5684, §4641.

[12] See 30 Stats. 87.

[13] 38 Stats. 792.

[14] 5 S. S. Comp. p 5683, § 4640*a*.

[15] 5 U. S. Comp. St. p. 5684, §4640*d*.

[16] 2 Supp. U. S. Comp. St., p. 1404, § 4640¼, *et seq.*

[16a] 2 Mason's U. S. Code, p. 2268, § 280.

viz: agate, (moss),[17] albertite,[18] alkaline substances,[19] alum,[20] aluminum.[21] cyanite,[21a] amber,[22] amphibole schist,[23] amygdaloid bands,[23a] asbestos,[24] asphalt,[25] bauxite,[26] borax,[27] brine,[28] calk,[29] calc-spar,[30] cement,[31] auriferous cement,[32] chalk,[33] French chalk,[34] clays,[35] valuable clays,[36] auriferous clay,[37] brick clay,[38] china or porcelain clay,[39] fire clay,[40] colloidal clay,[40a] kaolin,[41] coal (whether anthracite, bituminous, lignite, or cannel),[42] coal bed,[43] diamonds,[44] diatomaceous earth,[45] fahlbands,[46] gas,[47] dry natural gas,[48] wet natural gas,[49] galena,[50] gilsonite.[51]

[17] Min. Dig. 27.
[18] Id.
[19] See Pacific Coast Co. vs. N. P. R. Co., *supra* (2); see, also, Min. Lands, 1 L. D. 561.
[20] Webb vs. American Asphaltum Co., 157 Fed. 205.
[21] Union Oil Co. (on review), 25 L. D. 354; see, also, Hare vs French, 44 L. D. 217.
[21a] McInerny vs. Allebrand, — Cal. A. —, --- Pac. ---, A Silicate of aluminum, occurring in bladed or fibrous crystalline aggregates and in triclinic crystals. Its prevailing color is blue, whence its name, but varying from a fine Prussian blue to sky-blue or bluish white; also green or gray. It has the same composition as andalusite and fibrolite. Also kyanite and disthene. Cent. Dict.
[22] Webb vs. American Co., *supra* (20).
[23] See Layman vs. Ellis, *supra* (2).
[23a] Min. Dig., 27.
[24] Id.
[25] Hare vs. French, *supra* (21). See Pacific Coast Co. vs. N. P. R. Co., *supra* (19). A deposit of sand asphalt or sandstone heavily saturated with asphaltic minerals in hard solid formation is not "oil" within the meaning of the act of June 25, 1910, 36 Stats. 847. Richards, 52 L. D. 338.
[26] American Bauxite Co. vs. Saline County, 119 Ark. 362, 177 S. W. 1152; Sovereign vs. Arthur, 141 Ark. 114, 222 S. W. 732. The word, "bauxite" "alone when used in trade, indicates the crude ore, which when taken from the mine, resembles lumps of coarse earth or clay and contains iron, silica, titanic acid, besides other substances." Irwin, 62 Fed. 155.
[27] See Pacific Coast Co. vs. N. P. R. Co., *supra* (2)
[28] Atty. Gen. vs. Salt Union, 1 K. B. 488.
[29] Min. Dig. 27.
[30] Id.
[31] See U. S. vs. Cooke, 207 Fed. 682.
[32] Copp's Min. Dec. 78.
[33] Sult vs. Hochstetter Co., 63 W. Va. 317, 61 S. E. 307.
[34] Jenkins vs. Johnson, Fed. Cas. No. 7271.
[35] McCombs vs. Stephenson, 154 Ala. 109, 44 So. 867.
[36] Jones vs. Aztec Co. 34 L. D. 117.
[37] C. M. L. 121; Pacific Coast Co. vs. N. P. R. Co., *supra* (2)
[38] The authorities are not harmonious. See Midland Co. vs. Haunchwood, L. R. 20 Ch. Div. 522; Great Western Co. vs. Blades, 2 Ch. 624; King vs. Bradford, 31 L. D. 108; Holman vs. Utah, 41 L. D. 314; King vs. Mullins, 27 Mont. 364, 71 Pac. 155. For brick earth see Sult vs. Hochstetter Co., *supra* (33).
[39] Sult vs. Hochstetter Co., *supra* (33). In Hext vs. Gill, L. R. 7 Ch. App. 699, the House of Lords held that china clay, and "every substance which can be got from underneath the surface of the earth for the purpose of profit," was a mineral, unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning.
[40] Messmer vs. Geith, 22 Fed. (2d) 690; Aldritt vs. N. P. R. Co., 28 L. D. 49; Horse Creek Co. vs. Midkiff, 81 W. Va. 616, 95 S. E. 26; see Holman vs. Utah, 41 L. D. 314; *but see* Dailey Clay Co., 48 L. D. 429.
[40a] Colloidal clay has a value for different purposes, principally the filtering of oils in the process of refining. The propriety of locating the land containing such deposits as placer gound is unquestioned. Ortman, 52 L. D. 469.
[41] Parks vs. Hendsch, 12 L. D. 101.
[42] Pacific Coast Co. vs. N. P. R. Co., *supra* (19); U. S. vs. Beaman, 242 Fed. 8878; Henderson vs. Fulton, 35 L. D. 363. Coal is a nonmetallic mineral. Pacific Coast Co. vs. N. P. R. Co., *supra*.
[43] Delaware Co. vs. Gleason, 159 Fed. 385; see Rex vs. Brettell, 3 B. & Ad. 424; and see U. S. vs. Sweet, 245 U. S. 563.
[44] Webb vs. American Co., *supra* (20).
[45] C. P. R. Co., 45 L. D. 223.
See § 1—subd. L. D.
[46] C. M. L. 63.
[47] Min. Dig. 27; Webb vs. American Co., *supra* (20); Rechard vs. Cowly, 202 Ala. 337, 80 So. 420. See *infra*, note 77.
[48] Mussellem vs. Magnolia Co., 107 Okla. 183, 231 Pac. 530; W. & C. Co. vs. De Witt, 130 Pa. St. 235, 18 Atl. 724.
[49] Id.
[50] Duggan vs. Davey, 4 Dak. 110, 26 N. W. 887.
[51] Jones vs. Aztec Co., *supra* (36); Webb vs. American Co., *supra* (20).

gravel,[52] gold bearing gravel,[53] gravel and sand,[54] granite,[55] graphite,[56] guano,[57] gypsum,[58] gypsum cement,[59] infusorial earth,[60] iron,[61] chromate of iron,[62] oxide of iron,[63] franklinite,[64] isinglass,[65] lead,[66] black lead,[67] carbonate of lead,[68] lepidolite,[69] lime,[70] magnesia,[71] magnesite,[72] marble,[73] texicalli marble,[74] meteorites,[75] mica,[76] oil,[77]

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[52] Min. Dig. 28; Hooper, 1 L. D. 561.

Gravel is variously defined as "fragments of rock worn by the action of air and water and coarser than sand." Glossary, U. S. Geological Survey, Bulletin No. 95, as "more or less rounded stones and pebbles often intermixed with sand," 28 C. J. 824, as "sand fragments of mineral, mainly quartz." Bayley on Mineral and Rock, p. 202. Many of the beach pebbles are composed largely of quartz, because it is the most common mineral which physically and chemically can resist the wear of wave action. Diller, Education Series of Rock Specimens, U. S. Geological Survey Bulletin No. 150, p. 57. The distinction between sand and gravel is largely one of gradation in size. Id. 59. Lands containing deposits of gravel which can be extracted, removed and marketed at a profit are mineral lands subject to location and entry under the placer mining laws. Layman vs. Ellis, *supra* [2].

[53] Gregory vs. Pershbaker, 73 Cal. 109, 14 Pac. 401.

[54] Geneve Co. vs. Hudson Bros., 138 Mo. 439, 40 S. W. 93; see Waskey vs. McNaught, 163 Fed. 929. See Layman vs. Ellis, *supra* [2].

[55] N. P. R. Co. vs. Soderberg, *supra* [1].

[56] Min. Dig. 28; Atty. Gen. vs. Welsh Co., 35 W. R. 617.

[57] King vs. Bradford, 31 L. D. 110; see Richter vs. Utah, 27 L. D. 95. In this case the land department said: "Guano is the excrement of sea birds, accumulating during a long period of years into beds of varying thickness. It is a phosphate deposit, and is classed by Dana in his 'System of Mineralogy' among the apatite minerals. * * *. It must be said, therefore, that guana is a mineral, and that lands valuable for deposits of guano are within the meaning of the mining and other laws of the United States."

[58] Madison vs. Octave Oil Co., supra, [5]; Nephi Co. vs. Juab County, 33 Utah 114, 93 Pac. 53.

[59] Phifer vs. Heaton, 27 L. D. 57.

[60] Sometimes called Kieselgur, C. P. R. Co., 45 L. D. 223.

[61] C. M. L. 124. Iron may be located as a vein or lode when in rock in place as placer when in the form of a deposit. A discovery of black iron and manganese outcropping is sufficient to justify the location of a mining claim. Mt. Diablo Co. vs. Callison, Fed. Cas. 918. See U. S. vs. N. P. R. Co., 1 Fed. (2d) 53.

Bog iron is not a mineral. Min. Dig. 28.

[62] Gibson vs. Tyson, 5 Watts 38.

[63] Mt. Diablo Co. vs. Callison, *supra*, [61] see, also, Shoshone Co. vs. Rutter, 87 Fed. 801.

[64] Zinc Co. vs. Franklinite Co., 13 N. J. Eq. 323; Meredith vs. Zinc Co., 55 N. J. Eq. 215, 37 Atl. 539.

[65] Min. Dig. 28.

[66] Henderson vs. Fulton, *supra*, [42].

[67] Min. Dig. 28.

[68] Mt. Diablo Co. vs. Callison, *supra*, [61].

[69] Stewart vs. Douglass, 148 Cal. 511, 83 Pac. 699.

[70] Jones vs. Aztec Co., *supra* [50]. Limestone in some quality of purity and refinement has various uses, such as in the fluxing of ore, to remove impurities from the metal, the manufacture of glass, and in the processing of sugar to refine it. It also enters into the composition of cement. Fluorspar finds its principal use in the treatment of ores. The Land Department has classified limestone as mineral, unless it be of so low a grade as to be but slightly removed from the character of clay. It seems, also, that where the stone is suitable only for use in cement manufacture the lands are not subject to mineral entry." U. S. vs. S. P. R. Co., 11 Fed. (2d) 546. Calcite is held to be mineral in Dunbar Co. vs. Utah Co., 17 Fed. (2d) 351.

[71] Morrill vs. N. P. R. Co., 30 L. D. 475. See Gibson vs. Tyson, *supra*, [62]. Ordinarily magnesia is not considered a mineral. Marvel vs. Merritt, 116 U. S. 11.

[72] Johnson vs. Withers, 9 Cal. A. 52, 98 Pac. 42.

[73] Phelps vs. Church, 115 Fed. 882; Rock House Fork Co. vs. Raleigh Co., *supra*, [1].

[74] Min. Dig. 28.

[75] Goddard vs. Winchell, 86 Iowa 71, 52 N. W. 1121; Oregon Co. vs. Hughes, 47 Or. 313, 81 Pac. 573. See Shamel's Min. Law 34.

[76] Webb vs. American Co., *supra* [20].

[77] Ohio Oil Co. vs. State 177 U. S. 190; Texas Co. vs. Howard, —Tex. C. A.,— 212 S. W. 737. "There is no question that minerals include oil and gas." Crain vs. Pure Oil Co., 25 Fed. (2d) 826. Oil and gas in the ground, outside of an artificial receptacle, as the casing of a well or pipe line, are eighty-nine parts of the realty in which they are found or from which they are obtained. Nataile Co. vs. Louisiana Co., 137 La. 706, 69 So. 148; Warren vs. Boggs, 83 W. Va. 97 S. E. 592. See, also, Lovelace vs. S. W. Pet. Co., 267 Fed. 515; Isom vs. Rex Co., 147 Cal. 661, 82 Pac. 318; Heller vs. Daily, 28 Ind. A. 555, 63 N. E. 490; People vs. Bell, 237 Ill. 337, 86 N. E. 594; Beckett vs. Backer, 165 Ky. 819, 178 S. W. 1084; Kelly vs. Ohio Co., 57 Ohio St. 317, 49 S. E. 399; Kimbley vs. Luckey, 72 Okla. 217, 179 Pac. 931; Texas Co. vs. Daugherty —— Tex. C. A. ——, 160 S. W. 132; Horse Creek Co. vs. Midkiff *supra* [40]. The word "oil" as used in the act of July 17, 1914, 38 Stats. 509, includes oil shale, and a recital in a patent issued pursuant to that act, reserving to the United States all the oil and gas in the lands patented, is sufficient to reserve the oil shale deposits. Smallhorn Co., 52 L. D. 329.

mineral oil,[78] petroleum oil,[79] rock oil,[80] oil shale,[81] shale,[82] ochre,[83] onyx,[84] opal,[85] ore,[86] ozocerite,[87] paint rock,[88] paint stone,[89] phosphate, and phosphate lands,[90] calcium phosphate,[91] rock phosphate,[92] coprolites (phosphate nodules),[93] platinum,[94] potash,[95] plumbago,[96] resin,[97] pumice,[97a] salines,[98] salt,[99], salt beds,[100] common salt,[101] rock salt,[102] salt lakes and springs,[103] saltpeter,[104] sand,[105] building sand,[106] sandstone,[107] sand and gravel,[108] sand suitable for making glass,[109] silicate,[110] silicated rock,[111] slate,[112] natural slate,[113] roofing slate,[114] soda[115] carbonate of

[78] Kern Oil Co. vs. Clotfelter, 30 L. D. 585; see Kern Oil Co. vs. Clarke, (on review), 31 L. D. 288.

[79] Burke vs. S. P. R. Co., 234 U. S. 669; Kentucky vs. Keystone Co., 196 Fed. 320; Lovelace vs. S. W. Petroleum Co., *supra*.(77) Burke vs. S. P. Co., *supra*, involved the question whether petroleum or mineral oil was within the meaning of the term "mineral," as used in certain acts of congress reserving mineral lands from railroad land grants. In answering this question in the affirmative, there was cited the decisions of the courts of New York, Ohio, Pennsylvania, West Virginia, and Tennessee, affirming the mineral character of petroleum, and attention was directed to the fact that congress had at different times spoken of it as a mineral and that the Supreme Court of the United States has done the same in Ohio Oil Co. vs. Indiana, *supra* (77), and the court (234 U. S. 679) held that the words "mineral lands" should be applied in their ordinary and popular sense, and in that sense petroleum lands were embraced therein. This doctrine was approved in U. S. vs. S. P. Co., 251 U. S. 1. See, also, Union Oil Co. (on review), 23 L. D. 351.

[80] Utah vs. Watson, 50 L. D. 325.

[81] Id. Dennis vs. Utah, 51 L. D. 229.

[82] Biddy vs. Bunch, 176 Ala. 585, 58 So. 916; see Victor vs. S. P. Co., 43 L. D. 325.

[83] Stockton vs. Santa Paula Co., 64 Cal. A. 384, 221 Pac. 662.

[84] Utah Onyx Co., 38 L. D. 504.

[85] Min. Dig. 29.

[86] See J. M. Guffey Co. vs. Murrel, 127 La. 483, 53 So. 705; State vs. Berryman, 8 Nev. 270; Armstrong vs. Lake Champlain Co., 147 N. Y. 501, 42 N. E. 186. By the reduction of carnotite ore, radium bromide or chloride, uranium oxide and vanadium oxide are obtained. The elemental substances radium, uranium and vanadium generally are classed as metals. However, they are not produced, marketed or utilized in their elemental or metallic state, but as the compounds above mentioned. The radium salts are used for scientific and medical purposes. Con. Ores Co., 46 L. D. 468.

[87] Min. Dig. 29.

[88] Hartwell vs. Camman, 10 N. J. Eq. 129; *but see* Barnes, 7 L. D. 67. See Johnson vs. California Lustral Co., 127 Cal. 283, 59 Pac. 595.

[89] Id.

[90] Jones vs. Aztec Co., *supra*, (36); Murray vs. Allred, *supra*, (1).

[91] Duffield vs. San Francisco Co., 205 Fed. 480; see Webb vs. American Co., *supra*, (29)

[92] Harry Lode, 41 L. D. 406

[93] Atty. Gen. vs. Tomline, 5 Ch. Div. 762.

[94] In France "platinum, bismuth, arsenic, antimony, molybdenite, fossilized wood, and bituminous substances" are declared to be minerals. 1 Lindl. Mines (3d ed.), 22

[95] Min. Dig. 29.

[96] Id. 28.

[97] Webb vs. American Co., *supra*, (29)

[97a] Bennett vs. Moll, 41 L. D. 586.

[98] Garrard vs. S. P. Mines, 91 Fed. 989; see Southwestern Co., 14 L. D. 600; see New Mexico, 35 L. D. 3.

[99] Murray vs. Allred, *supra*, (1).

[100] New Mexico, *supra*.(98)

[101] Elliott vs. S. P. R. Co., 35 L. D. 152.

[102] New Mexico, *supra*.(98)

[103] State vs. Parker, 61 Tex. 268.

[104] Min. Dig. 29.

[105] Sult vs. A. Hochstetter Co., *supra*, (73).

[106] Loney vs. Scott, 57 Or. 384, 112 Pac. 172; see Hendler vs. Lehigh Co., *supra* (1); Scott vs. Midland Co., 1 K. B. 317.

[107] Hayden vs. Jamison, 26 L. D. 374; Pacific Coast Co. vs. N. P. R. Co., *supra*, (19), see Meiklejohn vs. Hyde, 42 L. D. 146.

[108] Gleneve Co. vs. Hudson Bros., *supra*, (54); Hendler vs. Lehigh Co., *supra*, (1).

[109] Delaney, 17 L. D. 120.

[110] Bennett vs. Moll, *supra*.(97a)

[111] State vs. Evans, 46 Wash. 219, 89 Pac. 568.

[112] Jones vs. Aztec Co., *supra*, (36); Rock House Fork Co., vs. Raleigh Co., *supra*.(1)

[113] Plastic Co. vs. San Francisco, 97 Fed. 623.

[114] Fickett, Sickels Min. Law, 487.

[115] Palmer, 38 L. D. 294.

soda,[116] nitrate of soda,[117] sulphate of soda,[118] stone,[119] beds of stone,[120] building stone,[121] flint stone, [122] free stone,[123] iron stone,[124] limestone,[125] lithographic stone,[126] lustral stone,[127] beds of sandstone,[128] stone of special commercial value,[129] stone suitable for making lime,[130] stone suitable for use as a flux,[131] stone quarry,[132] stockwerke,[133] sulphur,[134] sulphate,[135] tailings,[136] tin,[137] trap rock,[138] tungsten,[139] umber,[140] volcanic ash or pumice,[141] water,[142] subterranean waters,[143] mineral waters,[144] mineral white quartz suitable for making glass,[145] zeolites,[146] zinc,[147] carbonate, silicate and sulphide of zinc,[148]

§ 12. Minerals Crude.

Minerals crude, or not advanced in value or condition by refining or grinding, or other process of manufacture when imported into the United States, are exempt from duty.[149]

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[116] Elliott vs. S. P. R. Co., *supra*.(101)

[117] Union Oil Co., *supra*.(21)

[118] Elliott vs. S. P. R. Co., *supra*.(101)

[119] Midland Ry. vs. Checkley, 5 L. R. 4 Eq. C. 19; Bennett, 3 L. D. 116; Jones vs. Aztec Co., *supra*,(56); Sullivan vs. Schultz, 22 Mont. 546, 57 Pac. 279; see, also, Shannon vs. Village, 180 Ill. 204, 54 N. E. 181. A stone is defined as "earthly or mineral matter condensed into a hard state." Jenkins vs. Johnson, 9 Blatch, 519. Fossils are organic substances which have become penetrated by earthly or metallic particles, petrified forms of plants and minerals. Doster vs. Friedensville Co., *supra*.(1)

[120] Earl vs. Wainman, 14 M. & W. 859.

[121] Webb vs. American Co., *supra*.(20) A deposit of shell rock, used for building purposes, construction of roads and streets and the foundations of houses, is not a mineral within the meaning of the general mining laws. Hughes vs. State, 42 L. D. 401.

[122] Sult vs. Hochstetter Co., *supra*.(33); Tucker vs. Linger, L. R. 8 App. Cas. 508.

[123] Id.

[124] North British Co. vs. Budhill, App. Cas. 116, 127.

[125] Min. Dig. 28; Holman vs. Utah, *supra*,(39); see Gray Trust Co. 47 L. D. 20.

[126] Min. Dig. 28.

[127] Johnson vs. California Lustral Co., *supra*.(88) See *supra*, note 88.

[128] Greville vs. Hemmingway, 87 L. T. 443.

[129] Conlin vs. Kelly, 12 L. D. 2.

[130] Id.

[131] See Pacific Coast Co. vs. N. P. R. Co., *supra*.(19)

[132] N. P. R. Co. vs. Soderberg, *supra*(55); Meiklejohn vs. Hyde, *supra*(107); Freezer vs. Sweeney, 8 Mont. 513, 21 Pac. 20. Micklethwait vs. Winter, 6 Exch. 644.

[133] C. M. L. 52.

[134] Min. Lands, 1 L. D. 561. See 51 L. D. 647.

[135] See New Mexico, *supra*.(98)

[136] Jones vs. Jackson, 9 Cal. 237; Rogers vs. Cooney, 7 Nev. 213; see Ritter vs. Lynch, 123 Fed. 930; O'Keiffe vs. Cunningham, 9 Cal. 589; Goldfield Con. Co. vs. Old Sandstorm Co., 38 Nev. 426, 150 Pac. 317.

[137] Henderson vs. Fulton, *supra*.(42)

[138] Day, 50 L. D. 489.

[139] Hempstead & Son vs. Thomas, 122 Fed. 538. Tungsten, in the metallic state, is one of the rare elements, occurring neither in nature nor in the arts. Article, "Tungsten" 2 Min. Ind., p. 614. In the pure metallic state the metal is considered only as a curiosity. Title "Tungsten" 3 Min. Ind., p. 484. Metallic tungsten is obtained by reducing. Blovens Chemistry, p. 397.

[140] Pacific Coast Co. vs. N. P. R. Co., *supra*(2).

[141] Bennett vs. Moll, *supra*.(97a)

[142] Ridgway vs. Elk County, 191 Pa. St. 468, 43 Atla. 323.

[143] Subterranean waters are considered a "mineral" in respect to their use and enjoyment irrespective of the character and quantity of salts and gases which may be in solution. Hathorn vs. National Co., 194 N. Y. 326, 87 N. E. 504.

[144] See Pargosa Springs, 1 L. D. 562.

[145] McCombs vs. Stephenson, *supra*.(35)

[146] Sometimes known as the double silicate of alumina, or of iron or of both. They have the peculiar faculty of exchanging the base with which they may be chemically combined for another which is present in a solution brought into contact with zeolites. Permutit Co. vs. Wadham, 294 Fed. 371.

[147] Buffalo Zinc Co. vs. Crump, 70 Ark. 531, 69 S. W. 531.

[148] See U. S. vs. Brewster, 167 Fed. 122, and see Rhodes vs. Treas. 21 L. D. 503.

[149] U. S. Comp. St. 1923, p. 322, § 5841*b*, *et seq.* For a summary of minerals crude under the act of 1897 and for smelting and refining ores and crude metals in bond see T. D. 41494. For previous acts and decisions relating thereto, see Shamel's Min. Law, p. 61.

§ 13. Minerals Conserved.

Under the act of October 5, 1918, the following named mineral substances and ores, minerals and intermediate metallurgical products, metals, alloys and chemical compounds thereof, to wit: antimony, arsenic, ball clay, bismuth, bromine, cerium, chromium, cobalt, corundum, emery, fluorspar, ferrosilicon, fuller's earth, graphite, grinding pebbles, iridium, kaolin, magnesite, manganese, mercury, mica, molybdenum, osmium, sodium, platinum, palladium, paper clay, phosphorus, potassium, pyrites, radium, sulphur, thorium, tin, titanium, tungsten uranium, vanadium and zirconium were conserved to meet war needs.[150]

§ 14. Separation of Minerals and Surface.

A separate ownership of the minerals from the surface[151] may be created by lease,[152] deed[153] or statutory enactment.[154]

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[150] 40 Stats. 1009. This act authorized the President "to take over any of said necessaries and to use, distribute, allocate, or sell the same, and also to requisition and take over any undeveloped or insufficiently developed or operated idle land, deposit or mine, and any idle or partially operate smelter, or plant, or part thereof, producing or, in his judgment, capable of producing said necessaries, or either, through the agencies hereafter mentioned, or under lease or royalty agreement, or in any other manner and to store, use, distribute, allocate or sell the products thereof, provided, that no ores or metals, the principal money value of which consists in metals or metals others than those enumerated in § 1 hereof, (*supra*) shall be subject to requisition under the provisions of this act, whenever the president shall determine that the further use or operation by the government of any such land, deposit, mine, smelter, or plant, or part thereof so acquired, is no longer essential for the objects aforesaid, the same shall be returned to the person, firm or corporation, entitled thereto. The United States shall make just compensation," etc.

For adjustment of net losses of persons supplying manganese, chrome, pyrites or tungsten in compliance with the request or demand of the federal government to supply the urgent needs of the Nation in the prosecution of the war, see U. S. Comp. St. 1923, p. 185, § 3115 14/15e.

[151] The word "surface" as used in the books, means not merely the geological superficies without thickness, but includes whatever earth, soil or land lies above and superincumbent on the mine. Yandes vs. Wright, 66 Ind. 319; see also, Marquette Co. vs. Oglesby Co., 253 Fed. 111. It is a general presumption that one who has possession of the surface has possession of the subsoil also. Gill vs. Colton, 12 Fed. (2d) 533.

[152] Malcomson vs. Wappoo Mills, 85 Fed. 907; Paul vs. Cragnaz, 25 Nev. 293, 59 Pac. 857. A so-called lease may really be a grant of its subject matter. Plummer vs. Hillside Co., 104 Fed. 208; Hosack vs. Crill, 204 Pa. St. 97 53 Atl. 640.

[153] The owner of both the minerals and the land may convey the minerals and retain the ownership of that part of the land that does not consist of minerals, Kennedy vs. Hicks, 180 Ky. 562, 203 S. W. 320, or sell the surface rights and except from the sale the minerals below the surface and reserve to himself the right to mine such minerals. DeMoss vs. Sample, 143 La. 243, 78 So. 183. A grant of minerals under the surface of the land by the owner of the surface implies the right to mine such minerals by the sinking of shafts or boring of tunnels and the removal of minerals through such openings. Himrod vs. Fort Pitts Co., 220 Fed 82.

That, where there is ownership of the land in one and of the minerals under the land in another, there are two estates, may be conceded. Two other propositions are equally well known: (1) If there are no limits in the deed creating the two estates, certain limitations upon the right to use are presumed as between them; (2) there may be limitations expressed in the deed, and, if so, they exclude the idea of presumptions hostile thereto. Wilson vs. Missouri Co., 29 Fed. (2d) 665.

[154] Heydenfeldt vs. Daney Co., 93 U. S. 634; aff'g. 10 Nev. 290; Dower vs. Richards, 151 U. S. 658; aff'g. 81 Cal. 44, 22 Pac. 304; see 5 U. S. Comp. St., p. 5683, § 464*a*, *et seq.*; act of February 25, 1920, called the "Leasing Act," 2 Supp. U. S. Comp. St., p. 1404, § 4641¼. In West vs. Work, 11 Fed. (2d), 828, it is said: "The act of February 25, 1920, the 'Leasing Act,' was rather the expression of a new policy for the disposition of the public lands open to exploration or entry, by lease, instead of by complete alienation."

See Surface Rights.

CHAPTER V.

THE PUBLIC DOMAIN.

§ 15. Public Land.

The term "public land" used in the legislation of congress means such lands as are subject to appropriation as a mining claim[1] or subject to sale, or other disposition, under general laws[2] and does not include any lands to which claims or rights of others have attached.[3] Public mineral land is land belonging to the United States containing a deposit of mineral in some form, metalliferous or nonmetalliferous, in quantity and quality sufficient to justify expenditures in the effort to extract it and subject to occupation and purchase under the mining laws.[4] One

[1] McFadden vs. Mt. View Co., 97 Fed. 670. "There is no statutory definition of the words 'public lands,' and the meaning of them may vary somewhat in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of congress in their use." Wilcox vs. Jackson, 38 U. S. 418; Newhall vs. Sanger, 92 U. S. 76; see, also, State vs. Kennard, 56 Neb. 254, 78 N. W. 282; Rierson vs. St. Louis Co., 59 Kan. 32, 51 Pac. 901. The mining act of 1872, 17 Stats. 91, provided that "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." Rev. St. §§ 2318, 2319. Oklahoma vs. Texas, 258 U. S. 574. The object of these provisions was to promote the development of the mining resources of the United States. McKinley vs. Wheeler, 130 U. S. 630. Stanislaus Co., 41 L. D. 659.

[2] Newhall vs. Sanger, 92 U. S. 761; Minnesota vs. Hitchcock, 185 U. S. 391; Missouri vs. U. S., 235 U. S. 40; rev'g. 190 Fed. 491; Ash Co. vs. U. S., 252 U. S. 166; McFadden vs. Mt. View Co., *supra* [1]; U. S. vs. Blendauer, 128 Fed. 910; see 122 Fed. 703; Douglass vs. Rhodes, 280 Fed. 231.

Unsurveyed nonmineral lands are not "public lands" within the meaning of the law, so as to be subject to sale, entry, or disposal. Douglass vs. Rhodes, *supra* [2], unless embraced within a millsite location.

[3] Id. Lands originally public cease to be public when they have been entered at the land office. While the entry subsists of record the land entered thereby becomes segregated from the mass of public lands and takes the character of private property. Kendall vs. Bunnell, 56 Cal. A. 141, 205 Pac. 78; see, also, Hastings Co. vs. Whitney, 132 U. S. 361; Cowles vs. Huff, 24 L. D. 81, overruling 10 L. D. 221. § 2319 of the Rev. Stat., 5 U. S. Comp. St., p. 5414, § 4614, declares: "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase and the lands in which they are found to occupation and purchase," etc. This section is not as comprehensive as its words separately suggest. It is part of a chapter relating to mineral lands which in turn is a part of a title dealing with the survey and disposal of "The Public Lands." To be rightly understood it must be read with due regard for the entire statute of which it is but a part, and when this is done it is apparent that, while embracing only lands owned by the United States, it does not embrace all that are so owned. Of course, it has no application to the grounds about the Capitol in Washington or to the lands in the National Cemetery at Arlington, no matter what their mineral value; and yet both belong to the United States. And so of lands in the Yosemite National Park, the Yellowstone National Park, and the military reservations throughout the western states. Only where the United States has indicated that the lands are held for disposal under the land laws does this section apply; and it never applies when the United States directs that the disposal be only under other laws. Oklahoma vs. Texas, *supra* [1]; see, also, McNeil vs. Kingsbury, 190 Cal. 406, 213 Pac. 50.

The words "public lands" are not always used in the same sense. Their true meaning and effect are to be determined by the context within which they are used, and it is the duty of the court not to give such a meaning to the words as would destroy the object and purposes of the law or lead to absurd results. U. S. vs. Blendauer, *supra* [2]; Jackman vs. Atchison Co., 24 N. M. 278, 170 Pac. 1036.

[4] Pacific Coast Co. vs. N. P. R. Co., 25 L. D. 233; see, also, Deffeback vs. Hawke, 115 U. S. 392, affg. 4 Dak. 35, 22 N. W. 480; Alford vs. Barnum, 45 Cal. 482. The valuable mineral deposits mentioned in the statute are declared to be open to purchase, and are distinguished from the land within which they are found. Waterloo Co. vs. Doe, 82 Fed. 48; aff'g. 54 Fed. 935; *but see* St. Louis Co. vs. Montana Co., 113 Fed. 900. Title to mining claims in public domain remains in the government until patent and the locator's interest, until then, is merely a possessory right. Miller vs. Con. Royalty Oil Co., 23 Fed. (2d) 317.

who has complied with all the terms and conditions necessary to the securing of title to public lands acquires rights against the government which can not be divested by any subsequent withdrawal of said lands.[5]

§ 16. Taxation.

While title to land still is in the United States the land is not subject to taxation and a tax sale for taxes levied upon such land is void.[6]

§ 17. Reserved Areas.

The federal mining law declaring all valuable mineral deposits in lands belonging to the United States to be open to exploration and purchase[7] when read, as previously stated, with due regard to the entire title of the public lands of which it is a part, does not embrace all the lands owned by the United States, but only such lands as the United States has indicated are held for disposal under the land laws. It never applies where the United States directs the disposal be only

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[5] Payne vs. C. P. R. Co., 255 U. S. 228; aff'g. 46 App. D. C. 374, with a modification; Dailey Clay Co (on rehearing,) 48 L. D. 431.

[6] Secret Valley Co. vs. Perry, 187 Cal. 420, 202 Pac. 449; see, also, 11 Ann. Cas. 391. If a state tax is in point of fact levied upon the property right of the United States, it must be held void. Jaybird Co. vs. Weir, 271 U. S. 600; Gottstein vs. Adams, 202 Cal. 581, 262 Pac. 314; but if it is levied upon the property or the recognized right of the locator, and can be collected without affecting or embarrassing the title of the United States and property which belongs to the government, then there is no ground for interference with the processes of a state in its collection of the tax. Forbes vs. Gracey, 94 U. S. 763; see Burke vs. North, 12 Fed. (2d) 58. A valid subsisting mining location or an interest therein is subject to taxation by a state, though the title to the land on which such mining claim is located is in the United States and a part of the public lands. Elder vs. Wood, 208 U. S. 231, aff'g. 37 Colo. 174, 86 Pac. 319; see Arizona vs. Copper Queen Co., 233 U. S. 87, aff'g. 13 Ariz. 198, 108 Pac. 960. In other words, the possessory right to a mining claim and the product therefrom may be taxed and the lien be enforced by the sale of the right of possession. Bakersfield Co. vs. Kern County, 144 Cal. 148, 77 Pac. 892; Graciosa Co. vs. Santa Barbara Co., 155 Cal. 140, 99 Pac. 483. See Bishop vs. Jordan, 104 Cal. A. 319, 285 Pac. 1011. In Mohawk Oil Co. vs. Hopkins 196 Cal. 148, 235 Pac. 731, the court said: "A very essential difference exists between the land itself as the subject of taxation, and those possessory rights therein which obtain under oil leases * * * which permits a different and more drastic method for the collection of taxes under oil leases." The right of possession means the claim itself, that is, the right of possession of the land for mining purposes. The tax deed conveys merely such right without affecting the interest of the United States. Elder vs. Wood, *supra*. See Bowdre, 50 L. D. 486. See, also, Earhart vs. Powers, 17 Ariz. 57, 148 Pac. 288, wherein it is said that the land upon which an unpatented lode mining claim is located may not be taxed, for the title to the land is in the United States; but the right of possession of such a mining claim is property of great value and is distinct from the land itself, and therefore is subject to taxation. In such case the land upon which such mine is located is not assessed for taxes, but the claim itself, the right of possession of the land for mining purposes is the property that is assessed, and a state has the power to tax such interest in a mining claim and to enforce the collection of the tax by a sale. See Tallon vs. Vindicator Con. Co., 59 Colo. 316, 149 Pac. 108; Goldfield Con. Co. vs. Old Sandstorm Co., 36 Nev. 426, 150 Pac. 313; State vs. Donald, 161 Wis. 188, 153 N. W. 238. For a method of assessing mines and mining properties see Newport Co. vs. City, 185 Mich. 668, 152 N. W. 1088; Sunday Co. vs. Wakefield, 186 Mich., 626, 153, N. W. 14.

Usually real estate is taxed as a unit; but as different elements of the land are capable of being severed and separately owned, a statute may authorize a separate assessment against the owners of the several parts. Accordingly if the title has been severed land may be taxed to one or mineral or timber to another. Downman vs. Texas, 231 U. S. 357; also see Forbes vs. Gracey, *supra*; Graciosa Oil Co. vs. Santa Barbara Co., *supra*; Skelton, 81 Okla., 143, 197 Pac. 593. Murray vs. Allred, 100 Tenn. 100, 43 S. W. 355; De Moss vs. Sample, 143 La. 243, 78 So. 484; McGraw vs. Lakin, 67 W. Va. 385, 68 S. E. 27, and see Barnes vs. Bee, 138 Fed. 476; Brunson vs. Carter Oil Co., 259 Fed. 656; Con. Coal Co. vs. Baker, 135 Ill. 545, 26 N. E. 651; N. P. R. Co. vs. Mjelde, 48 Mont. 287, 137 Pac. 386. As to the taxation of oil and gas to the owner of the property prior to being reduced to possession, see Indian Territory Co., 43 Okla. 307, 142 Pac. 997, citing Kolachney vs. Galbreath, 26 Okla. 772, 110 Pac. 902.

By the California act of March 1, 1929, Stats. 1929, p. 19, it is provided that "in the case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion and for depreciation of improvements according to the peculiar conditions in each instance, such reasonable allowance in all cases to be made under the rules and regulations to be prescribed by the commissioner.

In the cases of leases the deduction shall be equitably apportioned between the lessor and the lessee.

under other laws,[8] or to land reserved by statute, or otherwise appropriated.[9]

The basis upon which depletion is to be allowed in respect of any property shall be as provided in §§ 113 and 114 of the said revenue act of 1928, or upon the basis provided in § 19 thereof.

45 Stats. 800; See Merle-Smith vs. Com. of Int. Rev., 42 Fed. (2d) 842. In this case the court said: "We agree with the Circuit Court of Appeals (294 F. 194) that: 'The plain, clear, and reasonable meaning of the statute seems to be that the reasonable allowance for depletion in case of a mine is to be made to every one whose property right and interest therein has been depleted by the extraction and disposition of the product thereof which has been mined and sold during the year for which the return and computation are made. And the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.' * * * The deduction for depletion in the case of mines is a special application of the general rule of the statute allowing a deduction for exhaustion of property. While respondent does not own the ore deposits, its right to mine and remove the ore and reduce it to possession and ownership is property within the meaning of the general provision. Obviously, as the process goes on, this property interest of the lessee in the mines is lessened from year to year, as the owner's property interest in the same mines is likewise lessened."

In the case of mines discovered by the taxpayer after February 28, 1913, the basis for depletion shall be the fair market value of the property at the date of discovery or within thirty days thereafter, if such mines were not acquired as the result of purchase of a proven tract or lease, and if the fair market value of the property is materially disproportionate to the cost. The depletion allowance based on discovery value provided in this paragraph shall not exceed fifty per centum of the net income of the taxpayer (computed without allowance for depletion) from the property upon which the discovery was made, except that in no case shall the depletion allowance be less than it would be if computed without reference to discovery value.

Discoveries shall include minerals in commercial quantities contained within a vein or deposit discovered in an existing mine or mining tract by the taxpayer after February 28, 1913, if the vein or deposit thus discovered was not merely the interrupted extension of a continuing commercial vein or deposit already known to exist, and if the discovered minerals are of sufficient value and quantity that they could be separately mined and marketed at a profit.

In the case of oil and gas wells the allowance for depletion shall be twenty-seven and one-half per centum of the gross income from the property during the taxable year. Such allowance shall not exceed fifty per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph." § 8*g*.

Ore when extracted or gold dust taken from a placer mining claim is subject to state taxation and sale for unpaid taxes. Forbes vs. Gracey, *supra;* McCarty's Estate, 3 Alaska 251.

Royalties received by lessors of a mine are subject to taxation. Lake Superior Mines vs. Lord, 270 U. S. 575.

Under a statute of Utah providing for taxation of the net proceeds of the annual product of mines and mining claims, it has been held that the proceeds of the treatment of tailings from a mine were of a product of the mine and taxable as such. Beaver County vs. South Utah Smelters, 17 Fed. (2d) 577, *certiorari* denied, 274 U. S. 1328. In Mammoth Co. vs. Juab County, 51 Utah 316, 170 Pac. 78, the net proceeds of ore placed in a dump were held to be taxable; the court said: "Nor does it make any difference whether the ores are obtained from the mine or from a dump, if in fact they were at some time taken from the mine." In South Utah Smelters vs. Beaver County, 262 U. S. 325, it was said that tailings, left as refuse from the concentration of ore derived from a mine long since worked out, and which were situate on land remote from the mine and had an ascertained and adjudged value of their own, constituted a unit of property entirely apart from the mine and subject to taxation upon their value, but not as a mine, since that implies something capable of being mined which this loose and homogenous deposit obviously was not.

In the case of Nephi Co. vs. Juab County, 33 Utah 114, 93 P. 53, the question was whether the manufactured products of gypsum extracted from placer mining claims should be taxed upon the basis of the net annual proceeds derived therefrom when sold on the market as net products of the mine or as personal property, and it was held that such manufactured articles were products of a mine, and only such net proceeds could be taxed.

In U. S. vs. Hurst, 2 Fed. (2) 73, it was held that the possessory right of a mining locator was in the nature of a gift from the government, and would be treated as such so far as income tax was concerned and would be exempt.

See § 591.

[7] West vs. Work, 11 Fed. (2d) 828.

[8] Oklahoma vs. Texas, *supra* [1]; West vs. Work, *supra* [7]; Reed, 50 L. D. 687. See City vs. Whittaker, 12 S. Dak. 522, 81 N. W. 908.

[9] Lands which have been appropriated or reserved for a lawful purpose are not public, and are to be regarded as impliedly excepted from subsequent laws, grants and disposals which do not specially disclose a purpose to include them. U. S. vs. Minnesota, 270 U. S. 182. Under the provisions of the act of June 30, 1919, no public lands in the United States shall be withdrawn except by act of Congress. 2 Supp. Comp. St., p. 1358, § 4529*b*.

§ 18. Military Reservations.

Mineral lands within a subsisting military reservation are not open to location,[10] but valid mining claims, located previously to its establishment, are not affected thereby;[11] and, necessarily, carry all rights and privileges incident to such proprietorship, including the right to appropriate surplus water, for mining purposes.[12]

§ 19. Reopen to Location.

Upon the reduction or abandonment of a military reservation the mineral deposits therein become subject to mineral location and entry.[13]

§ 20. Indian Lands.

A valid mining location can not be made upon a portion of the public domain withdrawn from entry for all purposes under an Indian treaty.[14] But a person in possession of a valid subsisting location at the time of the withdrawal may hold the claim with the right to pass over the reservation and to mine the claim.[15]

§ 21. Relocation of Indian Lands.

Such claims may be subject to relocation as provided by the mining law.[16]

§ 22. Location After Withdrawal.

A person in possession of a mining claim, on the withdrawal of a reservation under an Indian treaty, who has the requisite discovery, with surface boundaries marked, and notice of location posted, can, by adopting what has been done and causing a proper record to be made, and performing the assessment work, hold the claim and date his rights from the day of such withdrawal.[17]

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[10] Scott vs. Carew, 196 U. S. 100; Behrends vs. Goldstein, 1 Alaska 518.

[11] Fort Maginnis, 1 L. D. 552; see Piru Oil Co., 16 L. D. 119.

[12] Krall vs. U. S., 79 Fed. 241; distinguished in 174 U. S. 385.

[13] 6 Fed. St. Ann. 423.

[14] Buttz vs. N. P. R. Co., 119 U. S. 55; Kendall vs. San Juan Co., 144 U. S. 658, citing and dist'g. Noonan vs. Caledonia Co., 121 U. S. 593, and aff'g. 9 Colo. 349, 12 Pac. 198; see Spalding vs. Chandler, 160 U. S. 394; McFadden vs. Mt. View Co., *supra* [(1)]; Gibson vs. Anderson, 131 Fed. 39; Acme Co., 31 L. D. 129; *compare* King vs. McAndrews, 111 Fed. 860; Bay vs. Oklahoma Co., 13 Okla. 425, 73 Pac. 936. Lands within the limits of an Indian reservation are excluded from disposal of and are exempt from all congressional legislation unless there is an express declaration therein to the contrary. Leavenworth Co. vs. U. S., 92 U. S. 733; see Collins vs. Bubb, 73 Fed. 735; U. S. vs. Four Bottles, 90 Fed. 720; Navajo Indian Res., 30 L. D. 515; U. S. vs. Portneuf-Marsh Co., 213 Fed. 601, aff'g. 205 Fed. 416; see 230 Fed. 328, 343. Indian Appropriations Act of March 3, 1891, 26 Stats. 1026, provided: "All lands in Oklahoma are hereby declared to be agricultural lands, and proof of their nonmineral character shall not be required as a condition precedent to final entry." See West vs. Work, *supra* [(7)]; also, see 2 U. S. Comp. St. p. 2092, § 5027. For regulations governing prospecting for and mining of metalliferous minerals upon unallotted lands of Indian reservations and form of lease, bond, etc., see 47 L. D. 262; 49 L. D. 420, 421, 424.

[15] Navajo Indian Res., *supra* [(14)]; see Kinney, 44 L. D. 580; Hibberd vs. Slack, 84 Fed. 571.

[16] Navajo Indian Res., *supra* [(14)].

[17] Noonan vs. Caledonia Co., *supra* [(14)]; Jones vs. Wild Goose Co., 177 Fed. 98; Bay vs. Oklahoma Co., *supra* [(14)]; LeClair vs. Hawley, 18 Wyo. 23, 102 Pac. 853.

§ 23. Indian Leases.

An Indian may execute a valid lease for mining purposes,[18] subject to approval by the Secretary of the Interior.[19]

§ 24. Cancellation of Lease.

If any contract or lease made by an Indian allottee is in violation of the conditions of limitations imposed by acts of congress, under which the allottee has taken his allotment, then the United States has such an interest as entitle them to maintain an action to cancel.[20]

§ 24a. Extension of Lease Rights.

Recent congressional legislation provides for leases for mining purposes of lands reserved for Indian agency and school purposes,[20a] and of metalliferous and nonmetalliferous mines on withdrawn unalloted reservation lands.[20b]

§ 25. Mexican Grants.

A mining location may be made within the limits of an unconfirmed Mexican grant, but its locators must take the chance of the confirmation of the grant, or the exclusion of their claim from its boundaries.[21]

§ 26. National Parks.

Mineral lands within the confines of a national park are not subject to mining location, unless provided for in the act creating them.[22]

§ 27. National Monuments.

Under the provisions of the act of June 8, 1906, the President is authorized, in his discretion, to declare by public proclamation, historic land marks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the government of the United States to be national monuments.[23]

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[18] See McBride vs. Farrington, 131 Fed. 862; U. S. vs. Abrams, 181 Fed. 852; U. S. vs. Noble, 197 Fed. 295; Tidwell vs. Dobson, 37 Okla. 181, 131 Pac. 693. As to overlapping leases, see U. S. vs. Noble, *supra*. As to oil and gas leases by Indians, see Shulthis vs. McDougal, 170 Fed. 536. As to oil and gas leases and permits under the provisions of the "Leasing Act," § 13, see Harrison, 49 L. D. 139; Instructions, 50 L. D. 238. See, generally, Morrison vs. Fall, 290 Fed. 306.

[19] U. S. vs. McMurray, 181 Fed 728; Anchor Oil Co. vs. Gray, 257 Fed. 280. For effect of lease by minor, approved by court, see Jennings vs. Wood, 192 Fed. 509. For an instance of void Indian leases, see Eagle-Picher Co. vs. Fullerton, 28 Fed. (2d) 472. See, generally, Wilbur vs. Krushnic, 280 U. S. 306 aff'g. 30 Fed (2d) 742.

[20] U. S. vs. Abrams, *supra* [18].

[20a] 44 Stats. p. 301.

[20b] 44 Stats. p. 922. For procedure for obtaining oil and gas leases for unallotted lands within executive order, Indian reservations under act March 3, 1927, 44 Stats. 1347, see Instructions, 52 L. D. 55, and note.

See Regulations, 51 L. D. 647. See, generally, 1 Mason's U. S. Code, p. 1424, § 391. As to sale of timber on unallotted lands, see 1 Mason's U. S. Code, p. 1429, § 407.

[21] Lockhart vs. Wills, 9 N. M. 344, 54 Pac. 336, aff'd. 181 U. S. 516; see Lane vs. Watts, 234 U. S. 525, aff'g. 41 App. D. C. 139, 235; Watts vs. Ely Co., 254 Fed. 862. Lockhart vs. Leeds, 10 N. M. 568, 63 Pac. 48. For confirmation of Mexican grant by act of Congress, see Reilly vs. Shipman, 266 Fed. 852, distinguished in 254 U. S. 614; Yeast vs. Price, 299 Fed. 598; and see U. S. vs. Caster, 271 Fed. 619. See, generally, 1 Lindl. Mines (3d ed.), § 113 *et seq.*

[22] See U. S. Comp. St. 1925, p. 357, § 5196, *et seq.* Id., p. 363, § 5249*v*; 8 Fed. St. Ann., p. 959; Supp. Fed. St. Ann. 1919, p. 329; Fed. St. Ann. 1926, p. 213. As to rights of way in national parks, forests, military or Indian reservations, see Id., p. 362, § 5249*xx*, 8 Fed. St. Ann. p. 811; U. S. vs. Portneuf-Marsh Co., *supra* [14].

[23] 5 U. S. Comp. St., p. 6169, § 5279. See, also, 52 L. D. 150. As to the establishment of a National Monument in Riverside County, California, see 2 Supp. U. S. Comp. St., p. 1452, § 5281*b*.

§ 28. Dominant Reserve.

A national monument may be created within the limits of a forest reserve, but, in so far as both embrace the same land, the monument reserve becomes the dominant one.[24]

§ 29. Mineral Lands Withdrawn.

Land within a monument reserve is withdrawn from the operation of the mining laws, except as to valid mining locations made prior to the creation of such a reserve.[25]

§ 30. National Forests.

Forest reserves, the name of which was changed to that of national forests in 1907,[26] are maintained to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose nor intent of these provisions of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.[27]

§ 31. Department of the Interior.

The Department of the Interior is vested with jurisdiction to convey the title to lands within a national forest and to grant easements running with the land.[28] That department has full authority, of its own motion or at the instance of others, to inquire into the validity of mining locations within national forest and other government reserves. If the locations be found to be invalid, the lands covered thereby will be administered as part of the public domain, subject to the reservation purposes, without regard to the mining location.[29] Instances in which this power has been exercised in respect to mining locations are shown in the Yard Case,[30] the Nichols Case,[31] and the Grand Canyon Case.[32] Instances in which its exercise has received judicial sanction are found in the Lane Case,[33] the Cameron-Bass Case,[34] and in the Cameron Case;[35] an instance in which its existence received substantial, if not decisive

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[24] Cameron vs. U. S., 252 U. S. 450, aff'g. 250 Fed. 943; see Grand Canyon Co. vs. Cameron, 36 L. D. 66.

[25] Cameron vs. U. S., *supra* (24).

[26] 5 U. S. Comp. St., p. 6077, § 5122; Walker vs. Kingsbury, 36 Cal. A. 617, 173 Pac. 95.

[27] 5 U. S. Comp. St., p. 6079, § 5125; U. S. vs. Grimaud, 220 U. S. 515; U. S. vs. Southern Power Co., 31 Fed. (2d) 856; Sawyer vs. U. S., 10 Fed. (2d) 420; see U. S. vs. Homestake Co., 117 Fed. 481; U. S. vs. Shannon, 151 Fed. 863, aff'd. in 160 Fed. 870; *Ex parte* Hyde, 190 Fed. 213. It has been held that congress in the exercise of its control of the property of the United States could constitutionally enact the act of March 3, 1891, 26 Stats. 1095, 1103, under which public forest reservations may be established upon the public domain without the consent of the state wherein the land lies; and that congress may authorize an executive officer to make rules and regulations as to the use, occupancy, and preservation of forests, and that such authority so granted is not unconstitutional as a delegation of legislative power. U. S. vs. Grimaud, *supra*. Light vs. U. S., 220 U. S. 523; Opinion, 52 L. D. 152.

[28] 32 L. D. 609; see U. S. vs. Grimaud, *supra* (27).

[29] Yard, 38 L. D. 59, reaff'd. 46 L. D. 20; see Crowley, 46 L. D. 178; Independent Co. vs. Levelle, 47 L. D. 169.

[30] See *supra*, note 29.

[31] Id.

[32] Grand Canyon Co. vs. Cameron, *supra* (24).

[33] 45 App. D. C. 404.

[34] 19 Ariz. 246, 168 Pac. 645.

[35] Cameron vs. U. S., *supra* (24).

recognition by the Supreme Court of the United States is found in the Clipper-Eli Case.[36]

§ 32. Department of Agriculture.

The Department of Agriculture is vested with the management and regulation of the national forests. That department is authorized to make such rules and regulations and establish such service as will insure the objects of such reservations.[37] The rules and regulations so promulgated are embraced in what is known as the "Use Book."[38] Persons entering upon forest reservations for the purpose of prospecting, locating, and developing the mineral resources thereof must comply with such rules and regulations; the power to make which has been upheld.[39]

§ 33. Character of Land Within National Forests.

Lands within a national forest are considered to be mineral or nonmineral according to the use for which they are more valuable.[40] Mere discovery of mineral deposits having no appreciable commercial value is insufficient to constitute a valid location.[41]

The discovery should be such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine. This is not a novel nor mistaken test; it is one which the land department long has applied and the Supreme Court of the United States has approved.[42]

The land department has jurisdiction on application for a patent for a mining claim to decide as to whether or not a location is nonmineral, although after location the land was taken into a national forest.[43]

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[36] 194 U. S. 220, 223, 234; see, also, Cameron vs. U. S., *supra* [24]; Watterson vs. Cruse, 179 Cal. 383, 176 Pac. 872.

[37] Mason's U. S. Code, p. 903, § 551; U. S. vs. Grimaud, *supra* [27]; U. S. vs. Deasy, 24 Fed. (2d) 108; McFall vs. Arkoosh, 37 Ida. 243, 215 Pac. 978.

[38] Use Book.

[39] U. S. vs. Grimaud, *supra* [27]; Light vs. U. S., 206 Fed. 755; *but see* U. S. vs. Deasy, *supra*.[37]

[40] Cosmos Co. vs. Gray Eagle Co., 104 Fed. 20, aff'd. 112 Fed. 4, aff'd. 190 U. S. 301; see U. S. vs. Lavenson, 206 Fed. 755.

[41] U. S. vs. Lavenson, *supra* [40]. In U. S. vs. Lavenson an application for a patent was made for a group of lode claims lying along a river within a forest reservation. An examination of the claims was made by the superintendent of the forest reserve, an acting forest ranger and the Washington state geologist. The report of the latter officer was to the effect that the claims contained very little ore and were of no commercial value for mining purposes; the assays ranging from forty cents to eighty cents a ton. That said claims were very valuable for the water power thereon. Three weeks after the filing of the adverse report patent issued to the applicant. The United States brought suit to have the patent canceled. It appeared that no hearing was had upon the protest of the forester, probably because it erroneously stated that no patent for the claims to which it related had been applied for. It was held that, if the facts on which it was based were established, they would constitute ground for refusing a patent, and that whether it was not considered through inadvertence, or whether, through mistake of law, it was deemed insufficient, the United States was entitled to a cancellation of the patent, that such questions of fact might be considered and determined by the land department. See Cameron vs. U. S., *supra* [24]; Chrisman vs. Miller, 197 U. S. 313, aff'g. 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444; *but see* U. S. vs. Deasy, *supra* [37].

[42] Cameron vs. U. S., *supra* [24].

[43] Chrisman vs. Miller, *supra* [41]; Cameron vs. U. S., *supra* [24]; see, also, U. S. vs. Lavenson, *supra* [40]. In U. S. vs. Schultz, 31 Fed. (2d) 764, the court said: "The complaint alleges that without right defendants occupy with buildings and possess certain premises of a national forest, and the prayer is injunction to prevent. The answer questions the equity jurisdiction, alleges rightful occupancy and possession by virtue of lodes mining locations, and that the character of the land can not be investigated or determined save by proceedings in the land department.

The purpresture and public nuisance alleged invoke equity jurisdiction. U. S. vs. Hodges (D. C.) 218 F. 87.

To their contention that this court is without jurisdiction to hear and determine the character of the land, and that to that end plaintiff must proceed in the land

§ 34. Fraudulent Patent.

A patent procured for land within a national forest on the representation that such land was valuable for mineral deposits and that patentee desired it for that purpose may be cancelled at a suit on behalf of the United States, where it is made to appear that the land was not in fact valuable for its mineral deposits and that it was not the purpose of the patentee to use it for its mineral deposits, but for other and different purposes, and where there was no examination by personal investigation.[44]

§ 35. Mining Locations Within National Forests.

Mineral lands within national forests are subject to location and entry under the general mining laws in the usual manner[45] subject to the jurisdiction of the Forestry Service.[46] A mining claimant may, possibly, have no right to use any part of the surface of his unpatented location for other than mining purposes without a permit.[47] A valid location carries with it the right to fell and remove timber therefrom when used for actual mining purposes in connection with such claims.[48]

§ 36. Mill-sites Within National Forests.

Mill-site locations may be made within a national forest.[49]

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department, defendants cite Cameron vs. U. S., 252 U. S. 454, 40 S. Ct. 410, 64 L. Ed. 659. Therein are general expressions supporting defendants, but more or less dicta and not believed to close the courts to plaintiff in endeavor to abate nuisance upon its lands, to remove clouds, or to quiet title. The decision in the Cameron case is that upon application for patent for a lode claim, the land department has exclusive jurisdiction to hear and determine whether patent is due, and that its decisions of issues of fact, when unaffected by fraud or mistake, are conclusive in any court proceedings to enforce them.

The courts are always open to private litigants to determine possessory rights in public land. Gauthier vs. Morrison, 232 U. S. 461, 34 S. Ct. 384, 58 L. Ed. 680. Not to determine title, however, because they have not title. But the United States having title, the tribunals are always open to it to vindicate its rights therein, either that of the land department or that of the courts, at its election if proceedings are initiated by it. See U. S. vs. Sherman (C. C. A.) 288 F. 497. The obvious reason why private parties can not litigate title failing in respect to the United States, the rule limiting the former also fails. In general, the courts are open to the United States, and no statute closes them to it in matters of public land other than transfer of title. Unlike Cameron's Case, defendants have not applied for patent, and the United States institutes the instant proceedings. Of the evidence, it is so clear that the lands are not proven to be mineral in character, so clear that defendants' locations are void, within the rule of Cameron's Case (see also U. S. vs. Northern, etc., Co. (D. C.), 1 F (2d) 53), it suffices to say so."

[44] U. S. vs. Lavenson, *supra* (40).

[45] U. S. vs. Grimaud, *supra* (27). Circular, 30 L. D. 23. The rights of the locator of a mining claim within the boundaries of a forest reserve are substantially those of one who locates such claim upon the public domain, and gives the locator the right of "exclusive possession and enjoyment of all the surface of their locations." His rights of enjoyment, including the surface of his claim, are not qualified, nor can they be infringed upon by including the claim within a forest reserve. U. S. vs. Deasy, *supra* (37).

Where a state law provides that if a mining location is made in whole or in part upon abandoned mining property, the notice of location shall so state; such notice failing to contain such statement gives no rights against one in possession under a permit from the Department of Forestry. Fisher vs. Jackson, 120 Wash. 107, 206 Pac. 929.

[46] 7 Fed. St. Ann., p. 314.

[47] U. S. vs. Rizzinelli, 182 Fed. 675; see Teller vs. U. S., 113 Fed. 281; *but see* U. S. vs. Deasy, *supra* (37).

[48] Circular, 30 L. D. 28. "Where locators of mining claims on public lands under 30 U. S. C. A. § 36, have initiated claims in good faith and complied with the spirit of law, their rights will be protected, not only to extract ore from claims, but also to use of timber growing thereon in development, against any act or attempt on the part of the United States to deprive them of such use of timber." U. S. vs. Deasy, *supra* (37).

[49] Alaska Co., 43 L. D. 257; Nichol, 44 L. D. 197; Use Book. The land department has ample authority to entertain adverse proceedings to determine the validity of an asserted mill-site claim within a national forest before application for patent is filed. Crowley, 46 L. D. 178.

§ 37. Use of Water Within National Forest.

The act of 1897 [50] provided that all waters on forest reservations may be used for domestic, mining and milling purposes under the laws of the state wherein such national forests are situated, or under the laws of the United States and the rules and regulations thereunder.[51] A patent for a mining claim which is situate within a national forest, and which is without "pay ore" but is of great value for water purposes is subject to cancellation.[52]

§ 38. Rights of Way Within National Forest.

Rights of way within and across the national forests for mining purposes are subject to departmental regulation.[53]

§ 39. Use of Timber and Stone Within National Forest.

The Secretary of the Interior may permit, under regulations prescribed by him, the use of timber and stone found upon national forests, free of charge, by bona fide miners and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, such timber to be used within the state or territory, respectively, where such reservations may be located.[54]

§ 40. Sale of Timber on Mining Claims.

When unpatented mining claims are within a national forest, timber thereon which is dead, matured, and infested with insects so as to be a menace to the young and growing trees, may be sold by the Forest Service under regulations.[55]

§ 41. Restoration to Public Domain.

Where land within a national forest is found better adapted for mining than for forest usage it may be restored to the public domain.[56]

§ 42. Temporary Forest Reserves.

A "temporary forest reserve" is where lands are temporarily withdrawn from entry pending further examination as to their adaptability for inclusion within a definite forest reserve.[57]

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[50] 5 U. S. Comp. St., p. 6084, § 5132. The term "milling" as used in the act of 1897 has been said to be the equivalent of the term "manufacturing" and includes the generation of electric power. Lamborn vs. Bell, 18 Colo. 346, 32 Pac. 989; Denver Co. vs. Denver Co., 30 Colo. 204, 69 Pac. 568; Lucas vs. Ashland Co., 92 Neb. 550, 138 N. W. 761; *but see* 30 Opinions Atty. Gen. 263, construing the act of February 1, 1905, 33 Stats. 628; cited approvingly in Utah Co. vs. U. S., 243 U. S. 389, 408; Whitmore vs. Pleasant Valley Co., 27 Utah 284, 75 Pac. 748.

[51] Id. The appropriation of water for beneficial uses is under the exclusive control of the state. Kansas vs. Colorado, 206 U. S. 99; Hudson Co. vs. McCarter, 209 U. S. 349; Dunne vs. Economy Co., 234 U. S. 497.

[52] U. S. vs. Lavenson, *supra* [40].

[53] See act of February 1, 1905, 33 Stats. 628; 36 L. D. 567; 43 L. D. 448; Use Book; see Mt. Power Co. vs. Newman, 31 L. D. 360; Northern California Co., 37 L. D. 80.

See, also, U. S. Comp. St. 1925, p. 362, § 5249*xx*. A railroad right of way over and across a mining claim as a part of a national forest was superior to the right of a mining claimant who held his mining claim until the land was opened and who then made application and obtained a patent under the homestead law. Van Dyke vs. Arizona Co., 248 U. S. 52.

[54] 5 U. S. Comp. St., p. 6082, § 5128; White, 34 L. D. 81, see City and County, 34 L. D. 113.

[55] 5 U. S. Comp. St., p. 6081, § 5127; Lewis vs. Garlock, 168 Fed. 153.

[56] 5 U. S. Comp. St., p. 6084, § 5133; see U. S. vs. Lavenson, *supra* [40]; see, also, Meyers vs. Pratt, 255 Fed. 766. See U. S. vs. Deasy, *supra* [37].

[57] 28 Opinion Atty. Gen. 424, 522. In Walker vs. Kingsbury, *supra* [26], the court declined to put an interpretation on the terms "national forests" which would restrict their meaning to "permanent reservations" and "temporary reservations." The court said: "We have seen that in applying existing statutes, the courts make no such distinction."

§ 43. Weeks Law.

The Secretary of Agriculture is authorized, under general regulations prescribed by him to permit the prospecting, development and utilization of the mineral resources of the lands acquired under the Weeks law.[58]

§ 44. Townsites.

Townsite entries may be made by incorporated towns and cities on the mineral lands of the United States or, if not incorporated, by the judge of the proper county court, in trust; but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper or lead, or to any known mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof and when entry has been made or patent issued for such townsites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto; *provided,* that no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein claimant.[59]

§ 45. Mineral Character of Land Within Townsites.

No relief is afforded to a mineral claimant where he fails to show a valid discovery of mineral and where he has not made a valid location under the mining laws, and was not, in fact, possessed of a mineral

[58] 5 U. S. Comp. St., p. 6103, § 5187*a*. The "Weeks Law" constitutes "An act to enable any state to cooperate with any other state or states, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands * * *." See 5 U. S. Comp. St., p. 6099, § 5174, and also authorizes acquisition of lands by the government for forestry purposes. U. S. vs. Southern Power Co., *supra* (27). For condemnation proceedings see above case.

[59] 5 U. S. Comp. St., p. 5821, § 4799; Clark vs. Jones 30 Ariz. 535; 249 Pac. 551. See Deffebaek vs. Hawke, *supra* (9); Davis vs. Weibbold, 139 U. S. 517, rev'g. 7 Mont. 107, 14 Pac. 865; Golden vs. Murphy, 31 Nev. 408, 103 Pac. 394, 105 Pac. 99; and see Emerson vs. Kennedy Co., 169 Cal. 718, 147 Pac. 939. Townsites may be located upon mineral lands, but the townsite claimant will hold his claims subject to the rights of the mineral claimant. Esler vs. Townsite, 4 L. D. 212; see Ivanhoe Co. vs. Keystone Co., 102 U. S. 167; Steel vs. St. Louis Co., 106 U. S. 447. Where mineral veins are in the possession of a locator whose possession is recognized by local authority, the title to townsites shall be subject to such recognized possession and the necessary use thereof. Golden Center Co., 47 L. D. 27. A placer claim may be used as a townsite. Schwab vs. Beam, 86 Fed. 41; see St. Louis Co. vs. Kemp, 104 U. S. 636. For a case involving conflict between a lessee of oil mining rights and a townsite claimant, see Kinney-Costal Co. vs. Kieffer, 1 Fed. (2d) 795. For laws and regulations relating to townsites reserved by the president of the United States see 52 L. D. 106; for townsites platted by or for occupants see Id. 108; for townsites entered by trustees see Id. 113; for additional entries see Id. 114; for townsites in reclamation projects see Id. 117; for grants of land in reclamation townsites for school purposes see Id. 120; for townsites in former Indian reservations in Oklahoma see Id. 122; for townsites in former Indian reservations in Minnesota see Id. 125; for townsites in former Indian reservations in states other than Oklahoma and Minnesota see Id. 125; for townsites on mineral lands see Id. 126; for county seat townsites see Id. 128; for limits of reservations for townsites see Id. 129; for lands not subject to townsite reservations or entry see Id. 129; for rights of transferees of town lots see Id. 130; for townsites in Alaska see Id. 130; for acquisition or holdings of town lots in the territories by aliens see Id. 131.

See § 1, Subd. C.

vein, and he can not restrain a townsite claimant from interfering with or trespassing upon a pretended mining claim.[60]

§ 46. Mining Locations Permitted.

Land embraced within a townsite on the public domain and unoccupied is not exempt from location as a mining claim.[61]. But no title can be acquired to a millsite located in connection with a mining claim.[62]

§ 47. Priority of Location.

In the case of a conflict between a mineral location and a townsite patent the one which vests the title will prevail.[63]

§ 48. Mineral Patents.

An applicant for a mineral patent for lands embraced within a townsite must show that the lands were known to be mineral prior to entry and issuance of the townsite patent.[64] A person seeking to obtain patent for a mining claim on a townsite in the possession of another must show he has a better right to the land than the one in possession.[65]

§ 49. Townsite Patents.

A townsite patent when issued, will not operate to convey title to any lands known to be valuable for minerals at the date of the townsite entry. The patent will not affect any rights, present or prospective,

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[60] Regan vs. Whittaker, 14 S. Dak. 382, 85 N. W. 863. The mere existence of the location of a mining claim is not of itself evidence of the mineral character of land as against a subsequent townsite entry. Harkrader vs. Goldstein, 31 L. D. 89; see Magruder vs. Oregon Co., 28 L. D. 174; Elda Co., 29 L. D. 279. Deposits not known to be of such extent and value as to justify expenditures for the purpose of extracting them at the time of the townsite entry will not pass thereunder. Davis vs. Weibbold, *supra* [59]; Dower vs. Richards, 151 U. S. 658, aff'g. 81 Cal. 44, 22 Pac. 304; see South Butte Co. vs. Thomas, 260 Fed. 814, rev'g. 211 Fed. 105, *certiorari* denied, 253 U. S. 486. A location will not be held to be a valid mining claim and possession where its claimant has had ample time and opportunity to show the mineral value of the land and has failed to do so. Brophy vs. O'Hare, 34 L. D. 596. While a mine must be known to be such at the time of the townsite entry, although not in the possession of any person. Callahan vs. James, 141 Cal. 291, 74 Pac. 853, yet the possession of a mining claim upon which exploitation has been abandoned as unprofitable, Richards vs. Dower, *supra;* see, also, Callahan vs. James, *supra,* or mere indications of mineral before entry, Harkrader vs. Goldstein, *supra, but see* Goldsteen vs. Juneau Townsite, 23 L. D. 417; Discovery Placer vs. Murray, 25 L. D. 460, will not defeat the townsite patent. Discovery subsequent to the townsite patent is unavailing. Dower vs. Richards, *supra;* Tombstone Townsite Cases, 2 Ariz. 272, 15 Pac. 26; Clark vs. Jones, *supra* [59]; see, also, Davis vs. Weibbold, *supra;* Clark, 52 L. D. 426; Smith vs. Hill, 89 Cal. 122, 26 Pac. 644.

[61] Steel vs. St. Louis Co., *supra* [59]; Davis vs. Weibbold, *supra* [59]; Richards vs. Dower, *supra* [60]; Hawke vs. Deffeback, 4 Dak. 35, 22 N. W. 480, aff'd 115 U. S. 392; Silver Bow Co. vs. Clark, 5 Mont. 516, 5 Pac. 570; see Rankin, 7 L. D. 411; Ferrell vs. Hoge, 18 L. D. 81; see, also, Larned vs. Jenkins, 113 Fed. 636; Goldstein vs. Juneau Townsite, *supra* [60].

Where mining ground did not pass under a townsite patent the locator is entitled to extralateral rights and a reservation in the townsite patent is in accordance with the provisions of the townsite act. Golden vs. Murphy, *supra* [59]. The possessory right to the mining claim may be lost by default or laches. Emerson vs. Kennedy Co., *supra* [59]; Horsky vs. Moran, 21 Mont. 345, 53 Pac. 1064, dis. 178 U. S. 205, for want of jurisdiction.

[62] Deffeback vs. Hawke, *supra* [4]; Davis vs. Weibbold, *supra* [53]; Cleary vs. Skiffich, 28 Colo. 369; 65 Pac. 59; see Dughi vs. Harkins, 2 L. D. 721; Esler vs. Townsite, *supra* [59]; Hartman vs. Smith, 7 Mont. 19, 14 Pac. 648.

[63] Tombstone Townsite, *supra* [60]; Blackmore vs. Reilly, 2 Ariz., 442, 17 Pac. 72; see, also, St. Paul Co. vs. N. P. R. Co., 139 U. S. 1; N. P. R. Co. vs. Barden, 46 Fed. 608, aff'd. 154 U. S. 286; Silver Bow Co. vs. Clark, *supra* [61]; Talbot vs. King, 6 Mont. 76, 9 Pac. 434.

[64] Laney, 9 L. D. 33; Clark, *supra* [60]; Clark vs. Jones, *supra* [59].

[65] Banner vs. Meikle, 82 Fed. 700; Clark *supra* [60]. In this case it was said "that the findings of the department" that the claimants had made no discovery of mineral on the claim "is conclusive as to the status of the claim"; citing Clark vs. Jones, 30 Ariz. 535, 249 Pac. 551, which case cites Cameron vs. U. S., 252 U. S. 450. See Cook vs. Johnson, 3 Alaska 532.

possessory or otherwise, which locators may acquire under the provisions of the mining laws. They subsequently may apply for and receive patent under such laws for any or all lands claimed by them within the townsite which they can show were known to be valuable for minerals at the date of the entry the same as if the townsite patent had not been issued. The law preserves to them all rights acquired under the mining laws prior to such townsite entry.[66] But where a townsite patent regularly is issued the presumption must be indulged as against a subsequent mineral patent, that the land at the time of the issuance of the townsite patent did not contain any known mines and was not valuable for mineral; and in a contest between the townsite patentee and the subsequent mineral patentee the former may prove that the land was not known to be valuable for minerals at the date of the issuance of the patent, to rebut any presumption arising solely from the fact of issue of the mineral patent.[67] In case of a contest between a mineral claimant and a person holding a townsite patent, in order to except mineral lands from such a patent such lands must be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting such mineral, and the fact that they had once been valuable, or subsequently had been discovered to be so valuable, does not impair the townsite patent.[68]

§ 50. Effect of Townsite Patent.

A townsite patent, when issued, will not deprive a person of any right existing at the date of the townsite entry under any valid mining claim or possession within the patented area, as all such rights are protected; nor does the townsite patent deprive the department of jurisdiction to issue patent for such mining claims as the statute expressly authorizes the issuance of such patents[69] at any time notwithstanding a townsite entry, or the issuance of a townsite patent.[70]

§ 51. Remedies.

A mineral claimant to the extent that his interest is interfered with by the townsite patent can maintain a suit to remove a cloud from or to quiet title to his mining claim, but he can not maintain a suit to cancel a patent issued for a townsite. The patent can be assailed only in a direct proceeding by the government.[71]

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[66] Lalande vs. Townsite, 32 L. D. 211; see Pacific Slope Lode, 12 L. D. 686; and see Dower vs. Richards, *supra* (60). A townsite entry and patent do not carry title to any mine of gold, silver, cinnabar or copper, nor to any valid mining claim or possession held under existing law. Callahan vs. James, *supra* (60). The time when the character of the land within a claimed townsite is to be determined is when application to enter is made. Lockwitz vs Larson, 16 Utah 275, 52 Pac. 279; Clark vs. Jones, *supra* (59).

[67] Davis vs. Weibbold, *supra* (59); Dower vs. Richards, *supra* (60); Kansas City Co. vs. Clay, 3 Ariz. 332, 29 Pac. 9; Casey vs. Thieviege, 19 Mont. 353, 48 Pac. 934; Clark, *supra* (59).

[68] Deffeback vs. Hawke, *supra* (1); Davis vs. Weibbold, *supra* (59); Dower vs. Richards, *supra* (60); Bonner vs. Meikle, *supra* (65); Lalande vs. Townsite, *supra* (66); Madison vs. Octave Oil Co., 154 Cal. 772, 154 Pac. 768.

[69] Hulings vs. Ward Townsite, 29 L. D. 21; Nome & Sinook Co. vs. Townsite, 34

[70] Nome & Sinook Co. vs. Townsite, *supra* (69); see Telluride Townsite, 33 L. D. 542. L. D. 102; Lalande vs. Townsite, *supra* (66); Clark, *supra* (59); Brophy vs. O'Hare, *supra* (60).

Adverse suits are not necessary between mineral and townsite claimants. Lelande ve. Townsite, *supra*; Wright vs. Town, 13 Wyo. 497, 81 Pac. 649; see Young vs. Goldsteen, 97 Fed. 303.

[71] Carter vs. Thompson, 65 Fed. 329; Board vs. Mansfield, 17 S. Dak. 72, 95 N. W. 286; see Van Ness vs. Rooney, 160 Cal. 131, 116 Pac. 392.

§ 52. No Compensation for Improvements.

Land within the limits of a townsite entry which was known to be valuable for mineral, and found to be mineral in character, leaves townsite settlers on such lands without legal or equitable rights, and they are not entitled to compensation for their improvements under local statutes.[72]

§ 53. Homesteads.

Lands containing known valuable mineral deposits are not subject to homestead entry.[73]

§ 54. Possession.

The homestead entryman is entitled to exclusive possession as against all adverse claimants except one having a valid, prior, equal, or superior right. A person qualified to make a mining location and having a valid prior location has such a right of possession as against the homestead entryman. But prior to the Stock-Raising Law, a contest-

[72] Deffeback vs. Hawke, *supra* (4); Sparks vs. Pierce, 115 U. S. 413; Hawke, 5 L. D. 131.

[73] 5 U. S. Comp. St., p. 5333, § 4530; Deffebach vs. Hawke, *supra* (4); Diamond Coal Co. vs. U. S., 233 U. S. 236, aff'g. 191 Fed. 786, and cases therein cited; see, also, Sterns vs. U. S., 152 Fed. 900; Leonard vs. Lennox, 181 Fed. 760; Filcher vs. U. S., 7 Fed. (2d) 519; Jameson vs. James, 155 Cal. 275, 100 Pac. 700.

Under the homestead law, 5 U. S. Comp. St., p. 5333, § 4530, as it existed prior to the Act of December 29, 1916, 39 Stats. 862; see Stock-Raising Homesteads, 48 L. D. 485, sometimes called "the six hundred and forty acre Homestead Law," no rights were given to agricultural claimants except to such lands as were clearly and properly agricultural, as congress did not intend to do away with the well-established distinction so long recognized by legislation between agricultural and mineral lands, nor to allow lands mineral in character to be acquired under the laws regulating the disposal of agricultural lands. Carron vs. Curtis, 3 C. L. O. 130; see, also, Caledonia Co. vs. Rowen, 2 L. D. 714; Manners Co. vs. Rees, 31 L. D. 408; Min. Reg. par. 100; see also, 5 U. S. Comp. St., p. 5336, note 6. Under this law, a patent issued thereunder not only conveyed the surface of the ground described therein, but also all that lay beneath it. Amador Median Co. vs. South Spring Hill Co., 36 Fed. 668; see East. Oregon Co. vs. Willow Riv. Co., 204 Fed. 517, rev'g. 187 Fed. 466; *certiorari* denied, 234 U. S. 761; Woods vs. Holden, 26 L. D. 198, 27 L. D. 375; that a mineral patent does not necessarily do so, see Last Chance Co. vs. Tyler Co., 61 Fed., 557. The fact that an entryman who seeks a tract of public land under nonmineral law is so inexpert as to be unable to determine the existence of mineral upon the land will not warrant the disposition of mineral lands under nonmineral law. Roberts, 41 L. D. 641. One who has a valid homestead entry upon lands classed as agricultural, but not subject to the mineral laws, may be divested of his right by a showing that the land is more valuable for mining than agricultural purposes, if made at any time before final proof and payment made and final receipt issued. Bay vs. Oklahoma Co., *supra* (14). Where known mineral land has been entered as agricultural land, the patent may be set aside, at the suit of the United States. Morton vs. Nebraska, 21 Wall. 660; Colorado Coal Co. vs. U. S., 123 U. S. 307; Diamond Coal Co. vs. U. S. *supra;* U. S. vs. Reed, 28 Fed. 482. To justify the annulment of a homestead patent as wrongfully covering mineral land, it must appear that at the time of the proceedings which resulted in the patent "the land was known to be valuable for mineral," that is to say it must appear that the known conditions at the time of the proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. If at the time the land was not thus known to be valuable for mineral, subsequent discoveries will not affect the patent. Diamond Coal Co. vs. U. S., *supra*; Wyoming vs. U. S., 255 U. S. 489; U. S. vs. Porter Fuel Co., 247 Fed. 772; U. S. vs. S. P. R. Co., 260 Fed. 518; see U. S. vs. S. P. R. Co., 251 U. S. 501. In suits to annul patents the government has the burden of proof which must be sustained "by that class of evidence which commands respect and that amount of it which produces conviction." U. S. vs. S. P. Co., *supra*, distg. Diamond Coal Co. vs. U. S., *supra*.

ant for a mining claim or location was not entitled to either joint or adverse possession as against the homestead entryman.[74]

§ 55. Sale.

A sale of timber, or the disposal of mining rights, by the entryman prior to the issue of the final certificate is in direct violation of the rights vested in him by his inchoate title[75] and void as against the government.[76] Yet it may be valid as between the parties; and the issue of the final certificate may validate the transaction for all purposes.[77]

§ 56. Stock-Raising Homesteads.

Under the provisions of the act of December 29, 1916, all minerals are reserved to the United States.[78] The homesteader's rights are

[74] Bay vs. Oklahoma Co., *supra* (14). The fact that land was taken possession of as placer land and claimed under placer location gives the locator no right as against a homestead entry if in fact the land is not mineral in character. Montgomery vs. Gilbert, 26 L. D. 216. The land department must determine the actual character of the land in dispute, though represented by a claimant to be mineral. Reid vs. Lavellee, 26 L. D. 102. An agricultural entry may be cancelled on proof that the land is valuable for mineral purposes. Bunker Hill Co. vs. U. S., 226 U. S. 549; Gary vs. Todd, 18 L. D. 59; Bay vs. Oklahoma Co., *supra;* see U. S. vs. Dougherty, 277 Fed. 451. The discovery of mineral, however valuable, after the due issuance of final homestead certificate will not in any manner affect the right and title of the homestead claimant. Dufrene vs. Mace, 30 L. D. 219; see Shaw vs. Kellogg, 170 U. S. 332; Wyoming vs. U. S., *supra* (73); Riley, 33 L. D. 70. Where the character of the land embraced within a homestead entry is placed in issue, that question must be determined as of the time of the submission of final proof. Mabry, 48 L. D. 280.

[75] Orrell vs. Bay Co., 83 Miss. 800, 36 So. 561. A complete equitable title does not vest in a homestead entryman prior to submission of satisfactory final proof. Mabry, *supra* (74); and prior to patent the purchaser takes no better title than his grantor had. Hawley vs. Diller, 178 U. S. 476; aff'g. 81 Fed. 651, rev'g. 75 Fed. 946; Everett vs. Wallin, 150 Minn. 154, 184 N. W. 960. The entryman may cut and sell timber growing upon that part of his unperfected homestead which he has cleared for cultivation. Shiver vs. U. S., 159 U. S. 491; see H. D. Williams Co. vs. U. S., 221 Fed. 234. The object of the homestead law and other similar acts is to preserve the right of the actual settler, but not to open the door to manifest abuses, and during the residence required before final certificate issues, the entryman can treat the land as his own only so far as necessary to carry out the purposes of the statute, as the law contemplates the possibility of his abandoning it, but prevents him in the meantime from destroying its value to others who may wish to enter or purchase it. Shiver vs. U. S., *supra;* see K. C. L. Co. vs. Moores, 212 Fed. 153.

[76] Anderson vs. Wilder, 83 Miss. 606, 35 So. 875; see King-Rider Co. vs. Scott, 73 Ark. 329, 84 S. W. 787.

[77] Id. Guaranty Bank vs. Bladow, 176 U. S. 448. The final certificate is subject to cancellation, U. S. vs. Kennedy, 206 Fed. 47; Moses vs. Long-Bell Co., 206 Fed. 51; see, also, Kirk vs. Olson, 245 U. S. 229; Haumsser vs. Chehalis County, 76 Wash. 570, 136 Pac. 1141; Wolbol vs. Steinhoff, 25 Wyo. 250, 168 Pac. 257. The final receipt, however, is at least *prima facie* evidence of the facts and conclusions stated therein. Whittaker vs. Pendola, 78 Cal. 296, 20 Pac. 680; see, also, U. S. vs. Ball, 31 Fed. 667, 670; dis. in 140 U. S. 701. The question of the mineral character of the land is not open after the lapse of two years from the issuance of the register's receipt. Stockley vs. U. S., 260 U. S. 543. A cancellation of a final receipt or certificate of entry is not conclusive as against a transferee who had no notice and no opportunity to be heard upon the question of the original validity of the entry. The grantee has an equitable interest which can not be taken from him without some notice. Guaranty Bank, *supra;* Wolbol vs. Steinhoff, *supra.* But the doctrine of *bona fide* purchaser for value applies only to the purchasers of the legal title. Hawley vs. Diller, *supra* (75); Duncan Co. vs. Lane, 245 U. S. 31; see Boone vs. Chiles, 35 U. S. 210. That is to say, the land entered continues to be the property of the United States until the patent is issued. In other words, he is vested as far as is now possible with the right to the possession of the property as against one who shows no title and may maintain or defend actions covering the land. Knapp vs. Alexander-Edgar Co., 237 U. S. 162, aff'g. 145 Wis. 528, 130 N. W. 504. McDonald vs. Edmonds, 44 Cal. 328; Goodwin vs. McCabe, 75 Cal. 584, 17 Pac. 705; Thompson vs. Basler, 148 Cal., 84 Pac. 161.

[78] See *infra,* note 79.

confined to the surface or so much thereof as may not ultimately be set for the conduct of mining operations. The miner, under certain restrictions, may enter upon, prospect and mine the land,[79] thus practically conducting the usual mining operations thereon with the same facility as before the enactment of that law.[80] A separate patent will issue to the mineral claimant.[81]

§ 57. Timber and Stone Lands.

Surveyed public lands belonging to the United States within the public land states not included in any governmental reservation valuable chiefly for timber and unfit for cultivation, and lands chiefly valuable for stone may be acquired under the Timber and Stone Act,[82] or may be entered as placer claims.[83]

§ 58. Minerals Excepted.

Lands containing any valuable deposit gold, silver, cinnabar, copper or coal are excepted from acquisition under this act.[84]

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[79] 39 Stats. 862, amended 40 Stats. 1016, 41 Stats. 287; 42 Stats. 1445; 43 Stats. 469; Stats. 862. Section 9 of this act provides, that any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented under this Act, for the purpose of prospecting for the coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on the land by reason of such prospecting. It is further provided in said § 9 that any person *who has acquired from the United States the coal or other mineral deposits in any such land* or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; or, second, upon payment of the damages to crops or other tangible improvements to the owner thereof under agreement; or third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land to secure payment of such damages to the crops or tangible improvements of the entryman or owner as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon. Carlin vs. Cassrial, 50 L. D. 385. See Instructions, 51 L. D. 1. For forms under this act see Id. 17. For act of 1916, as amended, see Id. 21. The title of a mining claimant who had acquired only the minerals in lands which, at the time of the initiation of his claim were covered by a stock-raising homestead entry, does not become automatically enlarged, upon cancellation of the entry, to include the land and the minerals, but the surface continues to remain a separate estate. Filtrol Co. vs. Brittan, 51 L. D. 649.

[80] Id.

[81] Dean vs. Lusk Co., 50 L. D. 193. Where certain mining instrumentalities were affixed to the land while it was a part of the public domain and become a part of the realty it was held that they do not pass to the homestead entryman when he acquires his title from the United States, although such title be limited to the surface rights and certain surface rights reserved to the United States. Son vs. Adamson, 188 Cal. 99, 204 Pac. 392.

But mere occupancy of public lands and making improvements gives the settler no vested rights therein as against the United States, nor a purchaser from them. N. P. R. Co. vs. Colburn, 164 U. S. 383; Russian-American Co. vs. U. S., 199 U. S. 579; U. S. vs. Hanson, 167 Fed 881; Utah Co. vs. U. S., 230 Fed. 334; Reno vs. S. P. Co., 268 Fed. 761, aff'g. 257 Fed. 464; Halstrom vs. Rodes, 30 Utah 122, 83 Pac. 730.

[82] Act of June 3, 1878, 20 Stats. 89; 26 Stats. 391; 26 Stats. 1095; 27 Stats. 348; 28 Stats. 594; 30 Stats. 418; see 33 L. D. 539, 605; Morgan vs. U. S. 148 Fed. 192; Pierce vs. Bond, 22 L. D. 345; Jones vs. Aztec Co., 34 L. D. 117. For Stone Placer Act, see 27 Stats. 348, 2 Supp. 65. See, also, Hoover vs. Salling, 110 Fed. 43, rev'g. 102 Fed. 716; Robinett, 169 Fed. 781 For regulations under Timber and Stone Law, see 51 L. D. 365. Land which is shown to be more valuable at date of application for townsite purposes than for the stone it contains is not subject to acquisition under the timber and stone law. Tueson vs. Dodson, 52 L. D. 36.

[83] Under the act of August 4, 1892, 2 Mason's U. S. Code, p. 2253, § 161, lands chiefly valuable for building stone may be entered as a placer claim if it has not been reserved for the benefit of public schools nor donated to a state. Minnekahta Mine, 15 L. D. 256; Mieklejohn vs. Hyde, 42 L. D. 145. See N. P. R. Co. vs. Soderberg, 86 Fed. 51, aff'd. 188 U. S. 526; Sullivan vs. Schultz, 22 Mont. 546, 57 Pac. 279.

[84] 20 Stats. 89, § 2. See Purtle vs. Steffee, 31 L. D. 401; McFarland vs. Idaho, 32 L. D. 109. Where a tract of land in fact is mineral in character, the title, together

§ 59. Good Faith Essential.

It must appear by the sworn statement of the applicant that his application is not speculative but made in good faith for his exclusive benefit and free from agreement or contract to transfer his inchoate title to another.[85] But after his initial application and before final proof he has the right to contract to sell the title thereafter to be acquired; and the intending purchaser lawfully may advance to him money with which to make the final proof.[86]

§ 60. Effect of Final Certificate.

A complete equitable title becomes vested upon the applicant's full compliance with the law and the register's final certificate of entry is *prima facie* evidence of that title.[87]

§ 61. Bona Fide Purchasers.

A person making an entry under this act acquires only an equity and his vendee can not be regarded as a *bona fide* purchaser within the meaning of the statute. A *bona fide* purchaser can only be regarded as such after the government, by its patent, has parted with the legal title.[88]

§ 62. Patentee as Trustee.

Where a patent fraudulently is obtained under this act for land covered by a valid mining claim the owner of the latter may bring suit

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with the timber thereon, may be acquired under the provisions of the mining law; but if the tract is vacant and nonmineral, valuable chiefly for its timber but unfit for cultivation and contains no mining or other improvements, it may be purchased under the conditions of the Stone and Timber Act. Gallagher vs. Gray, 35 L. D. 90. Old excavations or unoccupied cabins upon abandoned mining locations are not such mining or other improvements as except the land upon which they are located from entry. Andrew vs. Stuart, 31 L. D. 265; see Chormicle vs. Hiller, 26 L. D. 9. After the issuance of the final certificate of entry a discovery of mineral inures to the benefit of the entryman or his grantee. U. S. vs. Plowman, 216 U. S. 374; U. S. vs. Porter Fuel Co., *supra* (73). See U. S. vs. Primrose Co., 216 Fed. 557.

[85] Hawley vs. Diller, *supra* (75); Kirk vs. Olson, *supra* (77); Stockley vs. U. S., 271 Fed. 640; U. S. vs. Bryan, 29 L. D. 149. Deception in the final proof can not be established as tending to show fraudulent motive in the original application. U. S. vs. Kettenbach, 208 Fed. 209, rev'g. in part 175 Fed. 463. As to borrowing money to acquire title, see U. S. vs. 11,150 Lbs. of Butter, 195 Fed. 663, aff'g. 188 Fed. 159; U. S. vs. Albright, 234 Fed. 204.

[86] Williamson vs. U. S., 207 U. S. 425; U. S. vs. Briggs, 211 U. S. 507; U. S. vs. Barber Co., 172 Fed. 948; U. S. vs. Boughten, 186 Fed. 226; U. S. vs. Kettenbach, *supra* (85); see U. S. vs. Nelson, 199 Fed. 474.

[87] Chamberlain, 48 L. D. 411; see, also, Pelham, 39 L. D. 201; and see Payne vs. New Mexico, 255 U. S. 367; Wyoming vs. U. S., *supra* (73). A report of a field agent, after the issuance of a final certificate upon a stone entry, charging that the land contains oil and gas and was so known at the date of final proof, may be used as a basis for governmental proceedings against the claim, but it is not competent evidence upon which final action adverse to the claimant may be taken, without charges, notice, and an opportunity for a hearing. Chamberlain, *supra*. As to withdrawal of the land subsequent to the final receipt and before the actual issuance of patent see Chamberlain, *supra*, and cases cited therein.

Prior to the submission of final proof and payment of the purchase money an application to make entry under the timber and stone law does not operate to defeat a withdrawal made pursuant to the act of June 25, 1910, 36 Stats. 847, as amended by the act of August 24, 1912, 37 Stats. 497. See Instructions, 52 L. D. 102.

[88] Hawley vs. Diller, *supra* (75); see U. S. vs. Smith, 181 Fed. 554, aff'd. 196 Fed. 593, aff'd. 236 U. S. 574. No action lies by the United States against *bona fide* purchasers from a patentee for value without notice of the fraud. U. S. vs. Koleno, 226 Fed. 180. The title of a *bona fide* purchaser of lands after the issue of a patent is superior to the equitable claim of the United States to avoid the patent and the title under it for fraud or error in its issuance. U. S. vs. Detroit Co., 200 U. S. 321. The defendant has the burden of proof to establish his defense of a *bona fide* purchaser. U. S. vs. Cooksey, 275 Fed. 670, aff'd. 262 U. S. 215. A transfer by the patentee to a corporation consisting of himself and family will not constitute the corporation *a bona fide* purchaser. U. S. vs. Smith, *supra*.

against the patentee to have him declared his trustee and to be required to make due conveyance.[89]

§ 63. Contract of Sale.

An applicant for the purchase of timber lands has, after his initial application and before final proof, the right to contract to sell the title thereafter to be acquired and the intending purchaser lawfully may advance to him money with which to make final proof.[90]

§ 64. Patents.

Patents issued under this act may be set aside and cancelled for fraud in the patentee in conspiring to purchase entries pursuant to an agreement to transfer the title to persons not *bona fide* purchasers for value.[91]

§ 65. Timber Cutting.

Timber upon lands belonging to the United States and known to be valuable for their minerals as to justify expenditure for their extraction may be felled and removed by citizens[92] and aliens,[93] but not by railroad corporations,[94] who are *bona fide* residents of the public land, states and other mineral districts of the United States,[95] for building, mining, smelting, roasting of ores or "other domestic purposes;"[96] subject to such rules and regulations as the Secretary of the Interior may

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[89] Mery vs. Brodt, 121 Cal. 332, 53 Pac. 818, distinguished in Cagle vs. Dunham, 14 Okla. 610, 78 Pac. 563; see Robbins, 42 L. D. 481; Ewbank vs. Mikel, 6 Cal. A. 139, 91 Pac. 673.

[90] Williamson vs. U. S., *supra* [80]; U. S. vs. Biggs, 211 U. S. 507; Dwinnell vs. U. S., 186 Fed. 759.

[91] U. S. vs. Kettenbach, *supra* [85].

[92] 20 Stats. 88, § 8 of act of March 3, 1891, 26 Stats. 1093; 27 Stats. 444; 30 Stats. 618; 30 Stats. 11; 31 Stats. 1436; 35 Stats. 1088; Circular Nos. 222 and 223, 42 L. D. 22 and 23; Instructions, 48 L. D. 17. As to right to cut timber in the State of Arizona granted to citizens of Washington and Kane counties, Utah, see 48 L. D. 608. While the act of March 4, 1911, which grants rights of way for telephone, telegraph and transmission lines, does not expressly authorize the cutting of timber from a right of way, yet such right must be implied as a necessary incident to the right of use and occupancy of the easement. 50 L. D. 608. U. S. vs. Copper Queen Co., 185 U. S. 495; U. S. vs. United Verde Co., 196 U. S. 207; U. S. vs. Plowman, *supra* [84], based upon U. S. vs. Basic Co., 121 Fed. 504 and U. S. vs. Rossi, 133 Fed. 380.

In N. P. R. Co. vs. Lewis, 162 U. S. 376, the court said: "The right to cut (timber) is exceptional and quite narrow" and the party claiming the right must prove it. U. S. vs. Plowman, *supra* [84].

[93] U. S. vs. Copper Queen Co., 7 Ariz. 86; aff'd. 185 U. S. 495; see Curtis vs. U. S., 262 U. S. 215, aff'g. 275 Fed. 670, 674.

[94] See *supra*, note 92.

[95] Id.; Stubbs vs. U. S., 111 Fed. 366; Anderson vs. U. S., 152 Fed. 87. For sale of dead or down and fire killed or damaged timber, see Act of July 3, 1926, 44 State. 890; for regulations thereunder, see 51 L. D. 574.

[96] U. S. vs. United Verde Co., *supra* [92]; U. S. vs. Price Co., 109 Fed. 239; U. S. vs. Edgar, 140 Fed. 655; White, 34 L. D. 78; Gallagher vs. Gray, *supra* [84]; Centerville Co. 39 L. D. 80. In U. S. vs. Richmond Co., 40 Fed. 415, it is said: "It appeared that a certain mining company was engaged in the business of mining, purchasing and production of ores and separating silver from lead, and bought charcoal to be used in the reduction of ores and refining the product thereof. The court held that such use was a domestic purpose within the meaning of the statute. That if reducing ores by melting or furnace process, and refining the bullion, is not properly a part of mining it certainly is incident to it, and closely connected with it. The court, however, did not dwell on that point, but put its judgment in favor of the mining company upon the ground that reducing ores was a domestic industry of the highest importance to the mines and the public and was within the benefits conferred by the statute"; cited with approval in U. S. vs. United Verde Co., *supra*. As quartz mills and reduction works are indispensable to a mining community, the cutting of the timber and the use in such mills and works of such timber is clearly within the provisions of the statute, and the consumer is as fully protected by it as if he consumed it in his dwelling. Hardin, 1 L. D. 598. For use of timber for fuel in oil drilling operations, see Regulations, 51 L. D. 311.

prescribe for the protection of the timber and of the undergrowth growing upon such lands and for other purposes.[97]

§ 66. Extent of Minerals.

The mere appearance of mineral and the mere presence of color here and there, are not sufficient to constitute land mineral, but there must be at least sufficient mineral to induce men of experience to go upon the ground and take and work it with the expectation of finding mineral, and this rule applies particularly to a country or district that had during a long series of years been thoroughly explored and prospected, and not to a case of newly discovered mineral country, and the circumstances are proper to be considered in connection with the alleged good faith of a person cutting timber from such lands.[98]

§ 67. Placer Locations.

Placer mining locations can not be made as a blind to cover contemplated timber cutting.[99] The locator of a placer mining claim has a means of protecting the timber growing upon his claim and recovering damages from a trespasser who cuts and removes the same.[100]

§ 68. Action for Damages.

Evidence is admissible in an action by the United States for trespass in cutting timber to show that the timber was cut from mineral claims and that the lands were in fact mineral in character, and that it was cut under contract or permits from the locators of mining claims, as permitted under the statute, for the purpose of establishing a rule as to the measure of damages.[101] In an action by the United States to recover the value of timber cut from the public domain, evidence is properly admissible to show the mineral character not only of the land from which timber was cut, but also to show the mineral character of

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[97] See *supra*, note 92, and see U. S. vs. Homestake Co., 117 Fed. 488; U. S. vs. Mullan Co., 118 Fed. 663; U. S. vs. Rossi, *supra* [92]; U. S. vs. Edgar, *supra* [66]. The rules and regulations authorized by the Secretary of the Interior under this law can not limit the rights granted by the statute, and he is not authorized to make any distinction between the lands designated as being mineral in the statute and lands designated by him as "strictly mineral." U. S. vs. Mullan Co., *supra;* U. S. vs. Copper Queen Co., *supra* [92]; see Anchor vs. Howe, 50 Fed. 366.

[98] Anderson vs. U. S., *supra.*[95] A person may lawfully cut timber on lands situated in mountainous, barren regions, unadapted to agriculture and the founding of homes, and which are interspersed with gulches and narrow valleys, and minerals are known to exist at different points therein, and where such timber may be essential not only for direct use in and about the mines to be opened and operated, but for building homes and fences for the use of the people desiring to occupy and develop such communities, and where such lands are not subject to entry under existing laws of the United States except for mineral. Morgan vs. United States, 169 Fed. 242; see U. S. vs. Basic Co., *supra* [92]; U. S. vs. Rossi, *supra* [92], *but see* U. S. vs. Plowman, *supra* [84]; Gallagher vs. Gray, *supra* [84]. This statute is not limited to land which is or may be actually occupied for mining purposes, and it is not altogether a matter of finding valuable ore or metal in the ground from which timber is taken where the lands are in a mountain region in the vicinity of valuable mines, and some indications of valuable minerals in them, and are unfit for cultivation or pasturage. U. S. vs. Edwards, 38 Fed. 812; U. S. vs. Mullan Co., *supra* [97]; Morgan vs. U. S., *supra.* If land is worth more for agriculture than mining, it is not mineral land, though it may contain some gold or silver. U. S. vs. Plowman, *supra* [84]. Timber of a kind useful for mining purposes and in such location with reference to mines as to give it value for such purposes, and to make the value of the land in excess of its present value for agricultural purposes, makes such land timber land within the meaning of this act. Grenon vs. Miller, 39 L. D. 577.

[99] Anderson vs. U. S. *supra* [95]. A valuable growth of timber may properly be an incentive to its locator. U. S. vs. Iron Co., 128 U. S. 673. U. S. vs. Safe Inv. Co., 258 Fed. 878.

[100] McQuillan vs. Tanana Co., 3 Alaska 129; see Rogers vs. Soggs, 22 Cal. 444; McFeters vs. Pierson, 15 Colo. 201, 24 Pac. 1076.

[101] U. S. vs. Gentry, 119 Fed. 70, rev'g. 101 Fed. 51.

other lands in the same vicinity for the purpose of showing the extent of the mineral district.[102]

§ 69. Evidence of Good Faith.

The test to determine whether one is a wilful or innocent trespasser is not his violation of law in the light of the maxim that every man must know the law, but his honest belief and his actual intention at the time he committed the alleged trespass; but neither a justification of the acts nor any other complete defense is essential to the proof that the person committing such acts was not a wilful trespasser.[103]

§ 70. Burden of Proof.

In an action by the United States to recover for cutting and taking timber on the public domain the burden is on the defendant to show that the timber was taken for the purposes prescribed in the act, and in the manner directed by the rules and regulations of the Secretary of the Interior.[104] A person charged with cutting timber in violation of this statute is not required to prove that the apparent character of the land was such as to inspire in an inexperienced miner the belief that he could work the mine at a profit, and whether or not the land was mineral within the meaning of the statute is a question of fact to be inferred from its surroundings and appearances.[105]

§ 71. Wilful Trespass—Proof and Presumption.

The general rule is that a person taking timber from the lands of the United States is a wilful trespasser, but this statute carves an exception out of the rule and gives to the *bona fide* residents of certain states the lawful authority to cut and remove timber from mineral lands for certain purposes subject to the rules prescribed by the Secretary of the Interior, and the *bona fide* resident must fairly and fully comply with the requirements of the act and the rules promulgated by the Secretary of the Interior in order to except himself from the claims of trespassers.[106]

§ 72. Measure of Damages.

In an action for damages for a trespass for cutting timber on public lands, where the trespass was wilful and intentional, the measure of damages is the value of the manufactured lumber or wood, but where the trespass was committed under a mistaken belief of his right to do so, on the part of the alleged trespasser, the amount of damages is the value of the wood or timber in the trees.[107]

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[102] U. S. vs. Rossi, *supra* (92).

[103] Durant Co. vs. Percy Co., 93 Fed. 166; U. S. vs. Gentry, *supra* (101); U. S. vs. Van Winkle, 113 Fed. 903; U. S. vs. Homestake Co., *supra* (97).

[104] U. S. vs. D. & R. G. Co., 191 U. S. 84; U. S. vs. Basic Co., *supra* (92).

[105] Morgan vs. U. S., *supra* (95). See U. S. vs. Plowman, *supra* (84).

[106] U. S. vs. Gentry, *supra* (101); see, also, U. S. vs. Homestake Co., *supra* (97).

[107] Bolles Co. vs. U. S., 106 U. S. 432; Benson Co. vs. Alta Co., 145 U. S. 428; U. S. vs. Mock, 149 U. S. 273; Powers vs. U. S., 119 Fed. 562; U. S. vs. Coughanour, 133 Fed. 274; see Bly vs. U. S., Fed. Cas. 767. The rule also is stated thus: (1) When the defendant is a wilful trespasser, the full value of the property at the time of bringing the action, with no deduction for his labor and expense. (2) When the defendant is an unintentional or mistaken trespasser, the value at the time of the commission less the amount which such trespasser has added to its value. Woodenware Co. vs. U. S., 106 U. S. 432; Union Co. vs. U. S., 240 U. S. 292; U. S. vs. Williams, 18 Fed. 475; U. S. vs. Waters-Pierce Co., 196 Fed. 767; Liberty Bell Co. vs. Smuggler-Union Co., 203 Fed. 795, *certiorari* denied 231 U. S. 747. A person

§ 73. Saline Lands.

All salt springs, salt beds and salt rock are covered by the general term "salines."[108] It can not be held to include all lands containing in their soils or in their waters the salts of sodium potassium (including chlorides, carbonates, and sulphates of these, and the other so-called alkaline earths) nor can it be held to include the associated gypsum minerals.[109]

§ 74. Saline Land Act.

This act extended the mining laws to saline lands and rendered the unoccupied public lands containing salt springs or deposits of salt in any form and chiefly valuable therefor subject to location and purchase under the provisions of the law relating to placer claims.[110]

§ 75. Limitation.

This act provided "that the same person shall not locate nor enter more than one claim hereunder.[111] The act of February 25, 1920,[112] is applicable to sodium and thereunder a permit to prospect for sodium must be obtained and the discoverer is entitled to one-half of the area covered by his permit and a preference right to lease the remainder.[113]

§ 76. Coal Lands.

In 1873 congress formulated its policy as to the disposition of the public coal lands of the United States, and the laws relating thereto

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cutting and disposing of timber on a mining claim can not be held in damages as a wilful trespasser merely because he failed to keep a record of the details of the transaction as prescribed by the regulations of the secretary of the interior, where he believed he was a resident, and his failure to keep such record was due to his ignorance that it was required. Powers vs. U. S. *supra*.

"It is not altogether a question of finding valuable ore or metals on the ground from which the timber is taken. Obviously the act of congress is not limited to land which is or may be actually occupied for mining purposes. After location made the timber on a mining claim belongs to the claimant, and it can not be supposed that congress intended to give it to another. Furthermore the grant is of timber on lands subject to mineral entry and not subject to entry as agricultural land, which means such as may be taken for mining purposes, as distinguished from such as have been taken in that way. Without attempting to describe mineral lands in a way which may be sufficient for all cases arising under the act of 1878, it seems clear that the lands mentioned in the complaint and in the statement of facts are of that character. They are in a mountainous region, in the vicinity of valuable mines, and have some indication of valuable metals in them. They are unfit for cultivation and pasture, and are not subject to entry under the pre-emption or other laws relating to agricultural lands." U. S. vs. Edwards, 38 Fed. 812; see Morgan vs. U. S., *supra* [98]; *but see* U. S. vs. Plowman, *supra* [84].

[108] U. S. Code, p. 964, § 171; see Southwestern Co., 14 L. D. 597; Lovely Claim, 35 L. D. 426; 49 L. D. 502.

[109] New Mexico, 35 L. D. 8. The term "deposits of sodium" include chlorides, sulphates, carbonates, borates, silicates and nitrates of sodium. 50 L. D. 650. See § 100.

[110] 6 Fed. St. Ann. p. 606; Lovely Claim *supra* [108]; *but see* 2 Supp. U. S. Comp. St., p. 1404, § 4640¾. Prior to this act (January 31, 1901), saline lands could only be disposed of under the act of January 12, 1877. 19 Stats. 221. See, generally, 3 Lindl. Mines (3d ed.), p. 1170, § 514, *et seq.*

[111] 6 Fed. St. Ann (2d. ed.), p. 606.

[112] 2 Supp. U. S. Comp. St., p. 1416, § 4640*l*. All valid claims existent at the date of the passage of this act and thereafter maintained in compliance with the laws under which initiated, are protected. Id. § 37, 49 L. D. 503. See *infra*, note 228.

[113] Id. The "Leasing Act" in so far as it pertains to deposits of sodium expressly excepts such deposits in San Bernardino County, California and such deposits still are to be disposed of pursuant to the placer mining laws and § § 31, 32 and 33 of the Mining Regulations, (49 L. D. 15, 64), are applicable thereto. 49 L. D. 505; see 47 L. D. 21. The occurrence of both potassium and sodium is not uncommon, but no authority exists to concurrently permit a prospecting right for potassium under the act of October 2, 1917, 40 Stats. 297, and of a permit for sodium under the act of February 25, 1920, 41 Stats. 437. The "Leasing Act" makes no provision in any case for any disposal save of sodium deposits (and other deposits named therein), and a right to use so much of the lands containing such deposit as is necessary in the prospecting for, mining and removing of said mineral. 50 L. D. 640.

were codified and carried into the revision of the statutes in 1874 under sections 2347 to 2352, inclusive.[114] These sections, together with the act of June 6, 1900,[115] and the act of April 18, 1904,[116] comprise a system of laws relating to the entry and location of coal lands and must be read and construed together, and all were intended to be operative. This system, continued in force until the adoption of the act of February 25, 1920,[117] known as "The Leasing Act," subjected coal lands except in Alaska to disposition only in the manner and form provided therein.

§ 77. Desert Lands.

The act of March 3, 1877, provided for the sale of "desert lands," the determination of what may be considered as such to be subject to the decision and regulation of the Commissioner of the General Land Office.[118]

§ 78. Tide Lands.

Each state owns the beds of all tide waters within its jurisdiction, unless they have been granted away;[119] and, also, the land between high and low water.[120] Hence mineral lands below high tide are not a part of the mineral lands of the United States subject to location for mining purposes like those above high tide.[121] Meandered lakes belong to the

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[114] Schofield, 41 L. D. 224.

[115] 31 Stats. 658.

[116] 33 Stats. 525.

[117] 2 Supp. U. S. Comp. St., p. 1404, § 4640¼; Work vs. Braffet, 278 U. S. 560; Shores vs. State of Utah, 52 L. D. 503. See, generally, Davis, 50 L. D. 342; McFayden, 51 L. D. 436.

[118] For statutes and regulations governing entries and proofs under the Desert Land Laws, see 50 L. D. 443. All lands, exclusive of timber lands and mineral lands, which will not, without irrigation, produce some agricultural crop, are deemed desert lands. 19 Stats. 377. The relation of the Federal government to the state government in the reclamation of desert lands arises out of the fact that the Federal government owns the lands and congress is invested by the constitution with the power of disposing of the same; while the state has been given jurisdiction to provide for the appropriation and beneficial use of the waters of the state which necessarily includes a use for the reclamation of such lands. Twin Falls Co. vs. Caldwell, 272 Fed. 357, rev'g. in part 242 Fed. 177, aff'd. in 266 U. S. 87; Commonwealth Co. vs. Smith, 266 U. S. 152, aff'g. 273 Fed. 1; Glavin vs. Commonwealth Co., 295 Fed. 103; Nampa District vs. Bond, 268 U. S. 50, aff'g. 283 Fed. 569, 288 Fed. 541. See also, Twin Falls Co. vs. Martens, 271 Fed. 428, *certiorai* denied, 257 U. S. 637; Central Oregon Co. vs. Public Service Com., 101 Or. 442, 196 Pac. 832. For "Carey Act" see 28 Stats. 422, amended, 29 Stats. 434, 31 Stats. 1188; see U. S. Comp. St. 1923, p. 256, § 4685*a et seq*; see, also, Crom vs. Fralm, 33 Ida. 314, 193 Pac. 1013. Mineral lands are not within the purview of this act. Wyoming, 38 L. D. 512. The act of July 17, 1914, provided for restricted patents. 38 Stats. 509; see U. S. Comp St. 1923, p. 255, § 4685*n*.

[119] The Abbey Dodge, 223 U. S. 174; Port vs. Oregon Railroad, 255 U. S. 56; Messinger vs. Kingsbury, 158 Cal. 611, 112 Pac. 66.

For swamp lands as distinguished from overflowed lands see San Francisco Union vs. Irwin, 28 Fed. 708; State vs. Gerbing, 56 Fla. 603, 47 So. 353.

The Swamp Land Acts granted to the states the swamp and overflowed lands, rendered unfit for cultivation, without reference to their mineral character and the states are not required to establish their nonmineral character. Work vs. Louisiana, 269 U. S. 250, aff'g. 287 Fed. 999; see U. S. vs. Minnesota, *supra* [9]; State of Louisiana, 51 L. D. 79; U. S. vs. River Rouge, 269 U. S. 411; rev'g. 285 Fed. 111.

[120] S. F. Sav. Union vs. Petroleum Co., 114 Cal. 134, 77 Pac. 833.

[121] Logan, 29 L. D. 395; Argillite Co., 29 L. D. 585; Alaska Co. vs. Barbridge, 1 Alaska, 311. Lands "under tide water" or "below high water mark," "lands flowed by the tide," and other expressions of similar import are usually employed in defining tide lands. Shiveley vs. Bowlby, 152 U. S. 1. The term "high water mark" means neither an extremely high nor an extremely low water line, but on the contrary refers to the ordinary high water mark. Ross vs. Barkhalt, 90 Cal. A. 207, 265 Pac. 982. The "shore" is that ground between ordinary high and low water mark. Columbia Co. vs. Hampton, 161 Fed. 60. In California the words "tide lands" do not apply to nor include the shore or any part thereof, or the bed or any part thereof of the ocean or of any navigable canal or stream or bay or inlet within that state, between ordinary high and low water mark. All such land over which the ordinary tide ebbs and flows is withheld from sale. Cal.

state in its sovereign capacity in trust for the public.[122] Minerals under navigable waters are the property of the state.[123] The beds of the unnavigable streams containing mineral deposits may be appropriated for mining purposes by placer locations, and as to the water itself, the locator obtains only a usufruct therein.[124]

§ 79. Public Nuisance.

All unlawful intrusions upon a waterway for purposes unconnected with the rights of navigation or passage are nuisances.[125] Congress has the power to put a stop to the workings of all mines that contribute in any degree to obstruct the navigable waters either between the states or connecting with the ocean and to prescribe the conditions upon which any work so contributing might be prosecuted.[126]

Pol. Code, § 3443*a*; Carr vs. Kingsbury, — Cal A.—, 295 Pac. 586; see Pearl Oyster Co. Heuston, 57 Wash. 533, 107 Pac. 249. In Alaska temporary possession of tide lands may be had for mining purposes. Such occupation is subject to such general limitations as may be necessary to exempt navigation from artificial obstruction. 31 Stats. 325. The beach is defined as "tide lands," that is, land "uncovered at ordinary low tide and covered with water at ordinary high tide." Baer vs. Moran Bros., 153 U. S. 287. "Navigable waters" are defined as including all tidal waters up to the line of ordinary high tide, and all nontidal waters navigable in fact up to the line of high water mark in 50 L. D. 79.

See Beach Claims.

[122] County Ditch, 142 Minn. 37, 170 N. W. 883; see, also, Doe vs. City, 9 How. 13; Pollard vs. Hagan, 3 How. 212; see, generally, Little vs. Williams, 231 U. S. 335; West vs. Rutledge, 210 Fed. 189; Oregon, 28 L. D. 318; Cal. 380, 249 Pac. 178; Ord vs. Alamitos Co., 199, Illinois 30 L. D. 128; Arkansas Sunk Lands, 37 L. D. 462; Cataract, 43 L. D. 248.

[123] State vs. Phosphate Coms., 31 Fla. 558. A mining claim can not be located so that one line or boundary is below high water mark of a navigable river, as this is not public land within the meaning of the mining laws. Heine vs. Roth, 2 Alaska 426; *but see* Del Monte Co. vs. Last Chance Co., 171 U. S. 55, and Jim Butler Co. vs. West End Co., 247 U. S. 454, affg. 39 Nevada 375, 158 Pac. 876. Both holding that the boundary marks of a lode mining claim may, partially, be laid upon property adversely held.

For statutory regulations in California affecting tide and submerged lands see Mining Leases.

[124] Rablin, 2 L. D. 765; see Snow Flake Fraction, 37 L. D. 251. In Hardin vs. Shedd, 190 U. S. 508, the court was particular in stating its position as to the effect of patents for lands bordering upon either navigable or unnavigable bodies of water, and to show the distinction between the two cases. It was held that the title passes from the government in either case. In the case of navigable waters the submerged land does not belong to the federal government, having passed to the state by its admission to the Union. In the case of unnavigable waters, the United States assumes the position of a private owner subject to the general laws of the state, so far as its conveyances are concerned. In either case the effect of the grant of the title to the submerged land will depend upon the law of the state where the land lies. See Scott vs. Lattig, 227 U. S. 229, rev'g. 17 Ida. 506; Empire Co. vs. Cascade Co., 205 Fed. 123; Rust-Owen Co. (on rehearing), 50 L. D. 678. Prior to the admission of a new state congress has the power, of course, by grant or otherwise, to dispose of lands underlying navigable waters, tide or inland, in any of the territorial domain of the United States. Shivelev vs. Bowlby, *supra* [121]. In the absence of specific legislation by that body, however, title to such lands can not be acquired by any individual or group of individuals. Mann vs. Tacoma Co., 153 U. S. 273. An unrestricted patent issued by the government, conveying lands abutting on an unnavigable lake, divests it of all title to or interest in the lake bed, including minerals therein, and the extent of the title of the riparian proprietor thereafter is to be determined in accordance with the laws of the state within which the lands lie. Malcolm, 50 L. D. 284. The return of a surveyor that a body of water is navigable or unnavigable is not conclusive. Oklahoma vs. Texas, *supra* [115].

[125] People vs. Gold Run Co., 66 Cal. 138, 4 Pac. 1152; see, also, Travis Co. vs. Mills, 94 Fed. 909; Alaska Co. vs. Barbridge, *supra* [125]; Jones vs. Robertson, 116 Ill. 543, 6 N. E. 890; Lord vs. Carbon Co., 42 N. J. Eq. 157, 6 Atl. 812; for an infringement of private rights, see San Francisco Union vs. Petroleum Co., *supra* [120]. See, also, 1 Farnham on Waters, Chaps. 5 and 6; 21 A. L. R. 207. As to private right against government, see 21 A. L. R. 221.

[126] U. S. vs. North Bloomfield Co., 81 Fed. 252. For act of March 1, 1893, creating the California Debris Commission, see 27 Stats. 507; amended 34 Stats. 1001.

The purpose of this statute, called the "Caminetti Act," 27 Stats. 507, is to provide a means by which hydraulic mining can be carried on in the territory named without directly or indirectly injuring the navigability of the river systems mentioned in the act. U. S. vs. North Bloomfield Co., *supra*. As to the circumstances and conditions leading to the enactment and on the interpretation of this statute, see U. S. vs. North Bloomfield Co., *supra;* Hobbs vs. Amador Co., 66 Cal. 161, 4 Pac. 1147; County of Sutter vs. Nichols, 152 Cal. 688, 93 Pac. 872; Salstrom vs. Orleans Bar Co., 153 Cal.

§ 80. Water Rights.

Next to the right to mine on the public domain the federal mining law[127] grants to miners the most valuable incident thereto, the right to use the public waters in mining, which is the very essence of the mining laws, without which mining could not be made profitable.[128] Previous to the enactment of that law, the possessory rights to water and its conduits rested solely upon the local customs, laws and decisions.[129]

551, 96 Pac. 292; Good vs. West Co., 154 Mo. A. 591, 136 S. W. 241; Nelson vs. O'Neal, 1 Mont. 284; Fitzpatrick vs. Montgomery, 20 Mont. 181, 51 Pac. 416; York vs. Davidson, 39 Or. 81, 65 Pac. 819; Carson vs. Hayes, 39 Or. 97, 65 Pac. 814. For definitions of the term "hydraulic mining," see Lindl. Min. (3d ed.), pp. 2101, 2103, §§ 851, 852.

[127] 5 U. S. Comp. St., p. 5693, § 4647, Act of July 26, 1866, 14 Stats. 253. Three distinct objects were in view in the passage of this statute, viz: (1) The confirmation of all existing water rights. (2) To grant the right of way over the public lands to persons desiring to construct flumes or canals for mining purposes. (3) To authorize the recovery of damages by settlers on such land. Jacob vs. Lorenz, 98 Cal. 326, 33 Pac. 119; see, also, Titcomb vs. Kirk, 51 Cal. 294; De Wolfskill vs. Smith, 5 Cal. A. 182, 89 Pac. 1001; Rockwell vs. Graham, 9 Colo. 37; 10 Pac. 284; Green vs. Wilhite, 14 Ida. 246, 93 Pac. 97. For a modification of the act of 1866, as amended by the Act of 1870, see 26 Stat. 1095; 36 Stat. 1235. See U. S. vs. Utah Co., 209 Fed. 561, rev'g. 208 Fed. 821. See, also, U. S. vs. Portneuf-Marsh Co., *supra* [(44)].

[128] McFarland vs. Alaska Perseverance Co., 3 Alaska 323. In Dripps vs. Allison's Co., 45 Cal. A. 95, 187 Pac. 448, it is said: In this state the location and possession of a mining claim draws to itself the right to a reasonable use, for mining purposes, of the waters of a stream flowing through the claim. Parties holding possessory rights in separate parcels of land, title being in the United States, have the right of riparian owners in the waters of any stream flowing naturally over both parcels. A locator on public lands with a view of appropriation becomes the absolute owner against everyone but the government and is entitled to all the incidents which appertain to the soil except rights antecedently acquired. As between locators of mining claims on a stream flowing through the public domain, the rule is "he who is prior in time is stronger in right." Leigh vs. Independent Co., 8 Cal. 323; Crandall vs. Woods, 8 Cal. 136, but the upper locator, though subsequent in time and though for that reason, his is a subsequent right, may, nevertheless, make reasonable use of the water of the stream, the reasonableness to be determined by the jury upon the facts and circumstances of each particular case. See Leiser vs. Brown, 121 Wash. 125, 208 Pac. 257. See, generally, Simmons vs. Inyo Co., 48 Cal. A. 524, 192 Pac. 144; Rindge vs. Crags Co., 56 Cal. A. 247, 205 Pac. 26; San Joaquin Co. vs. Worswick, 187 Cal. 674, 203 Pac. 999, *certiorari* denied, 258 U. S. 625. The right to the use of water for mining or other purposes under the provisions of this statute is not unrestricted, but it must be exercised within reasonable limits. Rio Grande Co. vs. Telluride Co., 16 Utah, 125, 137 Pac. 146; see Basey vs. Gallagher, 87 U. S. 670.

[129] Jennison vs. Kirk, 98 U. S. 456; Kern River Co., 38 L. D. 302; Revenue Co. vs. Balderston, 2 Alaska 368; see Isaacs vs. Barber, 10 Wash. 130, 38 Pac. 871. For a modification of the act of 1866, as amended by the act of 1870, see 26 Stats. 1095; 36 Stats. 1235; see U. S. vs. Utah Co., *supra* [(127)]. In the case of Drake vs. Earhart, 2 Ida. 750, 23 Pac. 541, the court said: "All the patents granted, or preemptions of homesteads allowed shall be subjected to any vested and accrued water rights, or rights to ditches. The rulings have been uniform that the patentee of lands has no claim upon the water flowing through the same as against a prior appropriator. South Yuba Co. vs. Rosa, 80 Cal. 333, 22 Pac. 222. As far back as 1855 the supreme court of California in Irwin vs. Phillips, 5 Cal. 145, and in Tartar vs. Spring Creek Co., 5 Cal. 395, distinctly held that the prior appropriator of water should hold it against the riparian claim of the owner of the land through which it flowed, and also in all branches of industry the prior appropriator of land, water and easements would be protected. Not only had such become the law by custom, by the legislative will and the decisions of the courts, without dissent, but the general government for many years, without protest, acquiesced in such occupation and use of its lands and waters by its citizens, while valuable properties and industries were building upon this principle. To put the question beyond uncertainty, and to prove and adopt what already existed as the common law of the West, congress passed the act of July 26th, 1866." See, also, Cave vs. Tyler, 147 Cal. 454, 82 Pac. 64; LeQuime vs Chambers, 15 Ida. 404, 98 Pac. 415. Both of these cases are cited with approval in San Bernardino Bank vs. Jones, 207 Cal. 657, 279 Pac. 657, wherein it is said "in this action to quiet title to water rights and to water rights in a tunnel and pipe line for the use thereof, where plaintiff's predecessor appropriated water from land, which was at the time government land for which a patent was later issued to defendants' predecessor subject to any vested or accruing water rights and rights to ditches or reservoirs used in connection with such water rights, and the patent to the land was recorded, regardless of whether or not defendants had actual or constructive notice of plaintiff's rights and they are entitled to have their title thereto quieted." The United States Supreme Court has uniformly upheld the same doctrine. See Broder vs. Water Co., 101 U. S. 274; see also Rose's U. S. notes; Atchison vs. Peterson, 20 Wall. 670; Basey vs. Gallagher, *supra* [(129)]; Forbes vs. Gracey, 94 U. S. 762; Wyoming vs. Colorado, 259 U. S. 461; Witherill vs. Brehm, 74 Cal. A. 298, 240 Pac. 529.

§ 81. Right to Appropriate Water.

The doctrine of appropriation under this law applied only to public lands and waters of the United States.[130] At the present time the various states, by statute, which vary in effect and detail, prescribe the use of water therein.[131] The different systems in different states are termed the "California system" and the "Colorado system."[132]

§ 82. Pollution of Water.

Water may not unreasonably be polluted[133] nor used in a way detrimental to others.[134]

§ 83. Rights of Way for Ditches and Reservoirs.

By virtue of the provisions of § 2339 Revised Statutes rights of way are granted over the public land for ditches,[135] canals,[136] flumes,[137] or for the construction of a reservoir [138] to one who has a vested and accrued water right.[139]

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[130] Winters vs. U. S., 143 Fed. 717; see U. S. vs. Conrad Co., 156 Fed. 126.

[131] Snyder vs. Colorado Co., 181 Fed. 62. A state by its statute can not take from a private individual the water rights granted him by the paramount law. Howell vs Johnson, 89 Fed. 559.

The control of the flow and the appropriation and use of water, where no government interest is involved, is governed by the local laws and customs of the state within which the stream is located, and in the administration of the various rights of way acts the jurisdiction of the land department is confined to the granting of rights of way for ditches, reservoirs and other constructed works upon the public lands. California-Oregon Co., 52 L. D. 633.

Subterranean percolating water within the public domain is the property of the federal government and when artificially developed is not subject to any state law governing the appropriation of water so long as it retains the title unto itself of the land in which such water is developed. Landheim, 52 L. D. 554.

[132] Willey vs. Decker, 11 Wyo. 496, 73 Pac. 210; see Snyder vs. Colorado Co., *supra* [131].

[133] Crane vs. Winsor, 2 Utah 248. A prior locator can not insist that the stream above him shall not be used by subsequent locators or appropriators for mining purposes and that the water shall flow to his claim in a state of absolute purity. While the subsequent locator will not be permitted to so conduct his operations as to unreasonably interfere with the fair enjoyment of the stream by the prior locator, or to destroy or substantially injure the latter's superior rights as a prior locator, nevertheless the law recognizes the necessity of some deterioration, which within reasonable limits is *damnum absque injuria*. Any other rule might involve an absolute prohibition of the use of all the water of a stream above a prior location in order to preserve the quality of a small portion taken therefrom. The reasonableness of the use is a question for the jury, to be determined by them upon the facts and circumstances of each particular case. The essence of the rule is tersely expressed in the homely maxim of the early miner's law, "Live and let live." Arizona Co. vs. Gillespie, 12 Ariz. 190, 100 Pac. 465, aff'd. 230 U. S. 46; Bear River Co. vs. New York Co., 8 Cal. 327; Hill vs. King, 8 Cal. 336; Hill vs. Smith, 27 Cal. 476; Provolt vs. Bailey, 62 Or. 58, 121 Pac. 961; Dripps vs. Allison's Co., *supra* [128].

The law is well settled that any use of a stream which materially fouls and adulterates the water, or the deposit or discharge therein of any filthy or noxious substances that so far affect the water as to impair its value for the ordinary purposes of life, or any thing that renders the water less wholesome than when in its ordinary state will constitute a nuisance, which courts of equity will enjoin, and for which a lower riparian owner injured thereby, is entitled to redress. Joerger vs. P. G. & E. Co., 207 Cal. 25, 276 Pac. 1017.

[134] Woodruff vs. North Bloomfield Co., 18 Fed. 753; Hardt vs. Liberty Hill Co., 27 Fed. 788; People vs. Gold Run Co., 66 Cal. 138, 4 Pac. 1150; Hobbs vs. Amador Co., *supra* [126]; Dripps vs. Allison's Co., *supra* [128]; see Salestrom vs. Orleans Co., *supra* [126]; Carson vs. Hayes, *supra* [126]; Cheeseman vs. Hale, 31 Mont. 577, 79 Pac. 254.

[135] Bear Lake Co. vs. Garland, 164 U. S. 1; Snyder vs. Colorado Co., *supra* [131].

[136] Bear Lake Co. vs. Garland, *supra* [135]; U. S. vs. Rickey, 164 Fed. 496; see Crane Falls Co. vs. Snake River Co., 24 Ida. 63, 133 Pac. 655.

[137] Rockwell vs. Graham, *supra* [127].

[138] Nippel vs. Forker, 26 Colo. 74, 56 Pac. 577; see Windsor Reservoir Co. vs. Miller, 51 L. D. 27 and 305.

[139] Edwards vs. Roberts, 26 Colo. A. 538, 144 Pac. 856; Crane Falls Co. vs. Snake See *infra*, note 142.

In order to establish any rights under § 2339 it is necessary to prove priority of possession. Telluride Co. vs. Rio Grande Co., 175 U. S. 639, rev'g. 16 Utah 125, 51 Pac. 146; Butte City Co. vs. Baker, 196 U. S. 119, aff'g. 28 Mont. 222, 72 Pac. 617; Creede Co. vs. Uinta Co., 196 U. S. 337. Priority of appropriation gives priority of right. The origin of all rights possible to be acquired in the waters must be traced to the first act of appropriation by the water claimant. If these rights spring into existence after rights have become vested in others, the water rights are subordinate to the rights of others already vested. Miocene Ditch Co. vs. Jacobson, 146 Fed. 683. See DeNecochea vs. Curtis, 80 Cal. 397, 20 Pac. 563.

§ 84. Vested Rights.

The federal law protects priority of possession in rights to the use of water for mining purposes where such rights have been vested and are recognized and acknowledged by the local customs, laws and decisions.[140]

§ 85. Ditches and Canals.

Congress by § 2339 of the Revised Statutes granted the right of way over the public lands for ditches and canals used in appropriating and applying waters for mining purposes.[141] By section 2340 it provided that all patents issued subsequent to its passage for public lands must be subject to any vested or accrued right to established ditches for mining purposes.[142] In order to establish any rights under this law, it is necessary to prove priority of possession.[143]

§ 86. Local Law and Decisions.

Even if priority of possession is shown, it still is necessary to prove

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[140] Jennison vs. Kirk, 98 U. S. 453; Broder vs. Water Co., *supra* (129); Gutierres vs. Albuquerque Co., 188 U. S. 553; Blackburn vs. Portland Co., 175 U. S. 587; Utah Co. vs. U. S., 230 Fed. 343; Lux vs Haggin, 69 Cal. 225, 10 Pac. 674; Jacob vs. Lorenz, *supra* (127); Smith vs. Hawkins, 110 Cal. 125, 42 Pac. 453; Parkersville District vs. Wattier, 48 Or. 338, 86 Pac. 775. "All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the preceding section." 5 U. S. Comp. St., p. 5705, § 4648.

Rights to the use of water for mining purposes are not only recognized, but provision also is made for their acquisition and protection, but this does not include a patent as the possession and use constitute the foundation for these rights, and the federal law secures to the claimant, by virtue of possession and use any rights acquired. Lennig, 13 C. L. O. 110; Lennig, 5 L. D. 191. A patentee of a placer mining claim who fails to continue working it as a mine after it becomes unprofitable and to offer it for sale as a mill site, or for manufacturing establishment, does not thereby lose the water right he had as a miner. Schwab vs. Beam, *supra* (59); see Snyder vs. Colorado Co., *supra* (131).

[141] Broder vs. Water Co., *supra* (129); U. S. vs. Rio Grande Co., 174 U. S. 690; Snyder vs. Colorado Co., *supra* (131); U. S. vs. Utah Co., *supra* (127); Lincoln Co. vs. Big Sandy Co., 32 L. D. 464; Osgood vs. El Dorado Co., 56 Cal. 581; Boglino vs. Giorgetta, 26 Colo. A. 344, 78 Pac. 612; see, also, Wyoming vs. Colorado, 259 U. S. 419, 496. The object of this section was to give the sanction of the government to possessory rights which had previously rested upon the local customs, laws and decisions, and to prevent such rights being lost upon the sale of the land. Jennison vs. Kirk, *supra* (129); Kern River Co., 38 L. D. 309. The law applies to water rights acquired after enactment as well as those vested and accrued before its passage. Jacob vs. Lorenz, *supra* (113). See Blackburn vs. Portland Co., *supra* (140). For an application of this section, see U. S. vs. Portneuf-Marsh Co., *supra* (14).

See *supra*, note 131.

[142] Sturr vs. Beck, 133 U. S. 551; McGuire vs. Brown, 106 Cal. 630, 39 Pac. 1060; Lynch vs. Lower Yakima Co., 73 Wash. 173, 131 Pac. 173; see, also, Schwab vs. Beam, *supra* (59); Thorndyke vs. Alaska Co., 164 Fed. 657; Snyder vs. Colorado Co., *supra* (131). A patent issued for a mining claim is subject to the easements provided by this act. Oliver vs. Agasse, 132 Cal. 300, 64 Pac. 401. The purchaser of a mine from a patentee takes the title to such mine subject to vested and accrued water rights used for mining and other purposes—Jacob vs. Day, 111 Cal. 579, 44 Pac. 243; a right of way for a flume—Maffet vs. Quine, 95 Fed. 347; Rockwell vs. Graham, *supra* (27); a pipe line—San Jose Co. vs. San Jose Co., 189 U. S. 177; Simons vs. Inyo Co., 48 Cal. A. 524, 192 Pac. 144, or the right to maintain a dam will be protected. Greeley Co. vs. Von Trotha, 48 Colo. 18, 108 Pac. 985.

In Utah Co. vs. U. S., *supra* (50), it was held that the provisions of §§ 2339 and 2340 Rev. Stats., Comp. Stats. 1913, §§ 4647 and 4648, were superseded by the enactment of May 14, 1896, 29 Stats. at L. 120, Chap. 179, Comp. Stats. 1913, empowering the Secretary of the Interior "under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground not exceeding forty acres, upon the public lands and reservations of the United States, for the purpose of generating, manufacturing or distributing electric power." The court said: "By them (§§ 2339 and 2340, *supra*) the right of way over the public lands was granted for ditches, canals and reservoirs used in diverting, storing and carrying water for 'mining, agricultural, manufacturing and other purposes.' The extent of the right of way in point of width or area was not stated, and the grant was noticeably free from conditions. No application to an administrative officer was contemplated, no consent or approval by such an officer was required, and no direction was given for noting the right of way upon any record. Obviously, this legislation was primitive. At that time works for generating and distributing electric power were unknown, and so were not in the mind of congress. Afterwards when they came into use it was found

that the right to the use of the water is recognized and acknowledged by the local customs, laws and decisions of the courts; all of which are questions of state law.[144]

§ 87. Federal Water Power Act.

Under the provisions of this act[145] any lands of the United States included in any proposed project become reserved from entry, location or other disposal under the laws of the United States, from the date of the filing of the application therefor. If the commission determines that the value of such lands, reserved or classified as power sites, will not be injured nor destroyed for the purpose of power development by location, entry or selection under the public land laws, the Secretary of the Interior shall declare such lands open to location, entry or selection subject to certain conditions.[146]

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that this legislation was at best poorly adapted to their needs. It was limited to ditches, canals and reservoirs, and did not cover power houses, transmission lines or the necessary subsidiary structures. In that situation congress passed the Act of May 14, 1896, 29 Stats. at L. 120, which related exclusively to rights of way for electric power purposes and read as follows: 'That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing, or distributing electric power.' We regard it as plain that this act superseded §§ 2339 and 2340 in so far as they were applicable to such rights of way. It dealt specifically with the subject, covered it fully, embodied some new provisions, and evidently was designed to be complete in itself. That it contained no express mention of ditches, canals and reservoirs is of no significance, for it was similarly silent respecting power houses, transmission lines, and subsidiary structures. What was done was to provide for all in a general way without naming any of them.'"

[143] Telluride Co. vs. Rio Grande Co., *supra* [139]; Butte City Co. vs. Baker, *supra* [139]; Creede Co. vs. Uinta Co., 196 U. S. 358; see Broder vs. Water Co., *supra* [129].

[144] Telluride Co. vs. Rio Grande Co., *supra* [139]; Helena Co., 48 Fed. 611; see Haight vs. Constanich, 184 Cal. 430, 194 Pac. 28; San Joaquin Co. vs. Worswick, 187 Cal. 674, 203 Pac. 999; and see Drake vs. Earhart, *supra* [129]; Brown vs. Baker, 39 Or. 66, 66 Pac. 193.

[145] Act of June 10, 1920, Supp. Fed. St. 1920, p. 367, amended; Supp. Fed. St. 1921, p. 333; U. S. Code, p. 411, § 818. See U. S. Comp. St. 1925, p. 828, § 9992¼*qq*. It does not cover the whole subject nor provide a complete system of law displacing all others. 33 Opinion Atty. Gen. 34. It is evident, however, that congress did not intend that the inclusion of lands within a proposed project or any power site withdrawal or reserve should not be subject to the provisions of the "Leasing Act," see 48 L. D. 459; Bailey Clay Co., *supra* [5]; see, also, Wilcox, 48 L. D. 181; Walker River District, 48 L. D. 197.

The scope and purpose of the Federal Water Power Act received the extensive and careful consideration of the attorney general in an opinion dated May 3, 1921. 32 Ops. Atty. Gen. 525.

[146] An oil and gas prospecting permit or a lease thereon, granted pursuant to the "Leasing Act" does not constitute an "entry," "location," nor other "disposal" of the land included therein, within the meaning of those terms as contemplated by § 24 of the Power Act of June 10, 1920. The authority conferred upon the Federal Power Commission by subdivision *h* of § 4 of that act to make rules and regulations not inconsistent with the purposes of the act as may be necessary and proper for the purpose of carrying out its provisions, does not clothe that commission with jurisdiction to require the insertion of restrictions in oil and gas permits and leases consequent thereon pursuant to the "Leasing Act," for lands within power site withdrawals and reserves for power purposes. 48 L. D. 459, 628. See Hall, 50 L. D. 656. The *proviso* to § 24 of the Federal Water Power Act, considered in the light of the provisions of § 2 of the act of June 9, 1916, 39 Stats. 218, operates retroactively to validate mining claims, otherwise regular, located upon lands within the forfeited grant to the O. & C. R. Co., after their executive withdrawal as "power site lands," but prior to their classification as such, the claims, however, being subject to the conditions and limitations of said § 24. Hall, *supra;* Twin Falls Co. vs. Caldwell, *supra* [118], overruling 48 L. D. 429, so far as in conflict.

The Federal Water Power Act confers upon the Federal Power Commission the jurisdiction and control over rights of way for power purposes formerly exercised under the act of February 15, 1901, 31 Stats. 790, by the land department, except as to projects involving Indian allotments or where the electrical energy is to be developed other than hydraulically. 51 L. D. 41. See U. S. vs. Southern Power Co., *supra* [27].

For permit for water-power project, see **41 Stats. 1063.**

§ 88. Reclamation Projects.

The act of June 17, 1902,[147] known as the "Reclamation Act," provides for two forms of withdrawal. The first form of withdrawal is of lands required for the construction of irrigation works.[148] This is an absolute withdrawal from any kind of entry or mineral location.[149] The second form of withdrawal is of lands under said works and subject to irrigation, and may be entered only under the Homestead laws.[150]

§ 89. Pipe Lines.

The words of the amendatory act of February 4, 1887,[151] in reference to persons and corporations "who (which) shall be considered and held to be common carriers within the meaning and purpose of this act" apply to any person engaged in the transportation of oil by means of pipe lines.[152]

§ 90. Rights of Way for Pipe Lines.

The rights of way through the public lands, including forest reserves of the United States, are granted for pipe-line purposes for the transportation of oil or natural gas.[153] The right of way is limited to the extent of the ground occupied by said pipe line and twenty-five feet on each side of the same under such regulations as to survey, location, application and use as may be prescribed by the Secretary of

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[147] U. S. Comp. St., p. 5763, § 4702, *et seq.*

[148] U. S. vs. Hanson, *supra* [81]; Twin Falls Co. vs. Caldwell, *supra* [118]; U. S. vs. Fall, 276 Fed. 623; Crafts, 36 L. D. 138; see Instructions, 33 L. D. 607; 38 L. D. 629; Loney vs. Scott, 57 Or. 378, 112 Pac. 172. Lands withdrawn under first-form reclamation withdrawals are withdrawn from all disposal and are dedicated and set aside for the use of the project. In 32 L. D. 387, the land department held that "Withdrawals made by the secretary of the interior under authority of the act of June 17, 1902, of lands which in his judgment are required for irrigation works contemplated under the provisions of said act, have the force of legislative withdrawals and are therefore effective to withdraw from other disposition all lands within the designated limits to which a right has not vested. Reed, *supra*.[9]

[149] See Bisbing, 13 L. D. 45; Gabathuler, 15 L. D. 488; Austin, 18 L. D. 4; Donley vs. Van Horn, 49 Cal. A. 385, 193 Pac. 515. Lands withdrawn for a reservoir site or similar reclamation purposes which are essential to the project, and lands acquired by purchase or condemnation for the exclusive use of the project, may be developed for their mineral resources only by temporary leases for periods not inconsistent with the needs of the project. Mell, 50 L. D. 308; see Wolfe, 49 L. D. 625; Clyde vs. Cummings, 35 Utah 461, 101 Pac. 106.

[150] U. S. vs. Fall, *supra* [148]. See Yuba Co. vs. Yuba Fields, 184 Cal. 469, 194 Pac. 19, s. c. 199 Cal. 203, 248 Pac. 672.

For regulations, under the act of August 11, 1916, 39 Stats. 506, entitled "An act to promote the reclamation of arid lands" as affecting state irrigation districts in their relation to the public lands of the United States, see Regulations 52 L. D. 155.

For regulations affecting the irrigation of lands in Nevada—acts of October 22, 1919 and September 22, 1922, see 52 L. D. 67.

[151] 34 Stats. 584.

[152] U. S. vs. Ohio Oil Co. (Pipe Line Cases), 234 U. S. 548; see Prairie Co. vs. U. S., 204 Fed. 798. A pipe line devoted to the public transportation of oil is a common carrier and subject to regulation by the state as a public utility. Producer's Co. vs. Railroad Commission, 251 U. S. 228; Producer's Co. vs. Railroad Commission, 176 Cal. 499, 169 Pac. 59, aff'd. 251 U. S. 228; Associated Co. vs. Railroad Commission, 176 Cal. 518, 169 Pac. 62. The term "pipe-line" when used in the act providing for the organization of the Railroad Commission in California "includes all real estate, fixtures and personal property, owned, controlled, or managed in connection with or to facilitate the transmission, storage, distribution, or delivery of crude oil or other fluid substances except water through pipe-lines." The term "pipe-line corporation" when used in said act, "includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any pipe-line for compensation within this state." Stats. 1911, Ex. Sess. 18.

[153] 41 Stats. 1063 see, also, Malone Co., 41 L. D. 138; Fraser Co., 43 L. D. 110, 51 L. D. 41. As to permits and leases being subject to rights of way, see 41 Stats. § 29. For rights of way over the public domain in Alaska, see 31 Stats. 534; Carter's Code, § 262; as to Arkansas, see 36 Stats. 296; as to Colorado and Wyoming, see 29 Stats. 127; as to Indian lands, see 33 Stats. 65; as to rights of way through certain parks, reservations, and other public lands, see 31 Stats. 790; 33 Stats. 628. See Northern Co., 37 L. D. 80.

the Interior, and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers.[154]

§ 91. Eminent Domain.

A pipe-line company may avail itself of the right of eminent domain in demanding private property for its right of way.[155]

§ 92. The Hepburn Act.

The Hepburn Act, regulating pipe lines, deals with commerce among the various states, and the fact that oils transported belong to the owner of the pipe line is not conclusive against the transportation being such commerce.[156]

§ 93. Rights of Way for Tramroads, Canals and Reservoirs.

The act of January 21, 1895, as amended by act of May 11, 1898,[157] authorized and empowered the Secretary of the Interior, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs of fifty feet on each side of the marginal limits thereof; or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber.

§ 94. State Lands.

Congress from time to time has granted to certain of the states and territories for educational purposes and for internal improvements,

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[154] See 51 L. D. 41.

[155] Producer's Co. vs. Railroad Commission, *supra* (152); Consumer's Co. vs. Harless, 131 Ind. 446, 129 N. E. 1062; Carnegie Co. vs. Swiger, 72 W. Va. 557, 79 S. E. 3. For appropriation of land for a public pipe line to supply water for mining in Alaska, see Miocene Ditch Co. vs. Lyng, 138 Fed. 548; see, also, Miocene Co. vs. Jacobsen, *supra* (130); Nash vs. Clark, 27 Utah 159; aff'd. in 198 U. S. 361. A pipe-line company is a common carrier. Prairie Co. vs. U. S. 204 Fed. 798, though it transports oil only for a corporation owning its capital stock. See Meischke-Smith Co. vs. Wardell, 286 Fed. 785; see Pipe Line cases, *supra* (152); Producers Co. vs. Railroad Commission, *supra*.

[156] U. S. vs. Ohio Co., *supra* (110). The transportation of oil or gas from state to state through the medium of pipe lines is commerce between the states. U. S. vs. Ohio Co., *supra*; U. S. vs. Simpson, 252 U. S. 466; Pierce Co. vs. Phoenix Co., 259 U. S. 128. Penn. Co. vs. P. S. Commission, 225 N. Y. 397; 122 N. E. 260; see, also, West vs. Kansas Co., 221 U. S. 229; Associated Co. vs. Railroad Commission, *supra* (152).

[157] 5 U. S. Comp. St., p. 5939, § 4943; Id. p. 5940, § 4946; U. S. vs. Utah Co., *supra* (127); 26 Opinion Atty. Gen. 421. Rights of way through national parks and national monuments are prohibited by the act of March 3, 1921, 41 Stats. 1353. Roosevelt District, 51 L. D. 122. For right of way in Colorado and Wyoming to pipe-line companies formed for the purpose of transporting oil, crude or refined, see 5 U. S. Comp. St., p. 5942, § 4947; Id., p. 5943, § 4949. This act was repealed and superseded by § 28 of the Leasing Act of February 25, 1920, 51 L. D. 41. As to Arkansas, see Id. p. 5944, § 4953. For "An act relating to rights of way through certain parks, reservations, and other public lands," see 2 Supp. R. S. 1483; see, also, Id. 1002, 31 Stats. 628, 33 Stats. 65. See Texas Co. vs. Henry, 34 Okla. 343, 126 Pac. 224. For rights of way within forest reserves, see 33 Stats. 628. This act, says the land department, evidently was drawn in the interest of miners. Northern California Co., 37 L. D. 81. As to the inhibition in the act of March 3, 1921, in relation to national parks or national monuments, see 41 Stats. 1353; Arbuckle Co., 50 L. D. 388; Opinion, 50 L. D. 569. A grant of a right of way under the act of March 3, 1891, 26 Stats. 1102, passes no right, title nor interest in or to any mineral deposits underlying the land, nor any right to prospect for, mine, and remove oil or gas deposits either directly by the grantee or any lessee thereof. The title to such deposits remains in the United States, subject only to such disposition as may be authorized by law. Windsor Co. vs. Miller, 51 L. D. 27.

certain portions of the public domain nonmineral in character, or not otherwise excepted from the grant, together with the right to select other lands in lieu thereof, if such lands are mineral in character, or, if covered by a valid subsisting claim or governmental reservation.[158]

§ 95. Mineral Lands Within State Lands.

It is well settled law that a grant of school lands to a state does not carry lands known to be chiefly valuable for mineral at the time when the state's rights would attach, if at all.[159] The general criterion seems to be that the land must be more valuable for mineral explorations than for agricultural purposes. There must be sufficient evidence of mineral to justify the expenditure of time and money for its extraction, and it must be so known at the time of the issuance of the patent therefor.[160] A mere return by the surveyor general or cadastral engineer does not have the effect of establishing the character of the lands as chiefly valuable for minerals[161] as the question is for the determination of the land department.[162] Lands containing valuable mineral deposits, whether of the metalliferous or fossiliferous class, of such quantity and quality as to render them subject to entry under the mining laws—that is, where they are more valuable on account of such mineral deposits than for agricultural purposes—are "mineral lands" within the meaning of that term as used in the exception from the grants to a railroad company and to a state.[163]

§ 96. When Title Vests.

While the grant is a present one[164] the title does not pass to the state until the land is surveyed; the survey finally is approved

[158] See, generally, Ivanhoe Co. vs. Keystone Co., *supra* (59); Work vs. Louisiana, 53 App. D. C. 22, 287 Fed. 999, modified and affirmed; Deweese vs. Reinhard, 165 U. S. 386; Minnesota vs. Hitchcock, *supra* (12); Johanson vs. Washington, 190 U. S. 179; U. S. vs. Sweet, 245 U. S. 563, rev'g. 228 Fed. 421; Payne vs. New Mexico, *supra* (67); Wyoming vs. U. S., *supra* (73); Johnston vs. Morris, 72 Fed. 89; Fall vs. Louisiana, 287 Fed. 999; modified and affirmed in Work vs. Louisiana, *supra*; Thorpe vs. State, 42 L. D. 15; Tillian vs. Keepers, 44 L. D. 462; Bond vs. California, 31 L. D. 34; Doll vs. Meador, 16 Cal. 341; N. P. R. Co. vs. Smith, 62 Mont. 108, 203 Pac. 503; Balderston vs. Brady, 17 Ida, 567, 107 Pac. 493; Heydenfeldt vs. Daney Co., 10 Nev. 290, aff'd. 93 U. S. 634; State vs. Whitney, 66 Wash. 473, 120 Pac. 116. Oklahoma has the right to receive mineral lands under the grant to it for school and other purposes, 34 Stats. 267, a thing not permitted to a state where the mining laws are in force. U. S. vs. Sweet, *supra*; Oklahoma vs. Texas, *supra*.(15)

[159] Utah, 32 L. D. 117. If the land was known to be mineral at the time the grant was made to the state, it does not revert to the state upon the exhaustion of the minerals. Hermocilla vs. Hubbell, 89 Cal. 5, 26 Pac. 611; Van Ness vs. Rooney, *supra* (71). Under the provisions of the act of January 25, 1927, 44 Stats. 1026, the several grants to the mining states of numbered sections in place were extended to embrace numbered sections mineral in character, upon the condition that all minerals, in the lands shall be reserved to the state and be subject only to lease by the state; the rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools. See Instructions, 52 L. D. 51.

[160] U. S. vs. C. P. Co., 84 Fed. 220. In Favot vs. Kingsbury, 98 Cal. A. 284 276 Pac. 1083, the court said: "It is conceded that, because of the fact that when the title to said section sixteen passed from the United States to the State of California in 1880 (by virtue of a school land grant), no mining claims were shown to be in said section, and that same had not been returned by the United States deputy surveyor as being mineral in character, not only did the state acquire title to said section sixteen, but also all mineral therein contained. (U. S. vs. Sweet, 245 U. S. 563; Ivanhoe Co. vs. Keystone Co., 102 U. S. 167; Water Co. vs. Bugbee, 96 U. S. 165; Saunders vs. La Purisima Co., 125 Cal. 159.)" U. S. Borax Co. vs. Death Valley Co., 92 Cal. A. 726, 268 Pac. 937.

[161] Instructions, 31 L. D. 212; Utah, *supra* (159); see Burke vs. S. P. Co., 234 U. S. 669. A mineral location existing at the time of the grant is not conclusive of the character of the land. Mahogany Claim, 33 L. D. 37.

[162] Cosmos Co. vs. Grey Eagle Co., *supra* (40).

[163] Pacific Coast Co. vs. N. P. Co., *supra* (1); see, also, Davis vs. Weibbold, *supra* (59); U. S. vs. Plowman, *supra* (84); U. S. vs. C. P. Co., *supra* (160); Merrill vs. Dixon, 15 Nev. 406. See U. S. vs. S. P. Co., 11 Fed. (2d) 546; Dunbar Co. vs. Utah Co, 17 Fed. (2d) 351; Mesmer vs. Geith, 22 Fed. (2d) 690.

[164] See McNee vs. Donahue, 76 Cal. 498, 18 Pac. 438, 142 U. S. 587; State vs. Whitney, *supra* (158); Washington vs. Geisler, 41 L. D. 621.

by the commissioner of the general land office;[165] and the plat of survey filed in the local land office;[166] or if indemnity or lien land, until the same is selected by the state and the selection is approved, certified or listed to the state by the land department, which is equivalent to patent,[167] which, however, as a rule, is not actually issued by the government to a state.[168] If not known to be mineral subsequent discovery of mineral or changed conditions in the land or its vicinity will not defeat the title of the state;[169] as the question must be determined according to the facts in existence at the time.[170] But if mineral in paying quantities is found after selection and prior to the approval thereof by the land department, such discovery vitiates the selection, as it then is not subject to approval by it.[171]

§ 97. Divestiture of Title.

A state may administer its public lands in any way that it sees fit,

[165] Heydenfeldt vs. Daney Co., *supra* (158); U. S. vs. Morrison, 240 U. S. 192, rev'g. 212 Fed. 29; Hyde & Co., 37 L. D. 164; Washington vs. Geisler, *supra* (164); Tillian vs. Keepers, *supra* (158); Hyde & Co., 48 L. D. 132; Medley vs. Robertson, 55 Cal. 396; U. S. Borax Co. vs. Death Valley Co., 92 Cal. A. 726, 268 Pac. 937; Clemmons vs. Gillette, 33 Mont. 321, 83 Pac. 879; N. P. Co. vs. Smith, *supra* (158). It unquestionably is the law that, if the lands are known to be mineral at the time of the approval of the survey, the state can not take title thereto. U. S. vs. Sweet, 245 U. S. 563; see, also, Wyoming vs. U. S., 255 U. S. 501; Everett vs. Pearson, 261 Fed. 634, dist'g. in Oklahoma vs. Texas, *supra* (1). See West vs. Standard Oil Co., 278 U. S. 200, rev'g. 57 App. D. C. 329, 23 Fed (2d) 750.

[166] Hyde & Co., *supra* (165); Washington vs. Geisler, *supra*, (164); see Hibberd vs. Slack, *supra* (15), *but see* California vs. Deseret Co., 243 U. S. 420, rev'g. 167 Cal. 147, 138 Pac. 981; U. S. vs. Bonners Ferry Co., 194 Fed. 187.

[167] McCreery vs. Haskell, 119 U. S. 327; Curtner vs. U. S., 149 U. S. 662; Carter vs. Ruddy, 166 U. S. 493; Wyoming vs. U. S. *supra* (87); Buena Vista Co. vs. Tulare Co., 67 Fed. 228; Garrard vs. S. P. Mines, 82 Fed. 578; Southern Dev. Co. vs. Endersen, 200 Fed. 283; Stutsman vs. Olinda Co., 231 Fed. 525; Wyoming, 46 L. D. 34; Knapp, 47 L. D. 156; 51 L. D. 566; California, 48 L. D. 384; Slade vs. Butte Co., 14 Cal. A. 453, 112 Pac. 485. If the land has been patented before being clear listed to the state, such listing is void. Jorgensen vs. McAllister, 34 Ida. 182, 202 Pac. 1050. See, generally, Independent Co. vs. U. S., 274 U. S. 640.

If the granting act provides for the approval by the Secretary of a list of the lands the approval ends the jurisdiction of the land department. Cole vs. Washington, 37 L. D. 387; Knapp, 47 L. D. 152, and it, likewise, imports that the necessary determination of the character of the lands has been made. See West vs. Standard Oil Co., *supra* (165).

[168] Chandler vs. Calumet Co., 159 U. S. 79; Buena Vista Co. vs. Tulare Co., *supra* (167); Southern Dev. Co. vs. Endersen, *supra* (167); Hendy vs. Compton, 9 L. D. 106; Buhne vs. Chism, 48 Cal. 467. In West vs. Standard Oil Co., *supra* (165), it is said that under a statute which grants to a state certain sections of land, if not mineral in character, and which does not require an administrative officer in the land department to issue a patent therefor on application of the grantee, such officer has no power to determine generally the validity of the title of a subsequent claimant thereto, without determining as a fact the nonmineral character at the time of the original survey.

Patents are issued for wagon-road grants to Oregon. See U. S. vs. Dalles, 140 U. S. 599.

[169] U. S. vs. Beaman, 242 Fed. 876; Rice vs. California, 24 L. D. 14. The land department uniformly has ruled that the states acquire a vested right in all school sections in place which are not otherwise appropriated, and not known to be mineral at the time they are identified by the survey, or at the date of the grant, where the survey precedes it, regardless of when the matter becomes a subject of inquiry and decision, and that this right is not defeated or affected by a subsequent mineral discovery. Wyoming vs. U. S., *supra* (73).

[170] Cosmos vs. Gray Eagle Co., *supra* (40); Daniels vs. Wagner, 237 U. S. 547; Buena Vista Co. vs. Honolulu Co., 166 Cal. 71, 134 Pac. 1154. It is well established in the parallel cases of Payne vs. C. P. R. Co., *supra* (5). Payne vs. New Mexico, *supra* (87). Wyoming vs. U. S., *supra* (73), that the validity of the selection must be determined according to the conditions existing at the time of the selection. Santa Fe Co. vs. Fall, 259 U. S. 197; West vs. Standard Oil Co., *supra* (165).

[171] See *supra*, note 37; Campbell vs. Flying Co., 25 Ariz. 577, 220 Pac. 417; Magnolia Co. vs. Price, 86 Okla. 105, 206 Pac. 1033. Equitable title to lands selected under the act of August 18, 1894, commonly known as the Carey Act, vests when the state has fully complied with the law and regulations and has completed its proofs in connection with its list for patent; but the power of the land department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed. Walker Basin Co. vs. Morson, 51 L. D. 406, dist'g. 48 L. D. 160.

so long as it does not conflict with the rights guaranteed by the Constitution of the United States.[172]

§ 98. State Lands Within National Forests.

The creation of a national forest reserve is, as to such lands as are under the control of the federal government, a dedication and an appropriation of these lands to a public use.[172a] The title of the state is not impaired by the inclusion of its lands within such a reserve. The state may waive its rights thereto and select land in lieu thereof.[172b]

§ 99. Collateral Attack.

The certification to the state being the same, in effect, as a patent, the decision of the land department as to the character of the land is conclusive and can not be questioned collaterally in an action involving the title to the land.[172c] Such an action must be brought in the name of the United States.[173] A state patent is conclusive of the character of the land and is not subject to collateral attack.[174] Of course, if the patent be void upon its face, or if looking beyond the patent for a law upon which it is based, it is found that there is no law which authorizes such a patent under any state of facts; or that the particular tract named in the patent has been absolutely reserved from disposal, then the patent would be worthless, and assailable from any quarter.[175] The rules applicable to cases involving patents of the general government upon principle apply with equal force to a patent of the state government.[176]

§ 100. Bona Fide Purchaser.

The legal presumption is that all the proceedings leading up to the patent, or its equivalent, were regular and valid, and that all who had dealt with the property had done so honestly and rightfully. No one is bound to assume and hunt for fraud and wrong in the acts of those who have dealt in the title to land he is buying, when that title is fair on its face, in order to secure himself the rights of a *bona fide* purchaser.[177] While the government may avoid a patent by a suit in equity for false and deceitful representations of material facts which

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[172] Frellsen Co. vs. Crandell, 217 U. S. 71; see Walker, 39 L. D. 426; Kinkade vs. California, 39 L. D. 491; Favot vs. Kingsbury, *supra* (159).

[172a] Light vs. U. S., 220 U. S. 523.

[172b] Deseret Co. vs. California, *supra* (166); Payne vs. New Mexico, *supra* (87); U. S. vs. Morrison, *supra* (165).

[172c] Chandler vs. Calumet Co., *supra* (168); Southern Dev. Co. vs. Endersen, *supra* (167); U. S. vs. Milner, 228 Fed. 431; Harrington vs. Goldsmith, 136 Cal. 168, 68 Pac. 594.

[173] Steel vs. St. Louis Co., *supra* (59); Burke vs. S. P. Co., *supra* (161); Jameson vs. James, 155 Cal. 275, 100 Pac. 700. The United States have no more rights, so far as equitable jurisdiction is concerned, than private citizens. U. S. vs. Midway Northern Oil Co., 232 Fed. 619.

[174] Worcester vs. Kitts, 9 Cal. A. 181, 96 Pac. 335; see West vs. Standard Oil Co., *supra* (165); Saunders vs. La Purisima Co., 125 Cal. 159, 57 Pac. 656. In Graham vs. Reed, 83 Cal. A. 516, 257 Pac. 131, it is said that a patent to land from the state is not subject to collateral attack, and can only be attacked on a direct proceeding to set aside the patent on the ground of fraud or other invalidity. And in this action to quiet title in which a state patent to the land involved was issued to plaintiff's predecessor in interest long prior to the location of a mining claim thereon by defendant, investigation as to the character of the land, whether mineral or agricultural, is concluded; hence the finding of the trial court that on March 3, 1853, and ever since, said lands were mineral in fact and well known to be so, was of no force and effect as beyond the power of the court in a collateral proceeding.

[175] Gale vs. Best, 78 Cal. 235, 20 Pac. 505.

[176] Dreyfus vs. Badger, 108 Cal. 58, 41 Pac. 279.

[177] U. S. vs. Detroit Co., 200 U. S. 601; U. S. vs. Beaman, *supra* (169)

induced the issue, the burden is upon the United States in such a case to prove the facts which establish the fraud it charges, not only by a mere preponderance of conflicting evidence, but by "that class of evidence which commands respect and that amount of it which produces conviction."[178] If the defendant is a *bona fide* purchaser for value, without notice, his title can not be attacked by the state, notwithstanding fraud was practiced by his grantor in securing the patent.[179]

§ 101. When Closed to Prospectors.

After title has passed to the state, the land is not open to mineral location.[180]

§ 102. Railroad Lands.

Land grants *in praesenti*, to be afterwards located,[181] have been made by congress from time to time to certain transcontinental railroad companies,[182] which include coal and iron deposits together with all minerals within the right of way[183] and including actual mineral lands whether known or unknown,[184] including oil lands,[185] and not merely such lands as were, at the time of the grant, known to be mineral.[186]

§ 103. Classification of Lands.

No provision is made for the classification of such lands except as to the grant to the Northern Pacific Company within the states of Montana and Idaho. In those states such lands are subject to examination and

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[178] Maxwell Land Grant, 121 U. S. 325; U. S. vs. Stinson, 197 U. S. 200; Diamond Coal Co. vs. U. S., *supra* (73); U. S. vs. Beaman, *supra* (160); U. S. vs. Porter Fuel Co., *supra* (73); U. S. vs. Safe Inv. Co., 258 Fed. 872.

[179] People vs. Swift, 96 Cal. 165, 31 Pac. 16; see Independent Co. vs. U. S. *supra* (167); U. S. vs. Kreger, 228 Fed. 97.

[180] Colorado Coal Co. vs. U. S., *supra* (7); Southern Dev. Co. vs. Endersen, *supra* (167); Rice vs. California, 24 L. D. 14; Buena Vista Co. vs. Tulare Co., *supra* (165); see Van Ness vs. Rooney, *supra* (71).

The California Act of 1897, Stats. & Amdts., p. 438, repealed by the act of 1921, Stats. & Amdts., p. 1305, provided for the exploration and sale of mineral lands within the grant of school lands to the state. A similar act prevails in Nevada. 1 Rev. Laws 1912, § 2457. Such an act does not revest title in the United States nor confer jurisdiction upon the land department to dispose of such lands prior to the approval of a selection of other lands by the state in lieu thereof nor does it constitute a waiver of the nonmineral character of the land at the time such grant took effect. Knapp, 47 L. D. 156; Favot, 48 L. D. 114; Russell vs. U. S. Co., 48 L. D. 418; see California vs. Deseret Co., *supra* (160). The states will not be permitted to make selections in lieu of lands within a school section alleged to be mineral, in the absence of proof that such lands are known to be chiefly valuable for mineral. Such preliminary proof must show the kind of mineral discovered and the extent thereof. Bond vs. California, *supra* (155).

[181] U. P. Co. vs. Laramie Co., 231 U. S. 190; Burke vs. S. P. Co., *supra* (161).

[182] Barden vs. N. P. Co., *supra* (63); Burke vs. S. P. Co., *supra* (161); O. C. Co. vs. Puckett, 39 L. D. 169; N. P. R. Co., 45 L. D. 153.

[183] Nadeau vs. U. P. R. Co., 253 U. S. 445; Doran vs. C. P. R. Co., 24 Cal. 245; Wilkinson vs. N. P. Ry. Co., 5 Mont. 538, 6 Pac. 349; see Jackman vs. Atchison Co., *supra* (3). A railroad right of way is subject to a prior mining claim or homestead or other privately owned land and must be purchased or condemned. See S. C. R. Co. vs. O'Donnell, 3 Cal. A. 382; 85 Pac. 932; U. P. R. Co. vs. Harris, 76 Kan. 255, 91 Pac. 68; N. P. R. Co. vs. Murray, 87 Fed. 648. For railroad right of way act, see 8 Fed. St. Ann, p 789; as amended by act of February 27, 1901, see Id, p. 812. For forfeiture of right of way, see I. D., p. 814. As to right of way for a wagon road, railroad or other highway, see Id. 810. See, also, Pennsylvania Co. vs. Everett, 29 Wash. 102, 69 Pac. 628.

[184] Burke vs. S. P. Co., *supra* (161); see N. P. R. Co. vs. Soderberg, *supra* (83).

The case of Barden vs. N. P. R. Co., *supra* (63), established the doctrine that mineral lands, ascertained to be such at any time prior to patent, do not accrue to the company under its land grant. See Filcher vs. U. S., *supra* (73). This applies to indemnity as well as to place lands. U. S. vs. S. P. Co., 251 U. S. 1, rev'g. 254 Fed. 266.

[185] U. S. vs. S. P. Co., *supra* (185); see Lovelace vs. S. W. Co., 267 Fed. 514.

[186] Barden vs. N. P. Co., *supra* (63).

classification by a commission appointed under an act of congres.[187] As the return of this commission is not conclusive,[188] it remains with the Land Department to ultimately determine the character of the land [189] at the time the patent issues.[190]

§ 104. When Title Vests.

While it may be said that title begins with the date of the grant, still, until the lands are identified the grant is a "float" and does not attach to any part of the public domain until the specified tracts are definitely ascertained by the location of the road and the survey of the land.[191] The title is confirmed by patent or certification,[192] or, by the terms of the granting act, from the date of the survey.[193]

§ 105. Railroad Patents.

A patent issued to a railroad company grants only land which is nonmineral in character and the duty of determining the character of the land is cast upon the land department, which is charged with the issue of patents.[194] Subsequent mineral discovery does not disturb

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[187] Burke vs. S. P. Co. *supra* (161). It is settled law, not only in the established practice of the land department, but by the decisions of the courts, that the rights acquired under a grant of public lands, not known to be mineral at the time they are surveyed, or at the date of the grant, where the survey precedes it, regardless of the time when the matter becomes a subject of inquiry and decision, are not defeated nor affected by a subsequent mineral discovery. U. S. vs. Morrison, *supra* (165); U. S. vs. Sweet, *supra* (88); Wyoming vs. U. S., *supra* (73). Likewise the validity of the grant relates back to the time when it was made. Payne vs. New Mexico, *supra* (87); Payne vs. C. P. R. Co., *supra* (5); Fall vs. Louisiana, *supra* (158).

[188] 28 Stats. 683; St. Paul Co., 34 L. D. 211.

[189] Lynch vs. U. S., 136 Fed. 535; Beaudette vs. N. P. Co., 29 L. D. 248; N. P. R. Co. vs. Ledoux, 32 L. D. 24; State vs. N. P. Co., 37 L. D. 138; Instructions, 39 L. D. 113–116.

[190] Burfenning vs. Chicago Co., 163 U. S. 323; U. S. vs. Lane, 250 U. S. 549; C. P. Co. vs. DeRego, 39 L. D. 288; Cameron vs. U. S., *supra* (24); Gale vs. Best, *supra* (178); Standard Co. vs. Habishaw, 132 Cal. 115, 64 Pac. 113.

[191] Wyoming vs. U. S., *supra* (73), holding that the only exception to the general rule that the time as of which the character of public land—whether mineral or nonmineral—is to be determined is that when selection was made is confined to railroad grants.

[192] N. P. Co. vs. Smith, *supra* (158).

Lands in place are those identified by filing the map of definite location, and indemnity lands by selections made in lieu of losses in the place limits. Payne vs. C. P. R. Co., *supra* (5).

[193] Burke vs. S. P. Co., *supra* (161); Southern Dev. Co. vs. Endersen, *supra* (167); C. P. R. Co. vs. Valentine, 11 L. D. 238.

[194] Bedal vs. St. Paul Co., 29 L. D. 254. See West vs. Standard Oil Co., *supra* (165).

The decision in the case of Burke vs. S. P. Co., *supra* (161), involved the construction of the grant to the Southern Pacific Railroad Company by the act of July 27, 1855 (14 Stats. 392). That act also, as do the Acts of 1862, 12 Stats. 492, and 1864, 13 Stats. 356, excluded from its operation all mineral lands other than coal and iron lands. In that case mining locations had been made on the land in controversy and discovery made thereon prior to the issuance of the patent. At the time the patent was issued to the railroad company in 1894, the locators were in possession of the mining locations, but afterward abandoned the same and the plaintiff and his associates relocated the same under the mining laws of the United States. The patent in that case contained a clause excepting mineral lands, should they be found in the tracts. After elaborate consideration the court decided the following propositions:

(1) That although mineral lands, known to be such at and before the issuance of patent, were excluded from the grant, yet that act cast upon the land department of the United States the duty of determining the character of the land before issuing patent therefor; (2) that the Land Department was the legally constituted tribunal to determine the question whether or not the land to be patented was or was not mineral land within the meaning of the act, and that its determination was not void, but that a patent issued in due form passed the title subject only to the right of the United States to attack the patent by a direct suit for its annullment if the land was known to be mineral when the patent issued; (3) that the clause in the patent purporting to except mineral lands found in the tract is void, because the officers of the United States who prepare and issue the patent have no authority to insert such exception; (4) that a patent so issued constitutes 'a conclusive and official declaration that the land is agricultural and that all the requirements have been complied with' except upon a direct attack by the United States or some person acting in privity with it, to set aside the patent for fraud or mistake, or to declare

the rights of the nonmineral patentee,[195] but the patent is subject to cancellation if the land covered thereby is known to be mineral at and prior to its date.[196] For instance, if the railroad company knows at the time of receiving a patent that the lands described therein are mineral, a case of fraud is presented which entitles the government to have the patent cancelled.[197] Such an action can only be brought in the name of the United States.[198]

§ 106. Statute of Limitations.

In cases of fraud, active or concealed, the statute of limitations begins to run from the date of the discovery of the fraud.[199] In cases other than fraud where patents are erroneously issued under a railroad grant, suit shall only be brought within five years from the passage of the act of March 2, 1896, and within six years after the date of the issuance of the patent.[200]

§ 107. Defenses.

It is a perfect defense to an action to set aside a patent that the title has passed to a *bona fide* purchaser, for value, without notice. And, generally speaking, equity will not simply consider the question whether the title has been fraudulently obtained from the government, but also will protect the rights and interests of innocent parties.[201] But this

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a trust under it; (5) that one claiming under a mining location, made after the issuance of the patent and after the previous location was abandoned, is not in privity with the United States so as to be able to invoke the right to annul such patent; (6) that the fact that the claimant of the mining location was not in privity with the government when the patent was issued prevents him from attacking the patent on the ground of fraud or mistake. See, also, Vore vs. Ephraim, 173 Cal. 245, 159 Pac. 719.

In Works vs. C. P. R. Co., 12 Fed. (2d) 834, it is held that under the acts making a grant of lands to that company, the title to all nonmineral lands in the odd numbered sections within the primary limits of the grant vested in the company, no objection appearing irrespective of the fact that said nonmineral land constituted only a part of a quarter quarter of a section or of a lot; distinguished in S. P. R. Co., 52 L. D. 419.

[195] Burke vs. S. P. Co., *supra* (161). See N. P. R. Co., 48 L. D. 573.

[196] Id. It does not even *pro tanto* divest the title of the patentee. U. S. vs. S. P. Co., *supra* (73).

[197] U. S. vs. S. P. Co., *supra* (73).

[198] Western P. Co. vs. U. S., 108 U. S. 510, distinguished in Burke vs. S. P. Co., *supra* (194). In a suit to cancel a patent on the ground of fraud or mistake, the evidence must be clear, convincing and satisfactory and the title will not be set aside on mere suspicion. U. S. vs. Delatur, 275 Fed. 137; see, also, U. S. vs. Medland, 281 Fed. 649.

[199] Burke vs. S. P. Co., *supra* (161).

[200] U. S. vs. Diamond Coal Co., *supra* (73); U. S. vs. Chandler-Dunbar Co., 152 Fed. 30; Exploration Co. vs. U. S., 247 U. S. 445, aff'g. 235 Fed. 11; see U. S. vs. Jones, 242 Fed. 616; U. S. vs. S. P. R. Co., 11 Fed. (2d) 546. A fraud concealed, or committed in such a way as to conceal itself, does not raise the bar of the statute of limitations until discovery of the fraud. U. S. vs. Wholley, 262 Fed. 518. See, also, Lightner Co. vs. Lane, 161 Cal. 689, 120 Pac. 771, and cases therein cited.

See § 100.

[201] Wright vs. Blodgett Co., 236 U. S. 397; Independent Co. vs. U. S. *supra* (167); U. S. vs. Cooksey, *supra* (88). For a precedent in setting up a defense, see Boone vs. Chiles, *supra* (77).

Fraud never is presumed, but must be established by clear, unequivocal and convincing proof; proof which merely creates a suspicion not being enough. U. S. vs. California Midway Oil Co., 259 Fed. 343. See, also, U. S. vs. Medland, *supra* (198); U. S. vs. Paiz, 293 Fed. 756; U. S. vs. Boucher, 15 Fed. (2d) 785. Where two inferences can be drawn from proven facts, one in favor of fair dealing and good faith and the other of a corrupt motive, it is the duty of the trier of facts to draw the inference favorable to good faith and fair dealing. Hawks, 204 Fed. 316; Ryder vs. Bamberger, 172 Cal. 797, 158 Pac. 753. No one is bound to assume and hunt for fraud and wrong in the acts of those who have dealt in the title to land he is buying, when that title is fair on its face, in order to secure himself the right of a *bona fide* purchaser. U. S. vs. Detroit Co., *supra* (177); U. S. vs. Clark, 200 U. S. 609; U. S. vs. Beaman, *supra* (169). For confirmation of sales to a *bona fide* purchaser, see S. P. R. Co. vs. U. S., 200 U. S. 507; Huntington vs. Donovan, 183 Cal. 751, 192 Pac. 546.

is an affirmative defense which the grantee must establish in order to defeat the government's right to the cancellation of the conveyance which fraud alone is shown to have induced,[202] and, nevertheless, the right remains in the government to sue for and recover the value of the lands so wrongfully received and conveyed.[203] When the United States is not the real party in interest, it may be barred by laches.[204]

§ 108. Collateral Attack.

It is well settled that issuance of a United States patent for land as either mineral or agricultural in character by a tribunal having jurisdiction that such is the character of the land precludes collateral attack.[205] In other words, the patent is conclusive evidence of the character of the land and of the regularity and proceedings resulting in its issue.[206] Although a patent is not subject to collateral attack[207] yet, in cases of void patents the same may be impeached in any form of action where they are offered as the base of the attack or defense.[208] It follows that an attack upon a patent can not be maintained by one unconnected with the paramount title,[209] nor by a junior locator.[210] But a senior locator may maintain an action to quiet title against the nonmineral patentee.[211] Such an action is not one to annul or void the patent but merely to determine whether the land was rightfully patented as nonmineral lands.[212] Or a suit may be brought to have one to whom the patent has issued declared a trustee for another who at the

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[202] 5 U. S. Comp. St., p. 5893, § 4901; Colorado Coal Co. vs. U. S., *supra* (73); U. S. vs. Winona Co., 165 U. S. 463; U. S. vs. Chicago Co., 195 U. S. 358; U. S. vs. Stinson, 197 U. S. 200, aff'g. 125 Fed. 907; Wright vs. Blodgett Co., *supra* (201); U. S. vs. Koleno, *supra* (88); Union Co. vs. U. S., 247 Fed. 107; U. S. vs. Cooksey, *supra* (88). See 5 U. S. Comp. St., p. 5898, § 4903.

[203] S. P. Co. vs. U. S., 200 U. S. 353; Whited vs. Wheless, 246 U. S. 552, rev'g. 232 Fed. 139; Union Co. vs. U. S., *supra* (72); Frick vs. U. S., 255 Fed. 612, aff'g. 244 Fed. 574. See Independent Co. vs. U. S., *supra* (167).

[204] U. S. vs. Beebe, 127 U. S. 338; Moran vs. Horsky, 178 U. S. 213; dis's. appeal 13 Mont. 250, 34 Pac. 360; Utah Co. vs. U. S. *supra* (81); U. S. vs. Fletcher, 242 Fed. 820. See Virginia vs. W. Virginia, 220 U. S. 34.

[205] Southern Dev. Co. vs. Endersen, *supra* (167); Patterson vs. Ogden, 141 Cal. 43, 74 Pac. 443; Chino Co. vs. Hamaker, 39 Cal. A. 274, 178 Pac. 738.

[206] Burke vs. S. P. Co., *supra* (161); Chino Co. vs. Hamaker, *supra* (205).

[207] Steel vs. St. Louis Co., *supra* (59); Burke vs. S. P. Co., *supra* (161); U. S. vs. Primrose Co., 216 Fed. 557; Seaples vs. Card, 246 Fed. 501; Old Dominion Co. vs. Haverly, 11 Ariz. 250, 90 Pac. 333.

[208] Burfenning vs. Chicago Co., *supra* (150); King vs. McAndrews, *supra* (14); Seaples vs. Card, *supra* (207); Williams vs. San Pedro, 153 Cal. 44, 94 Pac. 234; Donley vs. Van Horn, 49 Cal. A. 383, 193 Pac. 514.

[209] Daniels vs. Johnston, 237 U. S. 569; Peabody Co. vs. Gold Hill Co., 111 Fed. 82; aff'g. 106 Fed. 241; Roberts vs. S. P. R. Co., 186 Fed. 934; Standard Co. vs. Habishaw, *supra* (100); Phillips vs. Carter, 135 Cal. 606, 67 Pac. 1031. A patent containing the clause "reserving all claim of the United States to the same as mineral land" is a void exception. Persons not in privity with the government in any respect at the time the patent was issued can not successfully attack the patent. Chino Co. vs. Hamaker, *supra* (205). In Burke vs. S. P. R. Co., *supra* (161), the court held that while mineral land was excepted from the grant to the railroad company, the issuance of patent by the land department was a determination that the land was of the proper character and that such patent could not be collaterally attacked by a stranger. The court pointed out that the appropriate remedy was, if the land department had been induced by false proofs to issue such a patent for mineral lands, either a bill in equity on the part of the government to cancel the title, or by a prior mineral claimant in order to have the patentee declared a trustee for him. See, also, Knapp, 47 L. D. 156, distg. Heydenfeldt vs. Daney Co., *supra* (158); Noyes vs. Mantle, 127 U. S. 348, and *supra*, note 194.

[210] Van Ness vs. Rooney, *supra* (71); Chino Co. vs. Hamaker, *supra* (205).

[211] Van Ness vs. Rooney, *supra* (71).

[212] Id.

time of its issue had acquired such a right to the land as to entitle him to that form of equitable relief.[213]

§ 109. Procedure on Annulment of Patent.

In a suit brought by the United States to annul a patent the government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual.[214] It is incumbent upon the government to show that the land was known mineral land at the time the patent issued and that the land is chiefly valuable for mineral purposes.[215]

§ 110. Mining Locations Within Railroad Grants.

Mining locations may lawfully be made within the limits of a railroad grant,[216] other than within the right of way,[217] prior to patent. After certification or a patent has issued, no mineral rights can be initiated within such lands without the consent of the railroad company or its grantee.[218]

§ 110a. Mill-site Locations Within Railroad Grants.

No mill-site location may be made upon lands within the limits of the grant after the line of the road has been definitely fixed.[219]

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[213] Svor vs. Morris, 227 U. S. 524 rev'g. 118 Minn. 344, 136 N. W. 852; Van Ness vs. Rooney, *supra* (71); Loney vs. Scott, *supra* (148); see Fisher vs. Rule, 248 U. S. 314; aff'g. 232 Fed. 861; N. P. R. Co. vs. McComas, 250 U. S. 393.

To charge the holder of the legal title to land under a patent of the United States as a trustee for another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the government, and that, in consequence of erroneous rulings of the officers of the land department upon the land applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered the title should have been awarded to the claimant. Bohall vs. Dilla, 114 U. S. 47; Sparks vs. Pierce, *supra* (72); Lee vs. Johnson, 116 U. S. 249; Johnson vs. Riddle, 240 U. S. 481; N. P. R. Co. vs. McComas, *supra*; Jameson vs. James, 155 Cal. 279, 100 Pac. 700; Pierson vs. Loveland, 16 Ida. 628, 102 Pac. 340.

[214] U. S. vs. Mammoth Oil Co., 5 Fed. (2d) 333; Wilkinson vs. N. P. R. Co., *supra* (153). See Southern California Co. vs. O'Donnell, 3 Cal. A. 382, 85 Pac. 932.

The burden of proof rests upon the government, even though the establishment of a negative be required; and the evidence must be clear and convincing. U. S. vs. Stinson, *supra* (178); U. S. vs. Safe Inv. Co., 258 Fed. 872.

[215] U. S. vs. Plowman, 216 U. S. 372.

[216] Barden vs. N. P. Co., *supra* (63); Van Ness vs. Rooney, *supra* (71). Where in case of a lode mining claim in partial conflict with a railroad grant, discovery is made of a vein or lode upon such claim without the boundaries of the grant, the presumption is that the vein or lode extends to the limits of the location and the burden is upon the railroad to overcome the presumption. S. P. R. Co., 52 L. D. 437. See, also, U. S. vs. C. P. R. Co. (on rehearing), 49 L. D. 588; S. P. R. Co., 53 L. D. 419.

A discovery of mineral upon certain subdivisions of a placer claim located within the primary limits of a railroad grant can not defeat the grant as to the subdivisions within such claim found to be nonmineral in character. C. P. R. Co. vs. Mullin, 52 L. D. 573.

[217] See Bonner vs. Rio Grande Co., 31 Colo. 446, 72 Pac. 1065. See, also, Schirm-Carey Placers, 37 L. D. 371; Rio Grande Co. vs. Stringham, 38 Utah 113, 110 Pac. 868.

[218] Southern Dev. Co. vs. Endersen, *supra* (167); Van Ness vs. Rooney, *supra* (71); Traphagen vs. Kirk, 30 Mont. 562, 77 Pac. 58; see Weyerhauser vs. Hoyt, 219 U. S. 380.

Where a patent to a railroad company is cancelled by decree of court, the land covered thereby is restored to the public domain as of the date of the decree and immediately is subject to location as a mining claim without action by the land department. Such a location can be held indefinitely in the absence of an appeal by the railroad company. Double Eagle Co. vs. Hubbard, 42 Cal. A. 39, 183 Pac. 282.

[219] Keystone Co. vs. Nevada, 15 L. D. 259; Mongrain vs. N. P. Co., 18 L. D. 103.

§ 111. Rejection of Mineral Application for Patent.

Where it appears that an application for a mineral patent embraces land within a railroad grant, the application will be rejected or suspended by the local land officers.[220] The applicant may appeal or protest and apply for a hearing to determine the character of the land. In which case proceedings will be had in the manner usual in the land office.[221] The order of rejection or suspension is not reviewable in the courts.[222]

§ 112. Withdrawals.

On September 27, 1909, the president of the United States withdrew certain lands within the states of California and Wyoming from disposal under the mining laws, on account of the petroleum oils that might be contained therein.[223] This action was followed by the act of June 10, 1910,[224] known as the "Pickett Act," upholding the president's right to make such order. On August 24, 1912, that statute was amended so as to include all nonmetalliferous deposits.[225]

§ 113. Leasing Acts.

On and after the passage of the leasing acts of October 2, 1917,[226] and February 25, 1920.[227] lands which at the time of an attempted location on account of metalliferous deposits are known to be valuable for any minerals named in those acts, to wit: coal, phosphate, sodium,

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[220] Min. Regs. par. 44.

[221] Id.

[222] Plested vs. Abbey, 228 U. S. 47; Cameron vs. Weedin, 226 Fed. 44; Stockley vs. U. S., *supra* (85).

[223] See U. S. vs. Midwest Oil Co., 236 U. S. 459, rev'g. 216 Fed. 802. For a collection of cases bearing upon this subject, see Morrison's Oil Rights, page 255, *et seq.*

[224] 5 U. S. Comp. St., p. 5320, § 4523; see U. S. vs. Midwest Oil Co., *supra* (223); Shaw vs. Work, 9 Fed. (2d) 1014. For a considerable period of time prior to the year 1909 the lands of the United States chiefly valuable for petroleum deposits were open to location under what commonly is known as the "placer mining act," which permitted the location of mineral claims upon the public domain, ripening into a property right upon the discovery of oil, which might be extracted to exhaustion without the payment of any royalty to the United States as owner. Union Oil Co. vs. Smith, 249 U. S. 337, aff'g. 166 Cal. 217, 135 Pac. 996. In the year 1909 the government began what apparently is a new policy in dealing with at least some of its mineral lands, for in that year by presidential orders certain portions of the public domain, having been characterized as proven oil lands, were withdrawn from location and entry. There being some question about the legality of this executive order, which legality, however, subsequently sustained by the supreme court of the United States, congress passed an act, permitting the president, by order to withdraw such lands, and they were again withdrawn by a second presidential order in the year 1910. U. S. vs. Mammoth Oil Co., *supra* (214).

[225] 5 U. S. Comp. St., p. 5321, § 4524.

[226] 40 Stats. 297; see 50 L. D. 641.

By § 12 of the act of October 2, 1917, 40 Stats. 297, deposits of chlorides, sulphates, carbonates, borates, silicates, and nitrates of potassium, in lands valuable for such deposits and by § 37 of the act of February 25, 1920, 41 Stats. 437, deposits of coal, phosphates, sodium (including chlorides, sulphates, carbonates, borates, silicates and nitrates of sodium), oil, oil shale, and gas, in lands valuable for such minerals, are made subject to disposition only in the form and manner provided in such acts, except as to valid claims existent at the dates of the passage of the acts, and thereafter maintained in compliance with the laws under which initiated. Prior to these acts the deposits named therein, except coal, were subject to appropriation only under the provisions of the mineral laws, such laws having been extended to the public lands of the United States containing salt springs and deposits of salt in any form and chiefly valuable therefor by the act of January 31, 1901, 31 Stats. 745. See 50 L. D. 650. Dennis vs. Utah, 51 L. D. 231.

[227] 41 Stats. 437.

oil, oil shale, or gas, are not subject to appropriation under the pre-existing mining laws.[228]

§ 114. Mining Law States.

The laws of the United States relating to mining extend to the states of Arizona,[229] Arkansas, California, Florida, Idaho, Louisiana, Mississippi, Montana, Nevada,[230] New Mexico, North Dakota, Oregon, South Dakota,[231] Utah, Washington and Wyoming and, in a modified form within Alaska and the Philippine Islands. All mining states and also Alaska have legislation supplementing the federal mining law.[232]

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[228] See *supra*, note 226; see, also, Marcus vs. Gray, 50 L. D. 288; Herrin, 51 L. D. 424. No provision was made for the disposition of the deposits reserved in agricultural patents under the act of July 14, 1917, 38 Stats. 509, and none was subsequently made prior to the enactment of the act of February 25, 1920, 41 Stats. 437. On and after that date all deposits of minerals named therein became subject to disposition only in the form and manner provided in said act, except as to the claims specified in section 37 of that act, as valid claims existent at date of passage of that act, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under said laws. Dennis vs. Utah, *supra* [226].

West vs. Krushnic, 30 Fed. (2d) 742, distinguishing 17 Fed. (2d) 71, *certiorari* granted 279 U. S. 831, aff'd. 280 U. S. 306, was a proceeding in mandamus to compel the Secretary of the Interior to issue a patent for certain oil shale lands which were located more than five years before the passage of the "Leasing Act." The court held that "Inasmuch as it is conceded in this case that, but for the passage of the 'Leasing Act,' plaintiff's claim is valid and entitles him to a patent, it must be conceded that its validity, in the absence of any intervening locator, continued at all times from the date of the location until the filing of his application for patent. We interpret the exception to mean that so long as a person, who located a claim prior to the passage of the Leasing Act, maintains and observes the requirements of the Mining Act, and on complete compliance therewith applies for his patent, he comes within the exception to the Leasing Act and is not barred thereby. Such a locator is not subjected to any forfeitures that did not apply to the mining act, and the mere fact that oil shale claims were no longer subject to relocation after the passage of the Leasing Act is of no importance. Until relocation intervened, the claim of the original locator, or his lawful successor in interest, remains unimpaired. His rights after resumption were restored to exactly the same standing that they had, if no default had been made."

For operating regulations to govern the production of oil and gas, acts of February 25, 1920, June 4, 1920, and March 4, 1923, see 52 L. D. 1.

[229] See Norman vs. Phoenix Co., 28 L. D. 361.

[230] The act of July 25, 1866, see Del Monte Co. vs. Last Chance Co., 171 U. S. 55, granted to A. Sutro and his assigns certain privileges to aid in the construction of a tunnel and conferred upon them the right of preemption of all lodes within two thousand feet on each side of such tunnel. Locators of lode claims affected by such tunnel are exempted from the performance of actual assessment work. 8 C. L. O. 100. The waters flowing from such tunnel do not constitute a natural stream of water, and are the property of such persons as are engaged in the mining operations. Cardelli vs. Comstock Co., 26 Nev. 295, 66 Pac. 950.

[231] Under the act of January 11, 1915, all lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay in Tripp County in what was formerly within the Rosebud Indian Reservation in South Dakota were opened to exploration, purchase and disposal under the general provisions of the mining laws of the United States. 6 Fed. Stats. Ann. p. 615.

[232] Deeney vs. Mineral Creek Co., 11 N. M. 279, 67 Pac. 724. See Butte City Co. vs. Baker, *supra;* Costigan Min. Law, p. 21, § 4, wherein Mr. Costigan says: "A very interesting classification of state legislation has been made by Mr. Lindley, and should be stated here. He has two groups. (a) Proper state legislation; and (b) doubtful state legislation, 1 Lind. (2 ed.), §§ 250, 251. Under group (a) which consists of matters of legislation 'unquestionably proper within certain limits,' he classifies (1) Length of lode claims. (2) Width of lode claims. (3) Posting notices of location. (4) Contents of record and certificates of location. (5) Recording notices and certificates of location. (6) Posting certificates to the fact that the location certificate is recorded. (7) Authorizing amended locations and amended location certificates. (8) Marking of boundaries and defining the character of posts and monument. (9) Requiring sinking of discovery shaft or its equivalent prior to completion of location. (10) Requiring affidavit of sinking discovery shaft or its equivalent to be attached to and recorded with the notice of location. (11) Fixing time within which the location shall be completed after discovery. (12) Providing for the manner of relocating abandoned claims. (13) Amount of annual work. (14) Posting notice that annual or development work is in progress. (15)

§ 115. Alaska.

The laws of the United States relating to mining claims, mineral locations, and rights incident thereto were extended to the Territory of Alaska by the act of May 17, 1884,[233] and subsequently, by the act of June 6, 1900,[234] amended as to the law governing labor or improvements upon mining claims in Alaska by the act of March 2, 1907,[235] and by the act of August 1, 1912,[236] modifying and amending the mining laws in their application to the Terriory of Alaska, and for other purposes. This act was supplemented by the territorial legislature of Alaska in the year 1913.[237] The act of August 1, 1912, was amended by the act of March 23, 1925.[237a] The provisions of the act of February 25, 1920,[238] except as to coal lands and deposits of coal, are in force within Alaska.[239]

Authorizing the recording of affidavits of performance of annual labor. (16) Prescribing manner of organizing mining districts. (17) Authorizing survey of claim to be made by deputy mineral surveyor, and when recorded, to become a part of the location certificate, and become *prima facie* evidence as to all facts therein contained. (18) Manner of locating tunnel claims and length allowed on discovered lode. (19) Manner of locating millsites and area allowed therefor."

To which may be added making and recording affidavit of personal service or affidavit of publication upon defaulting co-owner. See California Civil Code, § 1426. "Under group (b) which consists of matters of legislation 'either clearly obnoxious to the federal law or open to criticism as being ineffectual' he classifies: (1) Laws giving a locator the right to all lodes which have their tops or apex within the location, and defining the extralateral right. (2) Laws defining the rights of parties in cases of lodes crossing or uniting. (3) Laws determining the rights of locators of two crevices found to be the same lode. (4) Laws prohibiting the proprietor of a mining claim from pursuing his vein on its strike beyond vertical planes drawn through surface boundaries. (5) Laws requiring verification of location certificates by oath. (6) Laws providing methods for forfeiting estates of delinquent co-owners. (7) Laws specifying the character of deposits which may be located under the placer laws. It would seem as if Mr. Lindley made a mistake in not putting (b) (5) under (a); see Butte City Water Co. vs. Baker, 196 U. S. 119. The requirement of the verification of location certificates by oath seems legally unobjectionable. The various states have legislated, also, in regard to drainage, easements, rights of way, mining corporations, etc.; but with the exception just noted, the strictly mining code provisions have been well classified by Mr. Lindley as above set forth."

[233] Bennett vs. Harkrader, 158 U. S. 441; Meydenbauer vs. Stevens, *supra* [(2)]; Tyee Con. Co. vs. Langstedt, 136 Fed. 124; Tyee Co. vs. Jennings, 137 Fed. 863; Brady, 26 L. D. 308; Low vs. Katalla Co., 40 L. D. 537; Price vs. McIntosh, 1 Alaska 286; U. S. vs. Berrigan, 2 Alaska 242; Madigan vs. Kougarok Co., 3 Alaska 69; McFarland vs. Alaska Perseverance Co., *supra* [(128)]; see Young vs. Goldsteen, *supra* [(50)].

No association placer claim may exceed forty acres nor may any person locate more than two placer claims within any calendar month. Sess. Laws Alaska, 1927, p. 135. No claim shall be longer than three times its greatest width which shall be determined by a transverse line drawn within the lines of the claim and at right angles to its longest side and that this dimensional restriction shall not apply to any isolated parcel of placer ground which lies between and adjoins patented or validly located claims on all its sides and is not over thirteen hundred and twenty feet in length, 43 Stats. 1118. The cadastral engineer will be careful to observe the above requirements and will not approve any survey of a placer location which does not in area and diminsions conform to the provisions of law. See 51 L. D. 111, amending Min. Regs., par. 60*c*. A location made in violation of these rules is null and void. 5 U. S. Comp. St., p. 6026, § 5056.

For locations by attorney in fact, in Alaska, see Cloninger vs. Finlaison, 230 Fed. 101; Sutherland vs. Purdy, 234 Fed. 602.

[234] Thompson vs. Pelton, 4 Alaska 510.

[235] U. S. Comp. St. p. 6004, § 5051; see Thatcher vs. Brown, 190 Fed. 708. For suspension of annual work in the year 1913 on all mining claims on Seward Peninsula in Alaska, see 38 Stats. 235. See Min. Regs. par. 60. For suspension of annual work until April 1, 1919, see 2 U. S. Comp. St. p. 245. §§ 4620*c*, 4620*d*.

[236] U. S. Comp. St. p. 6026, § 5054. See Placer Claims, 41 L. D. 337.

[237] Sess. Laws Alaska, 1913, p. 283; Sess. Laws Alaska, 1915, p. 11; amended Sess. Laws, 1927, p. 135. As to water rights, see Sess. Laws, 1917, p. 123. For an instance of the insufficiency of a recorded notice of location under the law of 1915 see Vedin vs. McConnell, 22 Fed. (2d) 753.

[237a] 43 Stats. 1118; see, also, 51 L. D. 111.

[238] 2 Supp. U. S. Comp. St. p. 1404, § 4640¾; see, also, act of March 8, 1922.

[239] Coal lands within the Territory of Alaska are subject to acquisition under the law of October 20, 1914; 38 Stats. 741, amended March 4, 1921, 2 Supp. U. S. Comp. St. p. 1514, § 5078*c*; U. S. vs. Munday, 222 U. S. 181. See also Circular, 45 L. D. 227, amended 45 L. D. 227; Circular, 48 L. D. 50; Healy River Co., 48 L. D. 443. Morrison's Oil and Gas Rights, p. 822. A special provision affects oil and gas-bearing lands within that territory, 2 Supp. U. S. Comp. St., p. 1415, § 4640*kk*. As to saline lands, see act of January 31, 1901, Stats 745; Min. Regs. par. 31.

§ 116. Federal Mining Laws Inoperative.

The federal mining laws do not apply within the states wherein there is no land belonging to the United States, as in the thirteen original states, namely: Connecticut, Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Virginia, and the four states carved therefrom, namely: Kentucky, Maine, Vermont, and West Virginia. Congressional legislation expressly has excepted the following states: Alabama,[240] Kansas,[241] Illinois,[242] Indiana[243] Michigan,[244] Minnesota,[245] Missouri,[246] Ohio,[247] Oklahoma,[248] (*but see* 31 Stats. 680.) and Wisconsin[249] from the operations of such laws.

Texas retained its public lands upon its admission to the Union and such lands are governed by its own mineral laws.[250]

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[240] 22 Stats. 487. For a reclassification of public lands in Alabama, see 6 Fed. St. Ann. [2d. ed], p. 607.

[241] 6 Fed. St. Ann. [2d. ed.], p. 599.

[242] See 27 Cyc. 543, note 9.

[243] Id.

[244] 6 Fed. St. Ann. [2d ed.], p. 592, § 2345; Cosmos Co. vs. Gray Eagle Co., 104 Fed. 47, aff'd 112 Fed. 4.

[245] Id. 51 L. D. 316.

[246] 6 Fed. St. p. 599.

[247] 27 Cyc. 643, note 9.

[248] 5 U. S. Comp. St. p. 6000, § 5027; see 32 Stats. 680; 34 Stats. 267, 273; Constitution of Oklahoma, art. 6, §§ 25, 26; Sess. Laws, Okla. 1095, p. 198; Oklahoma vs. Texas, 258; Bay vs. Oklahoma Co., *supra* (94); Oklahoma, 35 L. D. 509; Coley vs. Williams, 98 Okla. 143, 224 Pac. 345; see Cherokee vs. Hitchcock, 187 U. S. 294; U. S. vs. Rowell, 243 U. S. 468; Martin, 48 L. D. 277. All the lands in Oklahoma except as otherwise provided by law are declared to be agricultural lands, and proof of their nonmineral character is not required as a condition precedent to final entry. 2 Mason's U. S. Code, p. 3001, § 1098. This provision was not repealed by the "Leasing Act" of February 25, 1920. West vs. Work, 11 Fed. (2d) 828. For power of the Secretary of the Interior to grant permits or leases for oil and gas deposits belonging to the United States situated south of the medial line of the main channel of Red River, Oklahoma, see 2 Mason's U. S. Code, p. 2264, § 230; Oklahoma vs. Texas, 265 U. S. 493. For rights of agricultural lessee of oil lands and power of state to make mineral leases, see Price vs. Magnolia Co., 267 U. S. 415, aff'g. 86 Okla. 105, 206 Pac. 1033. Mining partnerships are recognized in Oklahoma. Sturm vs. Ulrich, 10 Fed. (2d) 12; Ellis vs. Lewis, 119 Okla. 201, 249 Pac. 295.

By act of June 6, 1900, 31 Stats. 680, the mining law was extended to certain lands within Oklahoma. See 31 L. D. 154.

[249] 6 Fed. St. Ann. p. 599; see 32 Cyc. 1117; 6 Fed. St. Ann. p. 592, § 2345; Cosmos Co. vs. Gray Eagle Co., *supra* (244).

[250] Vernon's C. & C. Stats. 1918, Supp. p. 1368, *et seq*; 4 Vernon's Sayles Tex. C. S. p. 3945, art. 5904. Vernon's Ann. Tex. St. p. 331, art. 5388. For oil and gas law, see 17 Vernon's Rev. C. S. p. 143, art. 6004 (7847). Vernon's Ann. Tex. St. p. 303, art. 5338. The Texas mining law specifies the locatable minerals thereunder as follows, viz: "gold, silver, cinnabar, lead, tin, copper, zinc, platinum, radio-active minerals, tungsten, ores of aluminum, coal, lignite, iron ore, kaolin, fire clays, barite, marble, petroleum, natural gas, gypsum, nitrates, asbestos, marls, salt, onyx, turquoise, mica, guano, bismuth and bismuth-bearing minerals, asphalt, potash compounds, sulphur, granite, magnesia, fuller's earth, and molybdenum and molybdenum-bearing minerals." Vernon's C. & C. Stats. 1918, p. 1368, art. 5904.

CHAPTER VI.

INSULAR POSSESSIONS.

§ 117. Hawaii.

Title to public land in Hawaii is obtained under local statutes. The land department of the United States has no jurisdiction within that territory.[1]

§ 118. Philippine Islands.

The special act regulating the manner of acquiring and holding mining claims in the Philippine Islands provides for lode locations of equal length and breadth without extra-lateral right, and restricts the "holder" to one location on the same vein or lode. It further provides how a claim shall be marked, and that the location notice shall be verified. That such notice shall be recorded within a certain time and have on its back a sketch plan showing as near as may be the position of the adjoining mineral claims and the size or shape of the claim to be recorded. Unless recorded within the statutory period the claim is deemed to be abandoned. Abandonment is also effected by filing written notice thereof with the mining recorder. There is no provision as to tunnel sites.[2]

§ 119. Conformity to Federal Mining Law as to Certain Provisions.

The provisions of the federal mining laws as to annual work, resumption of work, forfeiture of co-owners, application for patent and adverse claims are embodied in the act. But application for patent is to be made to the mining recorder of the province wherein the property sought to be patented is located.[3]

§ 120. Porto Rico.

Public land in Porto Rico is under the control of the government established and the legislative assembly created by congress.[4]

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[1] 31 Stats. 154; see McFadden vs. Mt. View Co., *supra* (1); Pszyk, 37 L. D. 18.
[2] 32 Stats. 697; see Reavis vs. Fianza, 215 U. S. 16.
[3] 32 Stats. 697.
[4] 31 Stats. 80; 32 Stats. 731; see McFadden vs. Mt. View Co., *supra* (1).
Porto Rico is not a territory of the United States within the meaning of that term as it is generally used by congress in dealing with the territories, 51 L. D. 54.

CHAPTER VII.

VEIN, LODE AND LEDGE.

§ 121. What Constitutes a Vein or Lode.

The question of what constitutes a vein or lode within the intent of the different sections of the mining law arises (1) between miners who have located on the same vein or lode under the provisions of § 2320 of the Revised Statutes, (2) between placer and lode claimants under the provisions of § 2333, (3) between mineral claimants and townsite patentees, (4) between mineral and agricultural claimants of the same land; and what is said in one character of cases may or may not be applicable in the other, and must always have a special reference to the formation and particular characteristics of the particular district within which the vein or lode is found.[1]

§ 122. Interchangeable Terms.

No definition of the terms "vein, lode and ledge" is given in the mining act.[2] In that statute those terms are used interchangeably, the object being to give them a more comprehensive meaning than the technical definitions convey. Their meaning as used therein is that which is so called by miners.[3]

§ 123. Miners' Use of Terms.

Miners used the terms "vein, lode and ledge" before geologists attempted to give them a definition.[4]

§ 124. Common Use of Terms.

The terms "vein, lode and ledge" now are used synonymously by miners, congress and the courts.[5]

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[1] Migeon vs. Montana Co., 77 Fed. 249; aff'g. 68 Fed. 811; Bonner vs. Meikle, 82 Fed. 697; Shoshone Co. vs. Rutter, 87 Fed. 807; Ambergris Co. vs. Day, 12 Ida. 117, 85 Pac. 109; Fox vs. Myers, 29 Nev. 169, 86 Pac. 793; Grand Central Co. vs. Mammoth Co., 29 Utah 490, 83 Pac. 648; writ of error to review dis. 213 U. S. 72. See, also, Davis vs. Weibbold, 139 U. S. 507, rev'g. 7 Mont. 107, 14 Pac. 865; Book vs. Justice Co., 58 Fed. 106.

[2] Eureka Co. vs. Richmond Co., Fed. Cas. 4548, aff'd. 103 U. S. 839; Hayes vs. Lavagnino, 17 Utah 185, 53 Pac. 1029; aff'd. 198 U. S. 443. In practical mining the terms "vein" and "lode" apply to all deposits of mineralized matter, within any zone or belt of mineralized rock separated from the neighboring rock by well-defined boundaries, and the discoverer of such a deposit may locate it as a vein or lode. In this sense these terms were employed in the several acts of congress. Hayes vs. Lavagnino, *supra*.

[3] Eureka Co. vs. Richmond Co., *supra* [2]; Harrington vs. Chambers, 3 Utah 94, 1 Pac. 362.

[4] Eureka Co. vs. Richmond Co., *supra* [2]. The word "vein" or "lode" may embrace any description of deposit which is so situated in the general mass of the country, whether it is described in any one way or another; that is to say, whether, in the language of the geologist, we say it is a bed, or a segregated vein, or gash vein, or true fissure vein, or merely a deposit. , Whenever a miner finds a valuable mineral deposit in the body of the earth in place he calls that a lode, whatever its form may be, and however it may be situated, and whatever its extent in the body of the earth. Stevens vs. Williams, Fed. Cas. 13 414. In order to constitute a lode it is not necessary that the minerals shall be evenly distributed through the zone or belt, but it may carry pay streaks near either side or in its center, while in some places the zone or belt may be nearly barren of mineral and in others disclose pockets rich in minerals; and parts of it may carry ore of a very low grade, while other parts contain valuable minerals. Meydenbauer vs. Stevens, 78 Fed. 791. See, also, Iron Co. vs. Cheesman, 116 U. S. 529; Iron Co. vs. Mike & Starr Co., 143 U. S. 394, rev'g. 16 Fed. 830.

[5] Iron Co. vs. Cheesman, *supra* [4]; Synott vs. Shaughnessy, 2 Ida. 122, 7 Pac. 82.

§ 125. The Miner's Vein or Lode.

To the miner a vein or lode is any body of ore, quartz or other mineral-bearing substance lying within the crust of the earth, bounded on each side by the country rock, greatly varying in extent across and through the country for greater or less distances.[6]

§ 126. Miners' Distinction Between Vein and Lode.

Among practical miners generally, narrow veins are designated simply as "veins," while veins of great thickness are called "great veins" or lodes.[7] This distinction, of course, is not scientific.

§ 127. Vein Within Lode.

A "lode" may, and often does, contain more than one vein.[8] It then is popularly called a "broad lode" or zone.

§ 128. Cornish Term.

The term "lode" is a Cornish word nearly synonymous with the term "vein."[9]

§ 129. Statutory Meaning.

The terms "vein, lode and ledge," within the meaning of the mining act is whatever the miner could follow and find ore.[10] But it is not an imaginary line without dimensions. It is not a thing without shape or form, but before it can legally and rightfully be denominated a lode or vein it must have length, width, and depth. It must be capable of measurement. It must occupy defined space and be capable of identification.[11]. It is by no means always a straight line of uniform dip, or thickness, or richness of mineral matter throughout its course.[12]

§ 130. Judicial Definitions.

Various courts have at different times given a definition of what constitutes a vein, lode and ledge, within the meaning of the mining act.

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[6] Stevens vs. Williams, *supra* (1); King vs. Amy Co., 9 Mont. 543, 24 Pac. 200; Grand Central Co. vs. Mammoth Co., *supra* (1). A lode can not exist without valuable ore; but if there is value, the form in which it appears is of no importance. Whether it be of iron or manganese, or carbonate of lead, or something else yielding silver, the result is the same. The law will not distinguish between different kinds and classes of ore, if they have appreciable value in the metal for which the location was made. Nor is it necessary that the ore shall be of economical value for treatment. It is enough if it is something ascertainable, something beyond a mere trace, which can be positively and certainly verified as existing in the ore. In the case of silver ore the value must be recognized by ounces—one or more in the ton of ore; and if it comes to that it is enough, other conditions being satisfied, to establish the existence of the lode. Stevens vs. Gill, Fed. Cas. 13, 398.

[7] See Lawson vs. U. S. Co., 207 U. S. 1, aff'g. 134 Fed. 709; Mt. Diablo Co. vs. Callison, Fed. Cas. 918; Waterloo Co. vs. Doe, 82 Fed. 45, aff'g 54 Fed. 935; Duggan vs. Davey, 4 Dak. 110, 26 N. W. 901.

[8] U. S. vs. Iron Co., 128 U. S. 673.

[9] Bullion Co. vs. Croesus Co., 2 Nev. 168; see Bullion Beck Co. vs. Eureka Co. 5 Utah 3, 11 Pac. 515.

[10] Hyman vs. Wheeler, 29 Fed. 347; Burke vs. McDonald, 2 Ida. 679, 33 Pac. 49. Some of the authorities hold the view that only minerals of the metallic class are within the statute relating to veins and lodes, but the great weight of authoriy is the other way, and the department is of opinion that the latter is the better view. That the statute is broad enough to embrace minerals of the nonmetalliferous class as well as the metallic class, wherever found in rock in place, was distinctly held after careful consideration and full discussion in the case of Pacific Coast Marble Company vs. N. P. R. Co., 25 L. D. 243. See, also, 1 Lindl. Mines (3d ed.) p. 130, § 86; 1 Snyder Mines, § 237; Henderson vs. Fulton, 35 L. D. 652. See, also, Webb vs. American Co., 157 Fed. 206, 33 Pac. 49; *but see* Grand Central Co. vs. Mammoth Co., *supra* (1).

[11] Foote vs. National Co., 2 Mont. 402.

[12] Iron Co. vs. Cheesman, *supra* (4).

§ 131. General Rule.

The definitions that have been given by the courts, as a general rule, apply to the peculiar character of the ore deposits or vein matter and of the country rock in the particular district where the claims are located.[13]

§ 132. No Conflict.

There is no conflict in the decisions, but the result is that some definitions have been given in some of the states that are not deemed wholly applicable to the conditions and surroundings of mining districts in other states, or other districts in the same state.[14]

§ 133. Various Definitions.

So, many definitions have been given, varying according to the facts under consideration.[15]

§ 134. No Arbitrary Definition.

It follows that the definitions of veins vary according to the facts under consideration. The term is not susceptible of an arbitrary definition applicable to every case. It must be controlled in a measure, at least, by the conditions of locality and deposit. The distinguishing feature between a vein and the formation enclosing it may be visible, as it must have boundaries, but it is not necessary that these be seen; their existence may be determined by assay and analysis. The controlling characteristic of a vein is a continuous body of mineral-bearing rock in place in the general mass of the surrounding formation. If it possesses these requisites and carries mineral in appreciable quantities, it is a mineral-bearing vein, within the meaning of the law, even though its boundaries may not have been ascertained.[16]

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[13] Id. Doe vs. Waterloo Co., 54 Fed. 935; aff'd. 82 Fed. 45; Lange vs. Robinson, 148 Fed. 802; Stinchfield vs. Gillis, 96 Cal. 37, 30 Pac. 839. For a collection of definitions of a vein, lode and ledge see Book vs. Justice Co., *supra* (1); Henderson vs. Fulton, *supra* (10); Beals vs. Cone, 27 Colo. 473, 62 Pac. 948; writ of review dis., 188 U. S. 184; Grand Central Co. vs. Mammoth Co., *supra* (1). In some mining districts the veins, lodes and ore deposits are so well and clearly defined as to avoid any questions being raised. In other localities the mineral is found in seams, narrow crevices, cracks or fissures in the earth, the precise extent and character of which can not be fully ascertained until extensive explorations are made, and the continuity of the ore and the existence of the rock in place, bearing mineral, is established. Book vs. Justice Co., *supra*.

[14] Id.

[15] Iron Co. vs. Cheesman, *supra* (4) Hyman vs. Wheeler, *supra* (10); Cheesman vs. Shreeve, 40 Fed. 787. The mining laws of congress give no definition of the term "lode" which it uses always in connection with the term "vein;" and "it is difficult to give any definition of the term, as understood and used in acts of congress, which will not be subject to criticism." Eureka Co. vs. Richmond Co., *supra* (2); Book vs. Justice Co., *supra* (1); Waterloo Co. vs. Doe, *supra* (7); Bunker Hill Co. vs. Empire State Co., 134 Fed. 268; Utah Co. vs. Utah Co., 277 Fed. 41, aff'd. 285 Fed. 249., *certiorari* denied, 258 U. S. 619, 261 U. S. 617; Beals vs. Cone, *supra* (13); Golden vs. Murphy, 31 Nev. 427, 103 Pac. 394.

[16] Beals vs. Cone, *supra* (13); Utah Co. vs. Utah Co., *supra* (15). "The acts of congress are so construed as to include in the category of lodes, veins and ledges certain deposits which would not fall under the above definition. As, for example, certain tilted beds or sedimentary strata containing ores as original constituents, and not formed by subsequent fissuring and mineralization. The geologist would call these beds, and not lodes, but we understand that the intent of the law is not to make distinctions based upon the genetic principle. It is doubtless true that a very small percentage of the ore deposits of the precious metals occur as tilted beds in place, unassociated with subsequent fissuring and mineralization; but, when such are found, they are undoubtedly subject to location as veins or lodes within the meaning of the statutes." Alameda Co. vs. Success Co., 29 Ida. 618, 161 Pac. 865.

§ 135. Approved Definition.

An approved definition is as follows: A zone or belt of mineralized rock lying within boundaries clearly separating it from neighboring rock. It includes all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms and appearing to have been created by the same processes.[17]

§ 136. Gravel Deposits.

The above definition does not apply to gravel deposits inclosed within defined boundaries.[18]

§ 137. Characteristics of a Vein or Lode.

In the books and among miners, veins and lodes are invested with many characteristics, as that they lie in fissures or other openings in the country rock; that they contain materials differing from or in some respects corresponding with the country rock; that they are of a tabular form and a banded structure; that some one or several things are generally associated with the valuable ores; that they have selvages and slickensides in the fissures and openings, and the like. Some of these characteristics are said to be common to all lodes and veins, and others are of rare occurrence.[19]

§ 138. Elements of a Vein or Lode.

The elements of a vein or lode are mineral or mineral-bearing rock and boundaries in place in the general mass of the mountain. When one of these is well established very slight evidence may be accepted as to the existence of the other.[20] But every seam or crevice in the rock does not constitute a vein or lode nor every ridge of stained rock its

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[17] Eureka Co. vs. Richmond Co., *supra* (2); Moulton Co. vs. Anaconda Co., 23 Fed. (2d) 814, mod. and aff'g. 20 Fed. (2d) 1008; see, also, Iron Co. vs. Cheesman, *supra*(4); U. S. vs. Iron Co., *supra*(8); Iron Co. vs. Mike & Starr Co., *supra*(4); Lawson vs. U. S. Co., *supra* (7); Hyman vs. Wheeler, *supra* (10); Cheesman vs. Shreeve, *supra* (15); Doe vs. Waterloo Co., *supra* (7); Stevens vs. Williams, *supra* (4); Utah Co. vs. Utah Co., *supra* (15); Rico-Argentine Co. vs. Rico Con. Co., 74 Colo. 444, 223 Pac. 31, 33; Buffalo Zinc Co. vs. Crump, 70 Ark. 525, 69 S. W. 572; Noyes vs. Clifford, 37 Mont. 842, 94 Pac. 842; Phillpotts vs. Bladsell, 8 Nev. 62; see Grand Central Co. vs. Mammoth Co., *supra* (1). The zone to which this definition was applied—in the Eureka case, *supra*—was of dolomitic limestone, a sedimentary deposit, broken, crushed and fissured, resting on a foot-wall of quartzite and having a hanging wall of clay shale. 1 Lindl. Min. (3d ed.), p. 654, § 292. See Alameda Co. vs. Success Co., *supra* (16).

[18] Gregory vs. Pershbaker, 71 Cal. 109, 14 Pac. 401, *compare* Jones vs. Prospect Co., 21 Nev. 339, 31 Pac. 642.

In the case of Parker, 38 L.D. 294, the land department had before it for determination the question as to whether a deposit of sandstone shown to carry gold, which has been located under the placer mining laws, was a lode or placer formation. The department said: "From the reasoning of the authorities cited, it follows that sand-rock or sedimentary sandstone formation in the general mass of the mountain bearing gold such as here disclosed by the evidence, is rock in place bearing mineral and constitutes a vein or lode, within the purview of the statute and can be located and entered only under the law applicable to lode deposits. The department is convinced that the deposit described in the testimony in this case falls well within the category of lode deposits under the mining statutes, and that such a deposit can not lawfully be appropriated or patented under those portions of the statute which apply to placer claims."

[19] Hyman vs. Wheeler, *supra* (10); see Harry Lode, 41 L. D. 407; Beals vs. Cone, *supra* (13). For a scientific definition of a vein, fissure vein, contact vein, gash vein, segregated vein, combined vein, interstitial vein, bedded vein, sometimes called blanket vein, reticulated vein, linked vein, brecciated vein, banded vein or ribbon vein, symmetrical banded vein, lenticular vein, replacement vein, sometimes called substitution vein, pipe vein, rake vein, mullock vein, stockwerke, reef, saddle reef, chute or shoot, pay streak, ore chimney, bonanza, see Shamel Min. Law 132 et seq.

[20] Id. Iron Co. vs. Cheesman, *supra* (4); U. S. vs. Iron Co., *supra* (8); Eureka Co vs. Richmond Co., *supra* (2).

croppings.[21] The vein or lode need be continuous only in the sense that it may be traced through the surrounding rocks.[22] It need not have well defined walls.[23] It may vary in direction, width, dip, and value, may split or may, in various places, be turned, curled or cupped outward, or divide into branches both in length and in depth. These branches may or may not again unite.[24] That it is occasionally found in the general course of the vein or shoot in pockets deeper down into the earth or higher up, does not affect its character as a vein, lode or ledge.[25]

§ 139. What Does Not Constitute a Vein or Lode.

Ore disseminated at intervals, or found in channels, chutes, cavities, pockets, or other irregular occurrences at intervals in quartzite, without ore connections between the same, is not a vein or lode within the meaning of the Mining Act.[26]

§ 140. Fissure Veins.

A fissure vein, in mining parlance, is a longitudinal opening with a foreign substance in it.[27] To constitute a vein it is not necessary that there be a clean fissure, filled with mineral, as it may exist when filled in places with other matter, but the fissure must have form, and be well defined, with hanging and foot walls. The presence of clay, selvages, slickensides, striations, and the ribbing of the walls is as strong evidence of the permanency and continuity of a fissure vein as the existence of the quartz itself.[28] Hence, true fissure veins often exist and are continuous without having any filling in certain points or places of mineral matter.[29] Where the evidence shows well-defined boundaries, very slight proof of ore or mineral within such boundaries prove the existence of a lode. Such boundaries constitute a fissure; and if in such fissure ore is found, although at considerable intervals and in small

[21] Burke vs. McDonald, *supra* (10). Crevice is a word sometimes applied to a mineral-bearing vein. Raisbeck vs. Anthony, 73 Wis. 568, 41 N. W. 77; St. Anthony Co. vs. Shaffra, 138 Wis. 507, 120 N. W. 238; see Shoshone Co. vs. Rutter, *supra* (1); Empire Co. vs. Tombstone Co., 131 Fed. 339.

[22] Iron Co. vs. Cheesman, *supra* (4); Tombstone Co. vs. Way Up Co., 1 Ariz. 426; 25 Pac 794. A continuous body of mineral or mineral-bearing rock, extending through loose and disjointed rocks is a lode as fully and certainly as that found in more regular formation; but if it is not continuous it can not be called by that name. In that case it lacks the indivisibility and extension which is an essential quality of a lode or vein. Iron Co. vs. Cheesman, *supra*. In Raisbeck vs. Anthony, *supra* (21), it was held that continuity of vein was not affected by barrier of intervening rock. Cheesman vs. Shreeve, *supra* (15); U. S. Co. vs. Lawson, 134 Fed. 769; aff'd. 207 U. S. 1; Wall vs. U. S. Co., 232 Fed. 614. See Leadville Co. vs. Fitzgerald, Fed. Cas. 5158; Stevens vs Williams, *supra* (4).

[23] Hyman vs. Wheeler, *supra* (16); Con. Wyoming Co. vs. Champion Co., 63 Fed. 540; Moulton Co. vs. Anaconda Co., *supra* (17); Beals vs. Cone, *supra* (13); Burke vs. McDonald, *supra* (10).

[24] Book vs. Justice Co., *supra* (1); Cosmopolitan Co. vs. Foote, 101 Fed. 518; King vs. Amy Co., *supra* (6); Stewart Co. vs. Ontario Co., 23 Ida. 735, 129 Pac. 932, aff'd. 132 Pac. 787, aff'd. 237 U. S. 350.

[25] Synott vs. Shaughnessy, *supra* (5).

[26] Cheesman vs. Shreeve, *supra* (15). Rock, whether brecciated or bedded, is not a mineral vein, lode, or ledge, within Rev.. St. § 2322, giving extralateral rights on a mineral vein, lode or ledge, even when found between well-defined walls, unless it has been mineralized. Utah Co. vs. Utah Co., *supra* (16).

[27] Crocker vs. Manley, 164 Ill. 282; 45 N. E. 577. Mr. Schamel, in his work on Mining, Mineral and Geological Law, 137, says: "One of the best definitions of a fissure vein is that given by Lindgren in 'Genesis of Ore Deposits,' p. 500: 'A fissure vein may be regarded as a mineral mass tabular in form, as a whole, although frequently irregular in detail, occupying or accompanying a fracture or set of fractures in the enclosed rock; this mineral mass has been formed later than the country rock, and the fracture, either through the filling of open spaces along the latter, or through chemical alteration of the adjoining rock.'" A fissure may have numerous offshoots, which the miner calls "spurs" or "angles." Shamel Min. Law, 146.

[28] Con. Wyoming Co. vs. Champion Co., *supra* (23).

[29] Id.

quantities, it is called a lode.[30] What values the filling or material of a fissure should contain to constitute it a vein, must necessarily depend upon the characteristics of the district or country in which the vein or lode, in any particular instance claimed to exist, is located, and upon the character, as to boundaries, of the vein itself.[31] A broad metalliferous zone having within its limits true fissure veins, plainly bounded, can not be regarded as a vein or lode, although such zone may have boundaries of its own which may be traced.[32] Metalliferous rock in place, not in fissure, may be found under such conditions within clearly defined boundaries as to require recognition as a vein or lode.[33] Ore bodies formed off from and unconnected with a fissure vein do not form a separate vein, lode, ledge or mineral deposit.[34]

§ 141. Anticlinal Vein.

Where a vein has a terminal edge its apex is the point which, or a line along which, in its strike, and from which it has a dip; and this is equally true of the crest of a vein in the form of a single anticlinal fold. The definitions of the apex of a vein are usually found in court decisions and are to be considered with reference to the facts upon which they are based, but there is nothing in these definitions which militates against the crest of the anticlinal roll being the apex of a vein.[35]

§ 142. Contact Vein.

A contact vein is one where each of the enclosing walls is of a different character or formation. One of such walls may, for instance, be composed of limestone and the other wall be of porphyry.[36] Whenever it appears that a fissure has existed at any time within a continuous body of ore therein which may have been interrupted by some subsequent convulsion, the character of the deposit remains the same as if no interruption had occurred; but if there is an intervening space in the 'contact' so barren in its continuity as to show a separate and distinct body of ore which has always been such, then it could not be followed beyond the side lines of a location.[37] Whether or not 'the contact' is to be regarded as a lode or vein is to be determined by its value, whatever may be the rule in regard to true fissures.[38] The term 'vein' or 'lode' is not to be understood as merely a typical fissure or contact vein, but rather any well-defined zone of mineral-bearing rock in place.[39] Proof of a barren contact between blue and brown limestone is not sufficient to establish a vein or lode, but it must carry ore to some extent and of some value to constitute such vein or lode.[40]

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[30] Iron Co. vs. Cheesman, *supra* (4); Grand Central Co. vs. Mammoth Co., *supra* (1); Hyman vs. Wheeler, *supra* (10); Cheesman vs. Shreeve, *supra* (15); Columbia Co. vs. Duchess Co., 13 Wyo. 253, 79 Pac. 385.

[31] Grand Central Co. vs. Mammoth Co., *supra* (1); see Hyman vs. Wheeler, *supra* (10).

[32] Mt. Diablo Co. vs. Callison, *supra* (7).

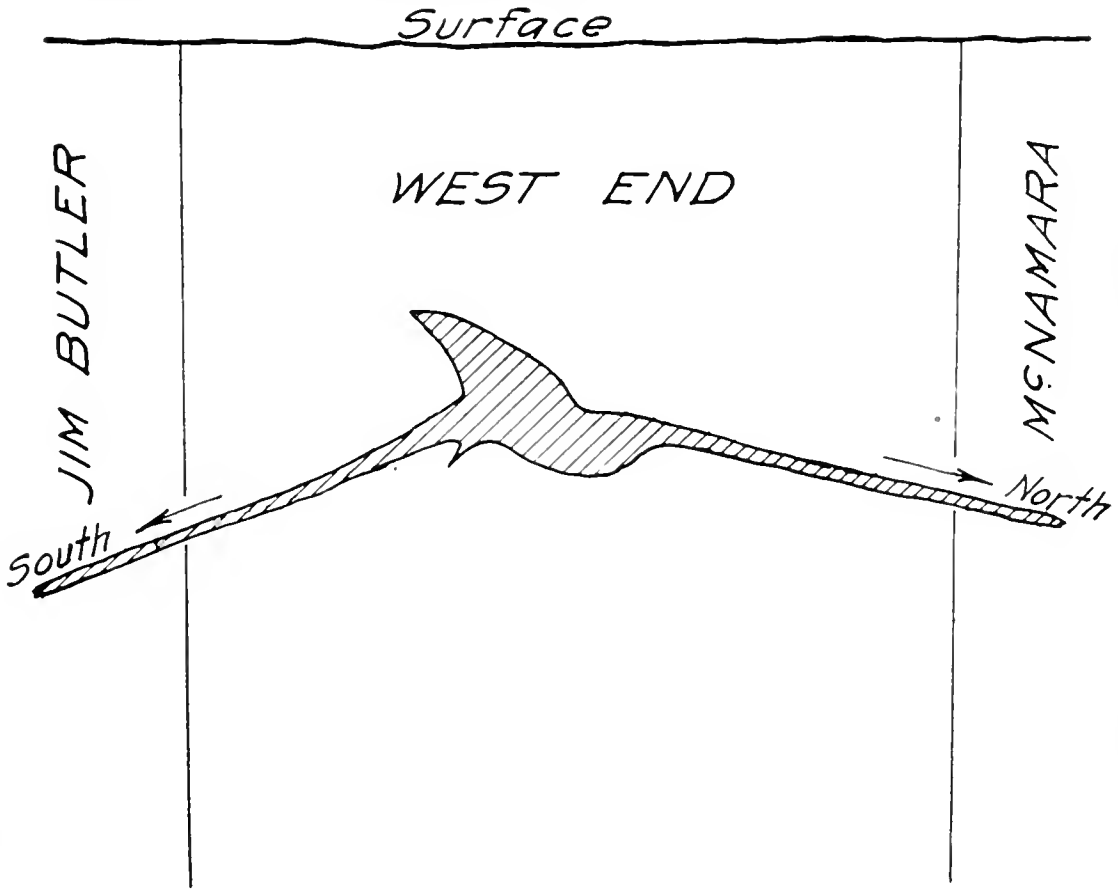
[33] Id. See Doe vs. Waterloo Co., *supra* (7); Grand Central Co. vs. Mammoth Co., *supra* (1).

[34] Cheesman vs. Shreeve, *supra* (15); Justice Co. vs. Barclay, 82 Fed. 554.

[35] The only difference between a vein in the form of a single anticlinal fold and the ordinary fissure vein is that the former has a crest, the limbs of which dip in

opposite directions, while the latter has a terminal edge and a dip in but one direction. But this distinction presents no difference such as would violate the purpose of the federal statute if the crest of the former, like the terminal edge of the latter, should be held to constitute an apex. Jim Butler Co. vs. West End Co., 247 U. S. 450; aff'g. 39 Nev. 375; 158 Pac. 876. For a collection of cases expressing the opinions of courts, definitions of text writers in support of the terminal edge theory, definitions of lexicographers of the term apex, differentiation of the Leadville Cases and the holding of the court that the crest of a vein in the form of an anticlinal fold is the apex and that a terminal edge is not necessary for an apex, see Jim Butler Co. vs. West End Co., 39 Nev. 375, 158 Pac. 876.

The following diagram represents a cross section of an anticlinal vein in the Jim Butler Case, where the two limbs have been shown by development work to be united at the crest of the anticlinal fold.



[36] Iron Co. vs. Cheesman, *supra* [4]; Grand Central Co. vs. Mammoth Co., *supra* [1]. The Ural lode has a hanging wall of granite or diorite, and the foot wall is slate, and this is called the 'contact vein.' Con. Wyoming Co. vs. Champion Co., *supra* [28]. "A contact vein," says Mr. Shamel, "may be a variety of fissure vein occupying a typical fracture from faulting between the different kinds of rock, or it may be a replacement vein formed by mineralized solutions percolating along the surface of the contact where the rock is usually more permeable, and there replacing one or both of the walls by metasomatic process." In this connection Mr. Schamel, in a footnote, says: "The United States Supreme Court, in the case of Iron Silver Mining Company vs. Cheesman, 116 U. S. 520, in speaking of veins, says: 'Generally, the veins are found in what, when the mineral is taken out of them, constitute clefts or fissures in the surrounding rock, with a well-defined wall above and below of different kinds of rock, as porphyry, on one side, above or below, and limestone on the other.' In other words, according to the Supreme Court, veins are generally contact veins; but in making this assertion the court was mistaken. A majority of veins have both walls of the same kind of rock." Shamel Min. Law, 143.

[37] Stevens vs. Williams, *supra* [4].

[38] Stevens vs. Gill, *supra* [6]; Stevens vs. Williams, *supra* [4]. There may be a contact, and yet no contact vein. See Illinois Co. vs. Raff, 7 N. M. 336, 34 Pac. 544.

[39] East Tintic Co., 40 L. D. 271.

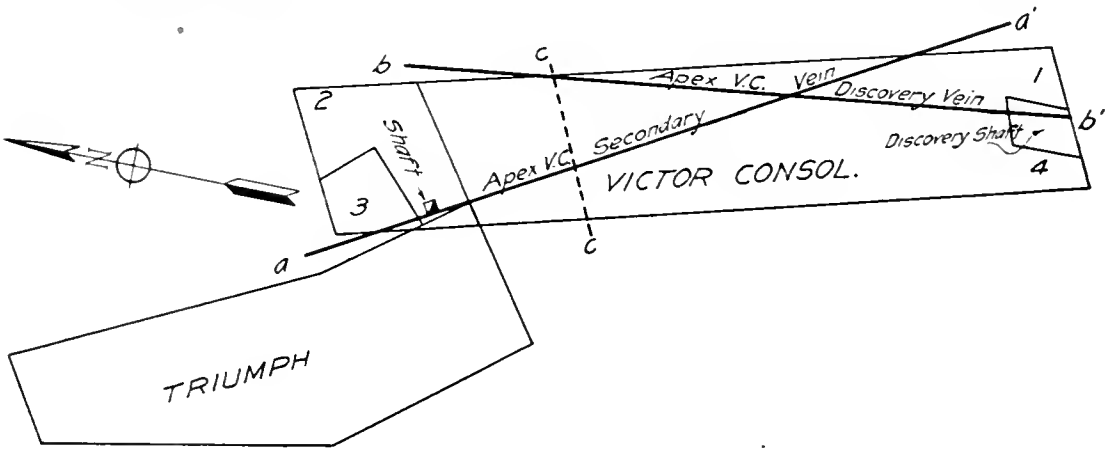
[40] Id.

§ 143. Secondary or Incidental Vein.

A secondary or incidental vein is a vein or lode within a mining claim other than the one located or intended to be located.[41]

[41] Cosmopolitan Co. vs. Foote, *supra* (24); St. Louis Co. vs. Montana Co., 104 Fed. 664; Stewart Co. vs. Bourne, 218 Fed. 327; Star Co., 47 L. D. 38; see, also, Del Monte Co. vs. Last Chance Co., 171 U. S. 55. Jim Butler Co. vs. West End Co., *supra* (35). In Arizona Co. vs. Iron Cap Co., 27 Ariz. 202, 232 Pac. 549, the court said: "This vein is entirely separate and distinct from the discovery vein and the location of the claim was made without any reference thereto. It is what is sometimes called a secondary vein, but the principles which govern the locator's rights in the discovery vein applies as well to such a vein as this." When a secondary or accidental vein crosses a common side line between two mining locations at an angle and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, the entire vein must be considered as apexing upon the senior location until it has wholly passed beyond its side line whether the vein dips towards either claim or does not dip at all. St. Louis Co. vs. Montana Co., *supra*. The discovery vein is the principal vein. Northport Co. vs. Lone Pine Co., 278 Fed. 719, aff'g. 271 Fed. 108. The course of the primary or discovery vein definitely determines the end lines and the side lines for all veins having their apexes within the exterior boundaries of the location. In other words, the courts have held that the locator of a mining claim can not treat the end lines of this location as the true end lines for the purpose of one vein having its apex within the surface boundaries of the claim and pursue his extralateral right on that vein in one direction, and then claim that those same end lines are side lines with reference to another vein having its apex within the surface boundaries of the location, so as to enable him to pursue his extralateral right on the secondary vein in substantially the same direction as the course or strike of his primary or discovery vein. Stewart vs. Ontario Co., *supra* (24); see Walrath vs. Champion Co., 171 U. S. 293.

The following diagram is explanatory of the excerpt from Ajax Co. vs. Hilkey, 31 Colo. 131, 72 Pac. 448.



The court said (in part): "The apex of the discovery vein of the Victor Consolidated is represented by b,b'. It enters the claim at the south end line, and its course in the main runs parallel with the claim as surveyed, but passes out through the east side line, about one thousand feet from the south end line. a,a' is the vein which the evidence tended to show passs diagonally across the location, entering it through the west, and leaving through the east side line. The Triumph claim is correctly delineated on the map. If the ore taken from the underground workings of the Triumph was taken from any vein apexing within the Victor Consolidated, as some of the evidence tended to show, it was from this so-called secondary vein. Stating the contention again, in a concrete form, the jury were told if the discovery vein of the Victor Consolidated crossed the east side line at c, then the right of the plaintiff to ore outside of its surface boundaries in any vein having its apex therein is limited to two parallel bounding planes, one drawn through the south end line, 4 of the location, as originally established, and the other passing through the claim at the point where the discovery plane leaves the east end line and parallel to the south end line of c,c'. The north end line, or bounding plane, of this right is the dotted line c,c', and the south boundary plane the south end line of the location 1,4. Plaintiff's extralateral rights as to all veins within the surface lines were, by this instruction, restricted to that part of the claim south of the line c,c', and in that part between this line and the north end line of the claim he was given none whatever, though about five hundred feet of the apex of the secondary vein was found in this latter segment." The court concludes as follows: "Our conclusion is that for all veins, both discovery and secondary, of a patented claim, the owner has extralateral rights, at least for so much thereof as apex within the surface lines; that such rights as to secondary veins are not confined to such veins as apex within the same segment of the claim in which the apex of the discovery claim exists; and while the end lines of the location, as fixed and described in the patent, are the end ilnes of all veins apexing within the surface boundaries, and may constitute the bounding planes for such extralateral rights, and in no case can the locator pursue the vein on its dip outside the surface lines beyond such planes continued in their

§ 144. Extralateral Right to Secondary Vein.

The extralateral right to secondary veins is not confined to such veins as apex within the same segment of the claim in which the apex of the discovery vein exists.[42] But no extralateral right attaches thereto should the vein or lode happen to extend transversely to the vein or lode located or intended to be located, although it may have its apex within the lines of such location.[43]

Where a secondary or accidental vein crosses a common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, the entire vein must be considered as apexing upon the senior location until it has wholly passed beyond its side line whether the vein dips toward either claim or does not dip at all.[44]

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own direction until they intersect such veins, yet these bounding planes, which in all cases must be parallel to the end lines, need not be coincident," *but see* Jefferson Co. vs. Anchoria Leland Co., 32 Colo. 176, 75 Pac. 1070; and see St. Louis Co. vs. Montana Co., *supra* (41).

In Work Co. vs. Doctor Jack Pot Co., 194 Fed. 629, *certiorari* denied 226 U. S. 610, the court said: "The end lines as fixed in the patent fix the limit beyond which the owner of a mining claim can not go upon either a discovery or secondary vein, and also fix the boundary lines within which the extralateral rights may be exercised in following the vein upon its dip, but it does not follow that to secure extralateral the vein must extend from end line to end line or, for that matter, intersect either end line, if it lies lengthwise of the claim. As said in Ajax, etc., vs. Hilkey, 31 Colo. 131, 72 Pac. 447: 'The extent of the right depends upon length of the apex, and the extralateral rights are measured not necessarily by the end lines—and only so when the vein passes across both end lines—but by bounding planes drawn parallel to the end lines passing through the claim at the points where it enters into and departs from the same. It would seem therefore, necessary to follow that the extralateral right depends *inter alia* upon the extent of the apex within the surface lines, and, while the end lines of the claim as fixed by the location are the end lines of all the veins apexing within the exterior boundaries, the planes which bound such rights of different veins may be as different as the extent of their respective apices, though all such planes must be drawn vertically downward parallel with the end lines. It makes no difference in what portion of the patented claim the apex is. The extralateral rights under this rule can be easily ascertained. The apex of the secondary vein need not be in the same portion as the apex of the discovery vein. The statute does not say so.'" In that case the discovery vein intersected one end line and on its course followed lengthwise of the claim for some distance and then departed through a side line and the contention was made that no extralateral rights could be claimed for secondary veins apexing within the patented boundaries of the claim beyond the point where the discovery vein departed from the side line. This contention was rejected by the court, and it was held that the apex of a secondary vein need not be in the same portion of the location as the apex of the discovery vein and that for all veins, both discovery and secondary, the owner of a mining claim has extralateral rights for so much thereof as apex within his surface boundary lines.

[42] Ajax Co. vs. Hilkey, *supra* (41).

[43] Cosmopolitan Co. vs. Foote, *supra* (24).

[44] St. Louis Co. vs. Montana Co., *supra* (41).

Rico-Argentine Co. vs. Rico Con. Co., *supra* (17), was a suit brought to recover the value of ore taken by defendants from within the boundaries of the plaintiffs' lode claim.

The ore bodies involved are within the surface boundaries of the plaintiffs' Allegheny claim. The plaintiffs claim that the ore bodies are connected with the Allegheny vein, which cuts through them, and that the apex of the Allegheny claim is the true apex of the ore bodies in question. They claim that the four lime beds have been mineralized by the Allegheney fissure. A further contention of the plaintiffs is that the four stopes, in the lime beds, mark the extreme limits of the mineralization in the lime beds and that the mineralization of the beds proceeds no further than the present stopes; in other words, that the mineralization does not extend above, and to the south of, the stopes to the Black Hawk fissure, as contended by the defendants, and they deny the existence of the Black Hawk vein.

The defendants contend that the ores taken from beneath the boundaries of the Allegheny claim were taken from the veins apexing within defendants' Wide Awake and Black Hawk claims, and belong to the defendants by virtue of the dip rights given under the acts of congress. The seniority of the location of defendants' claims over plaintiffs' claim is admitted. Defendants' Wide Awake and Black Hawk claims adjoin one another and have a common side line; the Allegheny claim of plaintiffs adjoins defendants' Black Hawk claim on the easterly side of the latter, and the westerly end line of the Allegheny claim constitutes a part of the easterly side line of the Black Hawk claim. Four different stopes starting at the surface near the center of defendants' Black Hawk claim have been sunk in a general easterly direction, beyond the easterly side line of the Black Hawk claim.

and extending into plaintiffs' Allegheny claim. Figure 1 following will aid to a better understanding of the location of the claims.

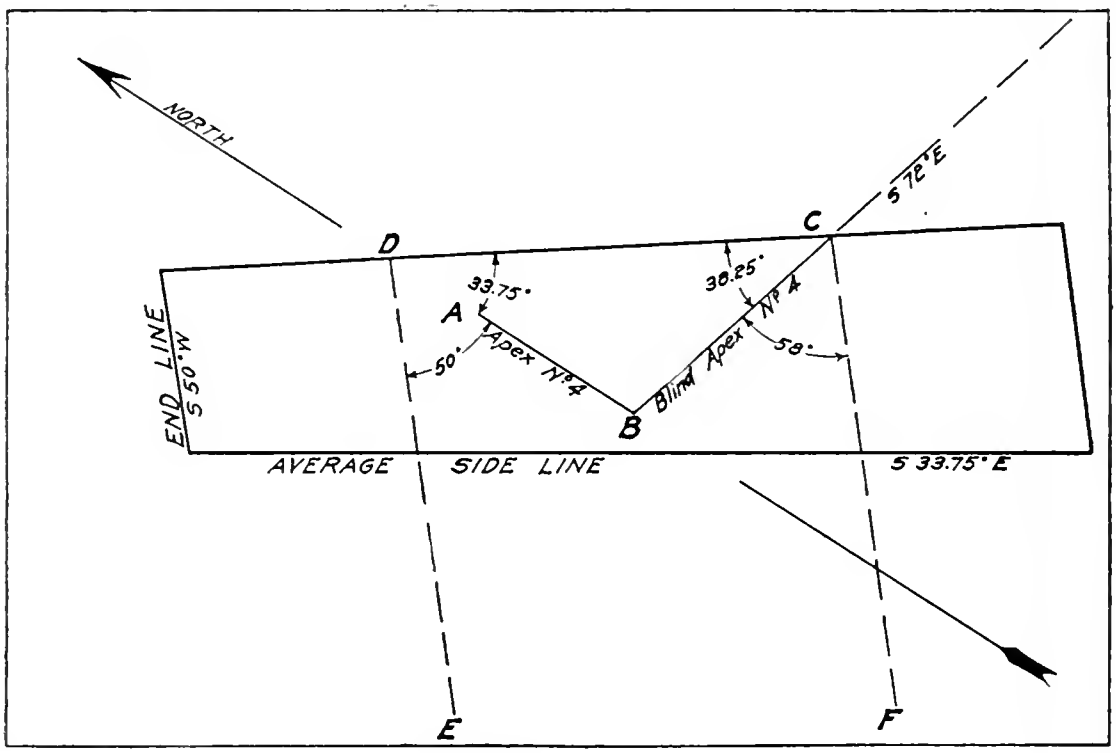

FIGURE NO. 1.

The defendants claim that the beds of limestone involved in this controversy were laid down one upon another, and that an upheaval came, and these beds were thereby tilted to an angle of 35°; that this was followed by fracturing and faulting, and that the greatest of these fractures, in this particular district, is known as the Black Hawk fault; that this fracture cut through all these uplifted beds and faulted the beds on the northeast side from four hundred to six hundred feet below those on the southwest side of the fault. They further contend that the Black Hawk fault was the source of deep-seated mineral solutions, which eat out portions of the lime beds and left in their stead replacement deposits of the precious metals. The four stopes mentioned are claimed by defendants to be in such replacement veins, and are called, respectively, beds 1, 2, 3, and 4, bed 1 being the lowest, and bed 4 the highest; that the discovery of the Black Hawk claim is upon No. 4 replacement vein. Defendants further contend that, while the stopes marked the limits of the commercial ore, above and to the south of each stope there was to be found complete pyritic mineralization following up the dip of the replacement veins, to a point where the Black Hawk fault was encountered, and that above the point of union of the replacement veins and the Black Hawk vein, both replacement veins and the Black Hawk vein were one, and proceeded to a common apex, at the surface, within the side lines of the Black Hawk claim, a portion of this apex outcropping on the surface, and a portion being underground, and that this apex more nearly parallels the side lines of the Black Hawk claim than it does the end lines. The following diagrams 2 and 3 give a clearer idea of defendants' contention in the particulars mentioned.

The defendants make the further contention that, even though it should be found that the apices of the four replacement veins cross the southwesterly side line of the Black Hawk claim, and continue up on their courses to the quartz in the Wide Awake claim, still the defendants own all the ore in controversy by reason of their ownership of the last named claim; that veins 1, 2, 3, and 4, and the quartz vein, constitute secondary veins in the Wide Awake claim, and that defendants are entitled to extralateral rights upon these veins, regardless of their course or extent, the apex of the quartz being within the surface boundaries of the Wide Awake claim.

The court said: "We also think the court erred in its finding that there was no continuous vein from the trespass stope up to defendants' alleged Black Hawk vein, but only replacement deposits of ore and iron, and therefore that No. 4 lime bed was not a lode. * * * Lime beds replaced with minerals, fractured and faulted, * * * constitute a lode as defined in the Eureka Case, 8 Fed. Cas. 819, No. 4548, 4 Saw. 302; Utah Cons. M. Co. vs. Apex M. Co., 285 Fed. 249; also U. S. Mining Co. vs. Lawson, 134 Fed. 769, 67 C. C. A. 587. * * * Notwithstanding the court's findings that the stopes were mineralized from the Allegheney vein, and are connected with it, if the Black Hawk, or Manganese, vein exists as claimed by defendants, and if their theory is correct that the pyrite reaches this vein, inasmuch as they have the senior location, they would have the extralateral rigts."

Mr. Shamel in his work on Mining, Mineral and Geological Law, page 245, under the caption "Extralateral rights of secondary vein which is parallel to legal end lines" presents the following interesting problem, viz, "The rights accruing to a

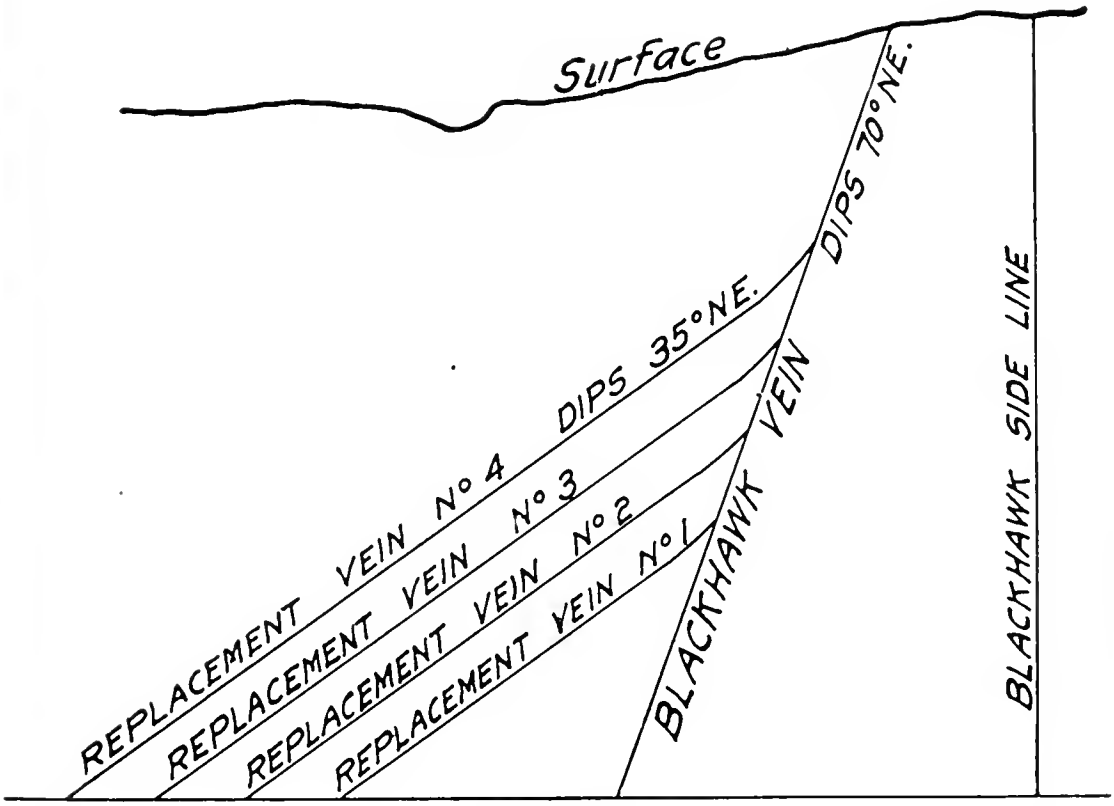

FIGURE No. 2.

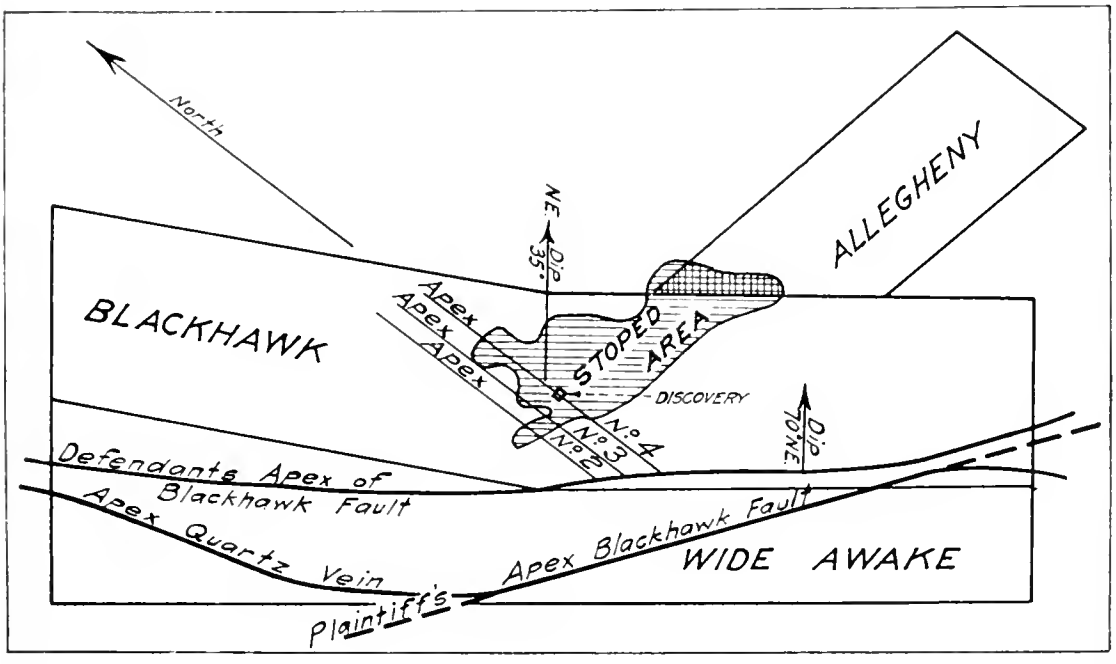

FIGURE No. 3.

secondary vein which crosses a claim parallel to the legal end lines is a puzzling question. In Fig. 85 G–H is a secondary vein and parallel to the end lines.

"The end lines for the secondary vein are the end lines, s-y-o and r-e-p of the known veins. The question is, how far can the owners of claim No. 1 and claim No. 2 each go in working the secondary vein G–H? The legal end lines for the claims do not furnish any limitation; for they do not intersect the secondary vein, nor would lines parallel thereto at any point within the claim do so. The side lines of the claim do not become end lines for the cross veins, but are also side lines for secondary veins within the claims, just as the legal end lines are also end lines for all veins within the claims. Lindley on Mines, 2d ed., § 413. Can such a vein be pursued beyond the side lines of the claim? If so, such rights would be indefinite in extent, as such a cross vein would never intersect the end lines of the claim or any lines parallel thereto. Clearly this can not be the law; and I think the only way out of

§ 145. Blanket Vein.

Blanket vein is a term applicable to a horizontal vein or deposit which may have no distinct apex.[45] The apex of a blanket vein is regarded as coextensive with the space between the side lines, and every part or point of such apex as much the middle of the vein as any other part.[46] A blanket vein is one where the ore body covers the entire area within the limits of the side and end lines of the location.[47] The right to an entire vein or lode can not be asserted under a location covering a part only of its width, and the location is only good for the part within the lines extended vertically downward.[48] A blanket vein or lode has no extralateral rights. It should, however, be located as a lode claim.[49]

§ 146. Single Vein.

A "single vein" in the sense in which that term is used by miners is a single ore deposit of identical origin, age and character throughout.[50]

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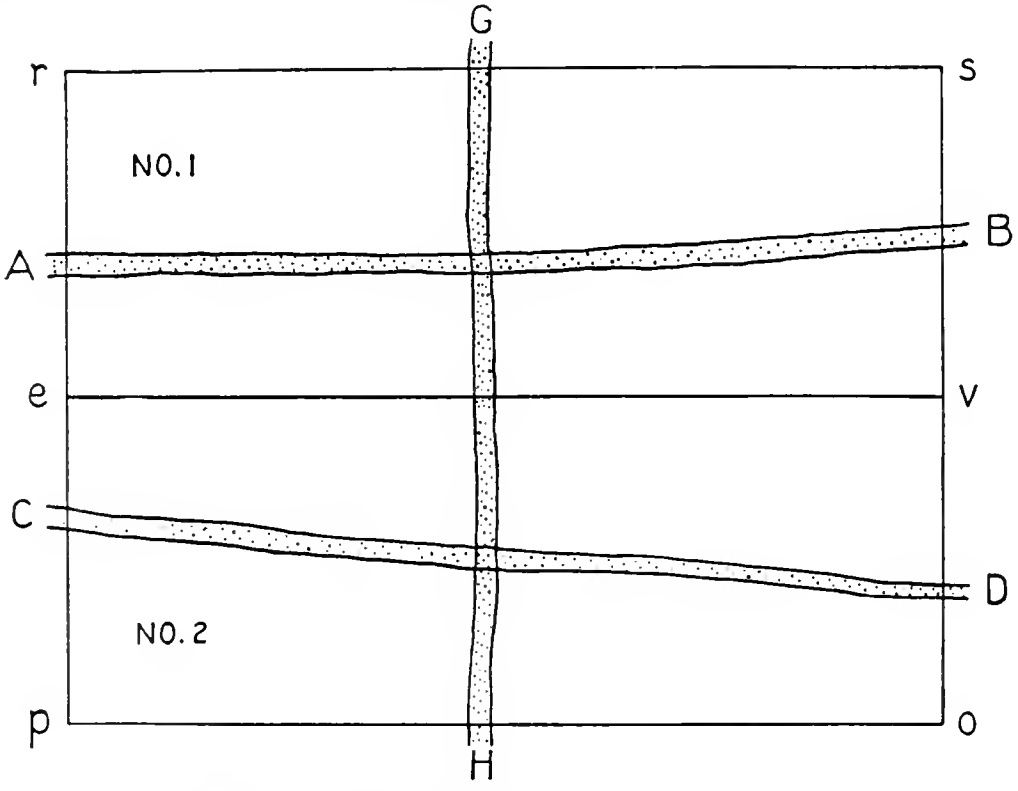
the dilemma is to say that the miner can not go beyond vertical planes through his boundaries on such a cross vein.

"The question is discussed in Lindley on Mines, § 594, who concludes: 'It is impossible to conceive upon what principle any extralateral right could be granted on the cross or secondary vein, without establishing two sets of end-line planes, which, as we have heretofore seen, is not permissible.'"



SHAMEL—FIGURE No. 85—Diagram of assumed case.

[45] Iron Co. vs. Mike & Starr Co., *supra* (4); Harper vs. Hill, 159 Cal. 250, 113 Pac. 162; see Duffield vs. San Francisco Co., 198 Fed. 942; San Francisco Co. vs. Duffield, 201 Fed. 836, aff'd. 205 Fed. 480.

[46] Homestake Co., 29 L. D. 690; Jack Pot Claim, 34 L. D. 470; Belligerent Co., 35 L. D. 22; U. S. Borax Co., 51 L. D. 466; see Iron Co. vs. Mike & Starr Co., *supra* (4).

[47] Id.

[48] Stewart Co. vs. Ontario Co., *supra* (24).

[49] Iron Co. vs. Campbell, 17 Colo. 274, 29 Pac. 513; see 135 U. S. 286; Duggan vs. Davey, *supra*, (7); Bullion Beck Co. vs. Eureka Co., *supra* (9). No extralateral can attach to a horizontal vein for the reason that such a vein has no 'course downward' as prescribed in the statute. Such a vein thus forms a top if not an apex, in the strict sense of that word, and will support a valid location. Jim Butler Co. vs. West End Co., *supra* (35).

[50] Eureka Co. vs. Richmond Co., *supra* (2).

A single small vein is weighed and measured by the same law and entitled to the same consideration as the "mother lode," and very often is far more valuable in the eyes of the miner.[51]

§ 147. Intersecting Veins.

Veins or lodes may interseet upon their strike or dip, and below the point of union become one vein or lode, in which ease the prior locator takes the same below the point of union, including the space of intersection and the whole vein thereafter.[52]

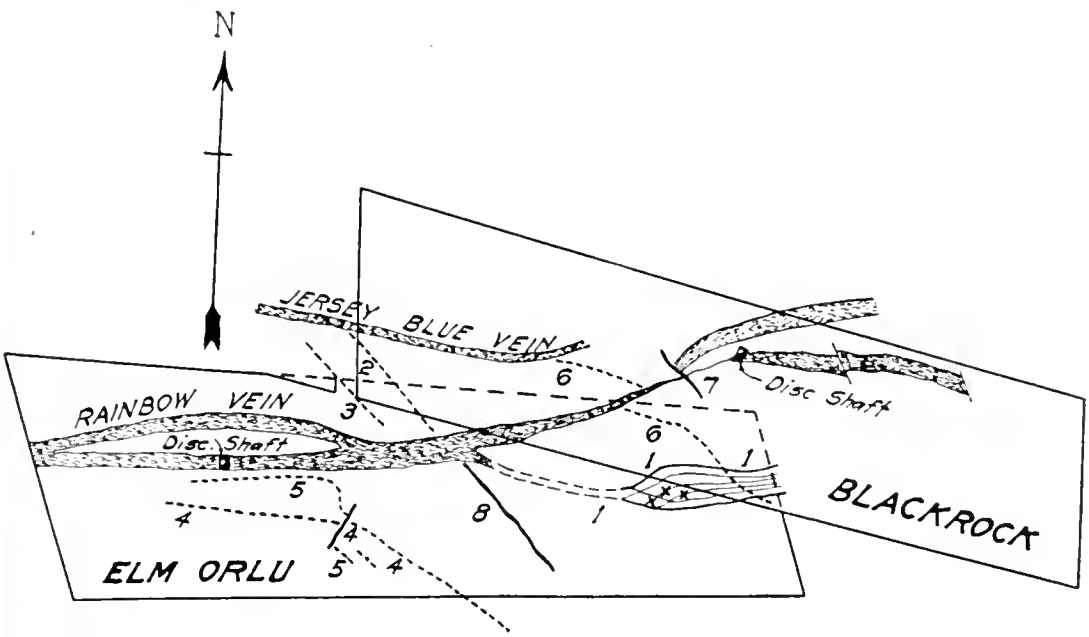
§ 148. Space of Intersection.

The space of intersection, in determining the ownership of ore within such space, means either intersection of veins or conflicting claims,

[51] Stinchfield vs. Gillis, *supra* (13).

[52] See Calhoun Co. vs. Ajax Co., 182 U. S. 499; aff'g. 27 Colo. 1, 59 Pac. 607; Con. Wyoming Co., *supra* (29); Clark-Montana Co. vs. Butte & S. Co., 233 Fed. 547; aff'd. 248 Fed. 609; aff'd. 249 U. S. 12; see Moulton Co. vs. Anaconda Co., *supra* (17); Watervale Co. vs. Leach, 4 Ariz. 34, 33 Pac. 418; Rico-Argentine Co. vs. Rico Co., *supra* (17); Anaconda Co. vs. Pilot-Butte Co., 51 Mont. 443, 156 Pac. 409; *but see* Roxanna Co. vs. Cone, 100 Fed. 168, 27 Cyc. 587; see Lawson vs. U. S. Co., *supra* (7); *but see* Lee vs. Stahl, 13 Colo. 174, 22 Pac. 456; Wilhelm vs. Silvester, 101 Cal. 358, 35 Pac. 997. The owner of a mining claim has the exclusive right of possession and enjoyment of the surface within the lines of his location without regard to the width or extent of the vein or lode. Gwillim vs. Donnellan, 115 U. S. 47; Calhoun Co. vs. Ajax Co., *supra;* Bradford vs. Morrison, 212 U. S. 394; Doe vs. Waterloo Co., *supra* (13). As to what cross or intersecting lodes are included in mineral patents and what rights in such lodes, see 83 Am. St. Rep. 41, note.

The following is a general sketch of the claims involved in Clark-Montana Co. vs. Butte & S. Co., *supra:*



This was an apex controversy. The defendants admitted that the apex of the Rainbow vein crossed the common side line of plaintiff's and defendant's claim, that from its apex in plaintiff's claim it extended on its dip under defendant's claim, that the ore body in dispute was in such vein, but claimed that the Rainbow vein united on strike and dip with the Jersey Blue vein, while plaintiff claimed that the Jersey Blue vein on strike and dip crossed the Rainbow vein. It was held that the plaintiff was not required to prove that the two veins crossed, but only to offset defendant's evidence that they united, and, if the alleged union was in doubt or balance, the finding must be that they did not unite, though the evidence would not warrant a finding that they crossed.

See, also, Keely vs. Ophir Co., 169 Fed. 603.

according to the facts in each particular case, and grants a right of way to the junior claimant for the convenient working of his mine through such space upon the veins which he owns or controls outside of that space—but this space upon the veins means the space underneath the surface. This construction harmonizes section 2336 and section 2322 of the Revised Statutes, but limits the space of intersection consistent with the provisions of section 2322 of the Revised Statutes.[53] The "ore within the space of intersection" means the body of ore bounded by the foot and hanging walls of one lode extended in the general course of that lode and the foot and hanging walls of the intersecting lode extended upon its general course, and it is to this body of ore that section 2336 relates.[54]

§ 149. United Veins.

Where two or more veins unite, the oldest or prior location takes the vein below the point of union, including all the space of intersection.[55]

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[53] Calhoun Co. vs. Ajax Co., *supra* (52); Correction Lode, 15 L. D. 69; Silver Queen Lode, 16 L. D. 186. The owner of a senior location owns all the ore in a vein apexing within his location and owns all the ore at the point of interscetion of his vein and a vein apexing within the junior location, and he is not subject to the charge of being a trespasser while extracting and removing the ore at such point of intersection. Esselstyn vs. U. S. Corp., 59 Colo. 294, 149 Pac. 93.

[54] Watervale Co. vs. Leach, *supra* (52).

[55] Rev. St. § 2336; Little Josephine Co. vs. Fullerton, 58 Fed. 522; Calhoun Co. vs. Ajax Co., *supra* (52); Rico-Argentine Co. vs. Rico Co., *supra* (17). There may be a union of veins or lodes in their downward course partly on the strike and partly on the dip of such veins or lodes. Con. Wyoming Co. vs. Champion Co., *supra* (27); Wilhelm vs. Sylvester, *supra* (52); Watervale vs. Leach, *supra* (52); see Stinchfield vs. Gillis, *supra* (13). Where two or more veins or lodes with an apex in different mining claims unite in their dip within the lines of a third claim the owner of the latter claim has no right in either vein or lode beyond the point of union. Roxanna Co. vs. Cone, *supra* (52). This section is not in conflict with § 2322, but supplements it. Calhoun Co. vs. Ajax Co., *supra*. Congress did not intend to give a preference to a prior locator in case of veins uniting on the "strike" as well as on the dip, after the point of union is reached, without regard to adverse proceedings, and the words "below the point of union" in § 2336 do not apply to a union of veins on the strike, but only on the dip. Lee vs. Stahl. The provisions of § 2336 to the effect that where two or more veins unite the eldest or prior location shall take the vein below the point of union, including all the space of intersection, contemplates an inquiry and decision after patent, and in such case the inquiry and decision could only be had in a court of competent jurisdiction, and this rule obtains as to all subterranean rights. Lawson vs. U. S. Co., *supra* (7); Argentine Co. vs. Terrible Co., 122 U. S. 478. In Champion Co. vs. Con. Wyoming Co., 75 Cal. 78, 16 Pac. 513, it is said: "Where an application for a patent to mining land has been filed in the United States Land Office, and notice thereof given by statute, and no adverse claim has been filed, and the proceedings have regularly culminated in a patent, it may be said generally that the proceedings are conclusive against a third person as to those things with respect to which he might have filed an adverse claim. But with respect to the united ledge which was afterwards discovered to be a union of the Wyoming and Phillip, there was nothing in the application for a patent for the Wyoming claim which called for any contest by the owners of the Phillip. The application for the Wyoming claim, if granted, would result in a patent for only the surface ground claimed, and the ledges whose apexes were within it. If it should turn out that a ledge within that ground united with another ledge, the property of an adjoining owner, the ownership of the united ledge would have to be determined upon the principle of priority of location. Moreover, at the time of the Wyoming application and patent, the union of the two ledges at a great depth in the earth was entirely unknown, and not even suspected. The owners of the Phillip ledge, therefore, with respect to the present claim to the united ledge, would and could not have had any standing in the land department as adverse claimants to the Wyoming application. It is, therefore, somewhat difficult to see how the question of priority of location between the Phillip and Wyoming could be adjudicated in a proceeding in which the location of the Phillip ledge was not involved at all; or how *ex parte* proof offered in the Wyoming application for the satisfaction of the United States government, is admissible in the case at bar, where the contest is about something not appearing upon the face of the application, nor involved in that proceeding." For amplification of the doctrine of the last cited case see, Lawson vs. U. S. Co., *supra* (7); Butte & S. Co. vs. Clark-Montana Co., 249 U. S. 28, aff'g. 248 Fed. 609; aff'g. 233 Fed. 547; Cole vs. Ralph, 252 U. S. 286; Star Co. vs. Federal Co., 265 Fed 896; *but see* Del Monte Co. vs. Last Chance Co., *supra* (49); Bunker Hill Co. vs. Empire State Co., 109 Fed. 538. The owner of the ore in a vein below the point of union with another vein is determined by priority of the surface location and belongs to the senior location in which one of the veins above the point of union has its outcrop or apex, and the rule applies whether such a vein has a separate apex or unites with still a third vein

§ 150. Blind Vein.

A blind vein or lode is one which does not crop upon the surface[56] and has its top or apex below the surface of the ground.[57] Such veins belong to the surface location.[58]

§ 151. Tunnel Claimant.

The rights of a tunnel claimant reach only to blind veins, such as are not known to exist and not discovered from the surface.[59]

§ 152. Known Vein.

A vein or lode is known to exist within the meaning of the mining act when it could be discovered by or is obvious to anyone making a reasonable and fair inspection of the premises for the purpose of making a location of a placer mining claim.[60] The term "known vein" is not

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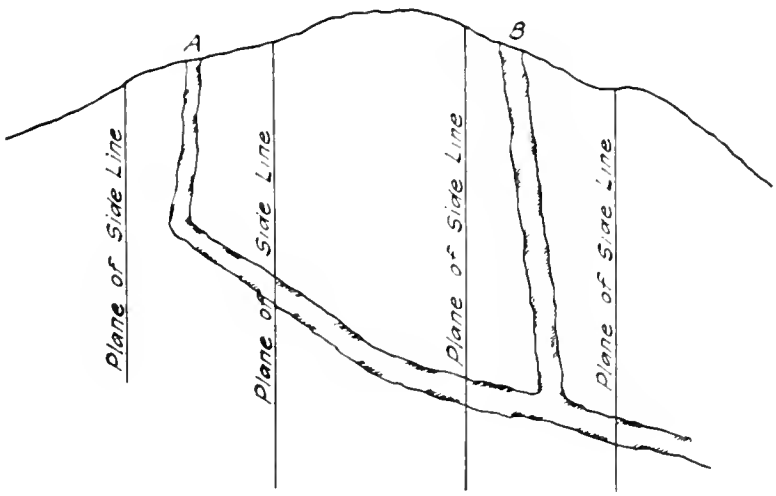
having its apex in the senior location. Anaconda Co. vs. Pilot-Butte Co., 51 Mont. 443, 153 Pac. 1008, 52 Mont. 165, 156 Pac. 409. The owner of a lode mining claim is entitled to have his title quieted to the vein or lode below the point of intersection with the defendant's vein, where the plaintiff's vein and the defendant's vein have each passed outside of the vertical planes of their surface locations, where it was expressly found by a jury that the vein below the point of intersection had its apex within the surface boundaries of the plaintiff's claim. Square Deal Co. vs. Colomo, 61 Colo. 93, 156 Pac. 147. See 83 Am. St. Rep. 44, note. See Clark-Montana Co., 233 Fed. 547, aff'd. 248 Fed. 609, aff'd. 249 U. S. 12.

The older possessory title will take the vein below the point of union in a case shown by the following diagram:



[56] Calhoun Co. vs. Ajax, *supra* [52]; see Jim Butler Co. vs. West End Co., *supra* [35].

[57] Larkin vs. Upton, 144 U. S. 19; aff'g. 7 Mont. 449, 17 Pac. 728.

[58] Calhoun Co. vs. Ajax Co., *supra* [52]; overruling Branagan vs. Dulaney, 8 Colo 408, 8 Pac. 669. In Jim Butler Co. vs. West End Co., *supra* [35] the court said: "The locators 'of any mineral veins, lode or ledge' are given not only 'an exclusive right of possession and enjoyment' of all the surface included within the lines of their locations, but 'of all veins, lodes and ledges throughout their entire depth the top of apex of which lies inside of such surface lines extended downward vertically.' A locator, therefore is not confined to the vein upon which he based his location and upon which the discovery was made and blind veins are not excepted and we can not except them. They are included in the description 'all veins,' and belong to the surface location."

[59] Enterprise Co. vs. Rico-Aspen Co., 167 U. S. 113; see Butte Co. vs. Barker, 35 Mont, 341, 89 Pac. 302; 90 Pac. 177.

[60] Iron Co. vs. Mike & Starr Co., *supra* [4]; Montana Co. vs. Migeon, 68 Fed. 815; aff'd. 77 Fed. 249; Mutchmor vs. McCarty, 149 Cal. 611, 87 Pac. 85; see Noyes vs. Clifford, 37 Mont. 138, 94 Pac. 848.

Float, outcroppings, lodes, and abandoned locations, separately or combined, are not sufficient to constitute a 'known vein or lode' within the exclusion of the placer mining law; but to be impressed with such character the vein or lode must, at the time of application for placer patent, be clearly ascertained and defined and of such extent and content that it will then, in view of present conditions, justify development and exploitation, and because of which the placer claim is valuable and more

to be taken as synonymous with "located vein," and refers to a vein or lode whose existence is known as distinguished from one which has been appropriated by location.[61] Hence, a regular location is not necessary before a vein or lode can be a "known vein or lode."[62] The time at which a vein or lode must be known to exist in order to except it from a placer patent is the time at which the application for a patent is made and to contain minerals in such quantity and quality as to justify expenditure for the purpose of extracting them.[63]

§ 153. Broad Lode or Zone.

The term "lode" has become extensively used in the classification of ore deposits that are not comprehended by the definition of a vein. Such an occurrence is called by the courts a "broad lode" or zone.[64]

§ 154. Indivisibility of a Broad Lode.

The ownership of the apex of a broad lode or vein confers the right to all mineral extending into adjoining territory, although adversely held, when its formation is such as to present a unity of the whole mass as a vein or lode.[65]

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valuable than for placer mining purposes. Subsequent development is immaterial. See U. S. vs. Iron Co., *supra*[8]; Barnard Co. vs. Nolan, 215 Fed. 999; Clark-Montana Co. vs. Ferguson, 218 Fed. 964; Cripple Creek Co. vs. Mt. Rosa Co., 26 L. D. 622; McConaghy vs. Doyle, 32 Colo. 97, 75 Pac. 419; Casey vs. Thievlege, 19 Mont. 347, 48 Pac. 394. "A quartz vein which contains so small a percentage of gold, silver, etc., as to be of no value for mining purposes is not a known vein within the meaning of the law, and whether it is of any practical value is always a question for the jury (or in the absence of a jury for the court)." Mutchmor vs. McCarty, *supra;* Noyes vs. Clifford, *supra* [60].

[61] Iron Co. vs. Mike & Starr Co., *supra* [4]; McConaghy vs. Doyle, *supra* [60]; Horsky vs. Moran, 21 Mont. 349, 53 Pac. 1064; dis. nonfederal question, 178 U. S. 205.

[62] Reynolds vs. Iron Co., *supra* [4]; Iron Co. vs. Mike & Starr Co., *supra* [4]; see Hopkins vs. Walker, 244 U. S. 489.

[63] Iron Co. vs. Reynolds, 124 U. S. 382; Iron Co. vs. Mike & Starr Co., *supra* [4]; Cripple Creek Co. vs. Mt. Rosa Co., *supra* [60].

"A vein known to exist within the boundaries of a placer claim at the date of the application for patent, and not included in the application, may be located by an adverse claimant after the issuance of the patent, and a vein is known to exist within the meaning of the statute: 1. When it is known to the placer claimant; 2. When its existence is generally known; 3. When any examination of the ground sufficient to enable the placer claimant to make oath that it is subject to location as such would necessarily disclose the existence of the vein. (Iron Co. vs. Mike & Starr Co., 143 U. S. 403.) * * * A quartz vein which contains so small a percentage of gold, silver, etc., as to be of no value for mining purposes is not a known vein within the meaning of the law, and whether it is of any practical value always is a question for the jury (or in the absence of a jury for the court)." See Mason vs. Washington-Butte Co., 214 Fed. 37. In Dahl vs. Raunheim, 132 U. S. 263, it is held that a vein of quartz exposed two hundred or three hundred feet without the boundaries of a placer claim and trending in the direction of such claim is not presumed to extend within it or that a vein exists therein.

[64] See *supra*, note 7; U. S. Co. vs. Lawson, *supra* [22]. See Utah Co. vs. Utah Co., *supra* [16]; Wall vs. U. S. Co., *supra* [22]; Eureka Co. vs. Richmond Co., *supra* [2]; Hyman vs. Wheeler, *supra* [10]; Bullion-Beck Co. vs. Eureka Co., *supra* [9].

[65] Eureka Co. vs. Richmond Co., *supra* [2]; Book vs. Justice Co., *supra* [1]; St. Louis Co. vs. Montana Co., *supra* [41]; Last Chance Co. vs. Bunker Hill Co., 131 Fed. 579; Star Co. vs. Federal Co., 265 Fed. 881, *certiorari* denied, 254 U. S. 651. "Where two or more mining claims longitudinally bisect or divide the apex of a vein, the senior claim takes the entire width of the vein on its dip, if it is in other respects so located as to give a right to pursue the vein downward outside of the side lines. This is so because it has been the custom among miners, since before the enactmnt of the mining laws, to regard and treat the vein as a unit and indivisible, in point of width, as respects the right to pursue it extralaterally beneath the surface; because usually the width of the vein is so irregular, and its strike and dip depart so far from right lines, that it is altogether impracticable, if not impossible, to continue the longitudinal bisection at the apex throughout the vei non its dip or downward course; and because it conforms to the principle pervading the mining laws, that priority of discovery and of location gives the better right, as is illustrated in the provision giving the senior claim all ore contained in the space of intersection when two or more veins intersect or cross each other, and in the further provision giving to the senior claim the entire vein at and below the point of union, where two or more veins with distinct apices and embraced in separate claims unite in their course downward. The priority of right to a single broad vein vested in the dis-

§ 155. What Constitutes a Broad Lode or Zone.

The term "broad lode or zone" designates any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. The deffinition given in the Eureka case implies a oneness genetically of the ore deposits included within its boundaries. So, lime beds replaced with minerals, fractured and faulted, constitute a lode as defined in that case.[66]

§ 156. What Does Not Constitute a Broad Lode or Zone.

Where mineral deposits are separated into well-defined parts, traceable for a great distance in their length and depth, and having distinct foot and hanging walls, each part is a separate vein or lode within the meaning of the mining law giving the right to follow the dip of the vein or lode beyond the side lines, although there are many ore-bearing cracks and seams running out from each vein, and sometimes extending over to the other.[67] While metalliferous rock in place may be so found within defined boundaries as to require recognition as a lode, though not in fissure, yet a broad metalliferous zone can not be permitted to swallow up under the name of lode true fissure veins found within its limits.[68] A court will not declare that a whole limestone area thousands of feet wide is one vein.[69] The term vein or lode can not be

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coverer is not determined by the dates of the entries or patents of the respective claims, and priority of discovery may be shown by testimony other than the entries of patents. In the absence of the record of an adverse suit there is no presumption that anything was considered or determined except the question of the right to the surface." U. S. Co. vs. Lawson, *supra* (22).

[66] See § 135. Also see Iron Co. vs. Cheesman, *supra* (4); U. S. Co. vs. Lawson, *supra* (7); a differentiation of which case may be found in Utah Co. vs. Utah Co., *supra* (16); Wall vs. U. S. Co., *supra* (22), in which case the court directs attention to the Lawson Case, *supra*, and says that that court "had occasion to consider the same stratum of limestone in the light of evidence which, while it related to a portion of the zone at some distance from the claims here in question, was substantially the same as the evidence in this case. That court held that this limestone zone constituted a broad vein or lode, and that the overlying and underlying beds of quartzite were the limits of the lode. Here this vein can be followed on its dip through a network of openings from its apex in the Roman Empire to the ore bodies beneath the surface of the Red River, showing a demonstrated continuity of vein." In conclusion the court says: "It is not necessary to consider whether the defendant takes the entire vein in dispute by virtue of its ownership of the Roman Empire and Montana claims in accordance with the decisions of the Circuit Court of Appeals of the Ninth Circuit in Empire State-Idaho M. & D. Co. vs. Bunker Hill & Sullivan M. & C. Co., 121 Fed. 973, 58 C. C. A. 311; and Empire State vs. Bunker Hill, etc., 131 Fed. 591, 66 C. C. A. 99, or whether as to a part it must rely on in the Columbia, under the Viola-San Carlos Case, Empire State, etc., vs. Bunker Hill & Sullivan, etc., Co., 114 Fed. 417, 52 C. C. A. 219. There is no reason to doubt the correctness of this latter decision." Bullion Beck Co. vs. Eureka Co., *supra* (9). The initial and leading case of Eureka Co. vs. Richmond Co., *supra* (2) also is differentiated in the case of Waterloo Co. vs. Doe, 82 Fed. 45, the court saying: "We can not see that the facts presented in this case are of a character which confronted the court in the Eureka case."

[67] Doe vs. Waterloo Co., *supra* (13); see Golden vs. Murphy, *supra* (15); *but see* Bullion Beck Co. vs. Eureka Co., *supra* (9).

[68] Mt. Diablo Co. vs. Callison, *supra* (7). In the Eureka Case, *supra* (2), Mr. Justice Field plainly recognized fissure fillings or veins in the geologist's meaning, as occurring in the Eureka lode and furthermore specifically states in U. S. vs. Iron Co., 128 U. S. 679, "that a lode may and often does contain more than one vein"—doubtless meaning more than one fissure filling. The geologist's vein is defined as the filling of a fissure. A fissure in order to be such must be a true fissure, and the geologist's vein thus defined evidently is a true fissure vein. Why the occurrence of a vein within a mineralized vein should destroy the identity of the zone is not apparent. In Bullion Beck Co. vs. Eureka, *supra* (9) the question was whether there was one broad lode or two veins. The evidence showed that there were two veins which were visible, distinct and separate, which could be followed separately, not only upon the surface, but below the surface for about two thousand feet in two well-defined, distinct and approximately parallel veins which were marked by outcrops of quartz gangue or vein stone showing above and below the surface, and separated by strata of limestone between the two veins with quartz gangue; and the court *held* that it was one broad lode.

[69] Mammoth Co. vs. Grand Central Co., *supra* (1). See, also, Bunker Hill Co. vs. Empire State Co., 134 Fed. 273; Utah Co. vs. Utah Co., *supra* (15).

applied to every metalliferous zone of country to which boundaries can be found, as this would reduce all mining districts to one lode.[70]

§ 157. Ledge Matter.

Ledge or vein matter is the matrix, or gangue, of all veins or lodes. By its peculiarities the experienced miner easily recognizes the vein, lode or ledge when discovered.[71] Ledge or vein matter, of itself, may not warrant a location. The filling of the vein or lode must be considered with special reference to the district where the vein or lode is found.[72]

§ 158. In Place.

The term "in place" indicates the body of the country which has not been affected by the action of the elements, which may remain in its original state and condition, as distinguished from the superficial mass which may lie above it.[73] The term "rock in place" has always received a liberal construction. It means that which is enclosed and embraced in the fixed and immovable rock forming the general mass of the mountain as distinguished from merely on the surface, or covered only by float, wash, slide, soil, waste, drift, debris, boulders and gravel.[74]

It does not mean merely hard rock, merely quartz rock, but any combination of rock broken up, mixed up with minerals and other

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[70] Doe vs. Waterloo Co., *supra* (7); Mt. Diablo Co. vs. Callison, *supra* (7); see U. S. Co. vs. Lawson, *supra* (22).

[71] Burke vs. McDonald, *supra* (10).

[72] Territory vs. Mackey, 8 Mont. 168; 19 Pac. 395; Golden vs. Murphy, *supra* (15); Grand Central Co. vs. Mammoth Co., *supra* (1).

When we say that certain substances are vein matter, we may mean that those substances are now a component part of some mineral vein, or that at some time they did constitute a part of the substance of some vein. It is well known that what miners call vein matter frequently rolls down a mountain side to a great distance from its original location in the vein. By the action of water it is carried to still greater distances. Bullion Co. vs. Croesus Co., 2 Nev. 168.

[73] Stevens vs. Williams, *supra* (4). Excluding the wash, slide or debris on the surface of the mounatin, all things in the mass of the mountain are in place. A continuous body of mineral-bearing rock, extending through loose and disjointed rocks is a lode as fully and certainly as that which is found in more regular formation; but if it is not continuous, or is not found in a crevice or opening which is itself continuous, it can not be called by that name. In that case it lacks the individuality and extension which is an essential quality of a lode or vein. Iron Co. vs. Cheesman, *supra* (4). In Jones vs. Prospect Co., *supra* (18), the lode under consideration consisted of limestone, boulders, low-grade ore, ground gravel and sand, which appeared to have been subjected to the action of water, and it was found to a depth of several hundred feet with the rock on either side fixed, solid and immovable. The court held that to draw a distinction based upon the mode or manner of time of its disposition would be impracticable and useless and said "mineral so found, no matter where it was originally found or deposited, is in place within the meaning of the law." Cited approvingly in Duffield vs. San Francisco Co., *supra* (45). A vein or lode is mineral-bearing rock or other earthy matter *in place* in a fissure in rock having its boundaries defined by rocky walls in place, and a lode location is the location of such a vein or lode in the manner prescribed by the statute. Webb vs. American Co., *supra* (10); Duffield vs. San Francisco Co., *supra*. In Henderson vs. Fulton, *supra* (10), the land department said: "Mineral-bearing rock in place or equivalent terms are invariably used in determining what the law contemplates as a vein or lode. Quartz or other rock in place bearing gold, silver, etc., are the terms used in the statute. Two distinct constituent elements of vein matter or substances are clearly recognized as essential; the *rock* and the *mineral* borne in the rock. To this extent, therefore, a general definition applicable to all cases may be given, namely, that a vein or lode, to be locatable and patentable under the mining laws, must possess the elements of rock in place bearing one or more of the minerals specified in the statute; or some other mineral that would be embraced within the added words "other valuable deposits."

[74] Iron Co. vs. Cheesman, *supra* (4); Leadville Co. vs. Fitzgerald, Fed. Cas. 8158; Stevens vs. Gill, *supra* (36); Stevens vs. Williams, *supra* (9); Jones vs. Prospect Co., *supra* (18). In Meydenbauer vs. Stevens, *supra* (4), the court said: "By the phrase 'in place' congress evidently intended to make a distinction between rock or quartz held in place by the adjoining country rock and bunches or blotches of quartz or rock simply lying or resting upon the earth's surface without any walls, and also pieces or boulders detached from the earth's crust, commonly called 'float,' and usually found in the mountain gulches and along the beds of streams in a mining country. The quartz or rock designated as 'in place' must be suspended between, or lie within,

things.[75] It is not material where the rock or mineral was originally formed or deposited;[76] if it is in its original position, although somewhat broken up and shattered by the movement of the country or other causes, it is in place.[77] It is immaterial, if in its original place, that the vein or lode matter is loose, broken, disintegrated, or solid material.[78]

§ 159. Other Rock in Place.

The term "other rock in place," as used in the Mining Act, means any rocky substance containing mineral matter.[79]

§ 160. Vein or Lode in Place.

A vein or lode is in place if the mineral is continuous to the extent that it may maintain that character, whether deposited in that form or removed bodily with its inclosing rocks to the place in which it may be found.[80]

§ 161. Vein or Lode Not in Place.

A vein or lode can not be in place unless it is within the general mass of the mountain. It must be inclosed by or held within the general mass of fixed and immovable rock. It is not enough to find the vein or lode lying on the top of fixed or immovable rock, for that which is on top is not within, and that which is without the rock in place can not be said to be within it, and the mineral must be in place within definite boundaries.[81]

A vein or lode is not in place if not fixed in rock in a loose state[82] or if found lying on the top of fixed or immovable rock.[83]

§ 162. Country Rock.

Country or neighboring rock designates the mass of rock, whether granite, gneiss, syenite, porphyry, or any other of the many different kinds of rock which may surround and inclose a vein or lode.[84]

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or be enclosed by walls of rock constituting the general mass of the earth's crust in the immediate vicinity of the zone or belt." In Tabor vs. Dexter, Fed. Cas. 13, 723, Judge Hallett said that: "Whether the ore is loose and friable, or very hard, if the enclosing walls are country rock, it may be located as a vein or lode. But if the ore is on top of the ground, or has no other covering than the superficial deposit which is called alluvium, diluvium, drift or debris, is not a lode or vein within the meaning of the act, which may be followed beyond the lines of the location. In this bill it is alleged that the overlying material is boulders and gravel, which can not be in place as required by the act. * * * For the decision of this motion (for an injunction) it is enough to say that where the mass overlying the ore is a mere drift, or loose deposit, the ore is not in place within the meaning of the act. Upon principles recently explained, a location on such a deposit of ore may be sufficient to hold all that lies within the lines; but it can not give a right to ore in other territory, although the ore body may extend beyond the lines." See, also, Burke vs. McDonald, *supra* [10].

[75] See preceding note.

[76] Jones vs. Prospect Co., *supra* [18].

[77] Stevens vs. Williams, *supra* [4].

[78] Id.

[79] Rev. St. § 2320; Stevens vs. Williams, *supra* [4].

[80] See *supra*, note 74.

[81] Jupiter Co. vs. Bodie Con. Co., 11 Fed. 666.

[82] Jones vs. Prospect Co., *supra* [18].

[83] Tabor vs. Dexter, *supra* [34].

[84] Leadville Co. vs. Fitzgerald, *supra* [74]. In Rough Rider Claims (on review 41 L. D. 255, it is said: "The entire rock formation of the claim in question constitutes a sort of blanket lode, some thousands of feet thick, in which the 'kidneys' of copper ore may be expected to be found. This is, in the opinion of the department, equivalent to a contention that the country rock itself is the lode, and that, therefore, a so-called discovery of country rock, which may or may not contain any mineral within the limits of the claim, is a sufficient discovery within the meaning of the law. In my opinion such a position seems essentially unsound."

§ 163. Horse.

An intrusion of country, or neighboring rock, into a vein or lode is called a "horse" or "rider." A piece of the wall rock detached and fallen into the fissure is called by miners a "horse." [85]

§ 164. Dykes.

Dykes are characteristically of igneous rocks and are matter between or through sedimentary beds.[86]

§ 165. Outcroppings.

Outcroppings are the edges of the strata appearing at the surface of the ground or which appear immediately under the soil and surface debris.[87] They relate to the vein or lode and mean the presentation of the mineral to the naked eye on the surface of the earth.[88] The term "outcrop" or "outcroppings" is sometimes used synonymously with the terms "top" and "apex." [89]

§ 166. Identity of Vein and Outcrop.

The vein or lode which the miner pursues from its outcrop must, of course, be the same which he pursues outside of his side lines.[90]

§ 167. Outcroppings Not Essential.

While it is on the line of the croppings that lode claims are generally, but not always accurately, laid without regard to the surface whether level or inclined,[91] it is not necessary that the vein or lode shall crop upon the surface that locations may be made upon it. If the vein or lode lies entirely beneath the surface its course may be ascertained by underground work at different points, or if slightly covered by foreign

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[85] Book vs. Justice Co., *supra* (1); Con. Wyoming Co. vs. Champion Co., *supra* (23). Shamel Min. Law, 145.

[86] Grand Central Co. vs. Mammoth Co., *supra* (1). See, also, Utah Co. vs. Utah Co., *supra* (15).

[87] Sloss-Sheffield Co. vs. Payne, 186 Ala. 341; 65 So. 137; Duggan vs. Davey, *supra* (7). See *infra*, § 184. Mr. Schamel says: "The outcrop of veins which contain pyrites usually consists of a mass of brown and rusty matter stained with, or perhaps chiefly composed of, iron oxides formed by the weathering of such iron minerals. This is termed 'gossan' or sometimes the 'iron hat' or 'iron cap.'" Shamel Min. Law, 148.

Outcroppings of mineral upon certain land are more or less evidentiary but by no means conclusive of its mineral character, and off the land their value as evidence rapidly lessens. They indicate possibilities or probabilities of valuable mineral deposits, but they are only indications. U. S. vs. Kostelak, 207 Fed. 452. The mere existence of outcroppings does not constitute a mine. There must be evidence of the actual value of the deposit to establish the mineral value of the land to render it mineral land. Colorado Coal Co. vs. U. S., 137 U. S. 307; Frees vs. State, 22, L. D. 510; see Caseaden vs. Bartolis, 162 Fed. 267. See, also, Diamond Coal Co. vs. U. S., 233 U. S. 236 aff'g. 191 Fed 786.

See *infra*, Note 100.

[88] Id. See Empire Co. vs. Tombstone Co., 100 Fed. 910 Id. Id. 131 Fed. 339.

[89] Stevens vs. Williams, *supra* (4).

[90] Cheesman vs. Shreeve, *supra* (4), wherein the court said: "in general it may be said that a lode or vein is a body of mineral, or mineral body of rock, within defined boundaries, in the general mass of the mountain. This lode, ledge or vein, which may thus be possessed and enjoyed outside of the limits of the surface side lines extended vertically, must be the same vein or lode on the apex or outcrop of which the claim of the party has been located. He can only go outside of this imaginary perpendicular wall to possess or enjoy a vein which, being his inside of that artificial line, he has the right to follow or pursue in its extension outside of those limits. The identity of the vein is, therefore, essential to his right to its possession." Butte Co. vs. Societe, 23 Mont. 200, 58 Pac. 116.

[91] Flagstaff Co. vs. Tarbet, 98 U. S. 463; Daggett vs. Yreka Co., 149 Cal. 357, 86 Pac. 968; Harper vs. Hill, *supra* (45); see Last Chance Co. vs. Tyler Co., 157 U. S. 683. rev'g. 61 Fed. 557.

matter the course of the apex may be ascertained by ordinary surface explorations and locations be made substantially following its course.[92]

A location is not invalid because its length is not along the vein or lode.[93]

§ 168. Top or Apex.

The term "top or apex," as used synonymously, may mean either a point[94] or a line of great length, [95] and designates the summit or edge of a vein or lode on,[96] or at any depth, below the surface.[97]

§ 169. Highest Point.

The highest point in a vein or lode is the ascent along the line of its dip or outeroppings and beyond which the vein or lode extends no further, so that it is the end or reversely the beginning of the vein or lode.[98]

§ 170. Definitions of Apex.

The definitions of the word apex as used in the mining act [99] all reach the one inevitable conclusion that it is the highest point in the vein,[100] but this is only a general definition and its application to any particular vein or peculiar location may, and often will, call for further

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[92] Flagstaff Co. vs. Tarbet, *supra* [91]; Last Chance Co. vs. Bunker Hill Co., *supra* [65]. Lodes and veins frequently do not appear upon the surface except at intervals. Sometimes they do not appear at all. The true apex or middle of the vein may not be accurately determined except by extensive excavations. Veins do not run in straight lines throughout their courses, but with many turns and angles. Detached masses projecting above the surface may be mistaken for the lode or vein. The ore may occur in a blanket formation having no distinct apex. Harper vs. Hill, *supra* [45].

[93] Flagstaff Co. vs. Tarbet, *supra* [91]; Iron Co. vs. Elgin Co., 118 U. S. 196; see Stewart vs. Bourne, *supra* [41].

[94] Duggan vs. Davey, *supra* [7].

[95] Larkin vs. Upton [57].

[96] Iron Co. vs. Murphy, 3 Fed. 368; Duggan vs. Davey, *supra* [7]; see *supra*, note 49; see Illinois Co. vs. Raff, *supra* [38]. Chief Justice Beatty, after defining dip and course of strike, said: "The top or apex of any part of a vein is found by following the line of its dip up to the highest point at which the vein matter exists in the fissure. According to this definition, the top or apex of a vein is the highest part of a vein along its entire course. If the vein is supposed to be divided into sections by vertical planes, at right angles to the strike, the top or apex of each section is the highest part of the vein between the planes that bound the section; but if the dividing planes are not vertical, or not at right angles to a vein which departs at all from a perpendicular in its downward course, then the highest part of the vein below such planes will not be the top or apex of the section which they include. Report of Public Lands Co. p. 399.

[97] Larkin vs. Upton, *supra* [57]; Iron Co. vs. Murphy, *supra* [96]. The extralateral right attaches to a vein having a subsurface apex the same as a vein which outcrops at the surface. Flagstaff Co. vs. Tarbet, *supra* [91]; Calhoun Co. vs. Ajax Co., *supra* [52]; Harper vs. Hill, *supra* [45]. A swell in a vein should not be mistaken for its true apex. Stevens vs. Williams, *supra* [4].

[98] Duggan vs. Davey, *supra* [7]; see, also, Gilpin vs. Sierra Nevada Co., 2 Ida. 662; 23 Pac. 547. See Alameda Co. vs. Success Co., *supra* [16] in which it is held that the extralateral right conferred by the federal statute is determined by the apex on the surface upon which the prospector makes his location and the top of the vein, and not upon the levels in the depths of the earth opened and disclosed in the working of the mine.

The law assumes that the lode has a top or apex, and provides for the acquisition of title by location upon this apex. Jim Butler Co. vs. West End Co., *supra* [35]. In Iron Co. vs. Elgin Co. (Horse Shoe Case), *supra* [93], the owner of a claim which contained no part of the apex of a vein was awarded the ore beneath his surface as against the owner of the claim which contained apex of the vein, who had so located that apex that he could not follow the vein extralaterally in the direction of the ores in controversy nor in any other direction. See, also, State vs. District Court, 25 Mont. 520, 65 Pac. 1026.

[99] Rev. St. § 2322, 5 U. S. Comp. St. p. 5466, § 4618.

[100] Flagstaff Co. vs. Tarbet, *supra* [91]; Del Monte Co. vs. Last Chance Co., *supra* [41]; Duggan vs. Davey, *supra* [7]. A claim located upon an outcrop may possess no extralateral rights because the outcrop was not an exposure on the strike of the vein. Duggan vs. Davey, *supra* [7]. See, also, Iron Co. vs. Elgin Co., *supra* [93]; Eilers vs. Boatman, 3 Utah 150, 2 Pac. 66, aff'd. 111 U. S. 356.

particularity of description. It must be the top or terminal edge of the vein on the surface, or the nearest point to the surface, and it must be the top of the vein proper, rather than of a spur or feeder, just as the highest point in the roof of a house would be taken to be the apex of the house and not the chimney or flagstaff. Again, an apex is a point from which the vein has a dip, as well as strike, or course, else it confers no extralateral right. Where a vein has a terminal edge, its apex is a point from which, or a line along which is its strike and from which it has a dip;[101] but this is equally true of the crest of a vein in the form of a single antielinal fold.[102]

§ 171. Theoretic Apex.

For the purpose of discovery and purchase under the mining laws, the legal apex of a vein dipping out of the ground disposed of under the placer or nonmineral laws, is that portion of the vein within the public lands which would constitute its actual apex if the vein had no actual existence in the ground so disposed of.[103]

§ 172. Discovery of Top or Apex.

Any portion of the top or apex on the course or strike of the vein or lode within the limits of the location, is sufficient discovery[104] and gives the miner the right to follow the vein or lode downward even though it may depart from a perpendicular and extend laterally outside of the vertical side lines of such surface location;[105] except where the vein or

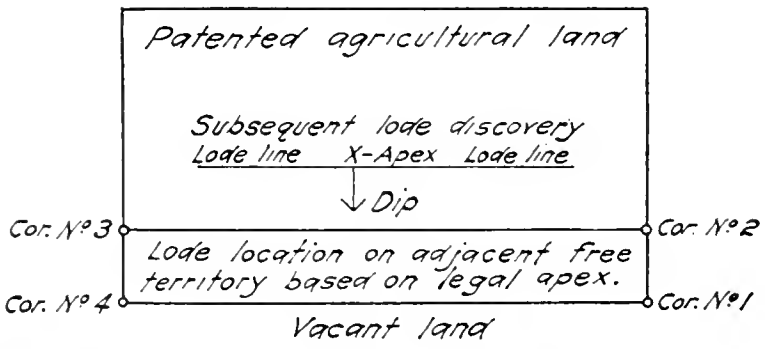
[101] Stewart vs. Ontario Co., *supra* (24).

[102] Jim Butler Co. vs. West End Co., *supra* (35). See Hyman vs. Wheeler, *supra* (10); Stewart vs. Ontario Co., *supra* (42); Illinois Co. vs. Raff, *supra* (38).

If the vein or lode lies entirely beneath the surface, and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position and course of the vein; and locations may properly be made upon the surface above it, so as to secure a right to the vein or lode beneath. Flagstaff Co. vs. Tarbet, *supra* (91); Duggan vs. Davey, *supra* (7).

[103] Woods vs. Holden, 27 L. D. 375; Id. on review, 29 L. D. 198; U. S. Borax Co., *supra* (46), see Del Monte Co. vs. Last Chance Co., *supra* (41); Jim Butler Co. vs. West End Co., *supra* (35). What is the top or apex of a vein or lode is a question of fact. Bluebird Co. vs. Largey, 49 Fed. 289.

The subjoined diagram is illustrative of the condition presented by the text:



See Costigan Min. Law, p. 450, § 118*m*; 1 Lindl. Mines (3d ed), p. 712, § 312*a*.

[104] Larkin vs. Upton, *supra* (57).

[105] Gwillim vs. Donnellan, 115 U. S. 47; King vs. Amy Co., 152 U. S. 222, rev'g. 9 Mont. 543; Del Monte Co. vs. Last Chance Co., *supra* (41); Stewart Co. vs. Ontario Co., *supra* (24); Doe vs. Waterloo Co., *supra* (13); Gregory vs. Pershbaker, *supra* (18); Davis vs. Shepherd, 31 Colo. 141, 72 Pac. 57. When the apex is shown to exist in a mining claim, there is an inference that it dips beyond the side lines of the claim. Arizona Co. vs. Iron Cap Co., *supra* (141).

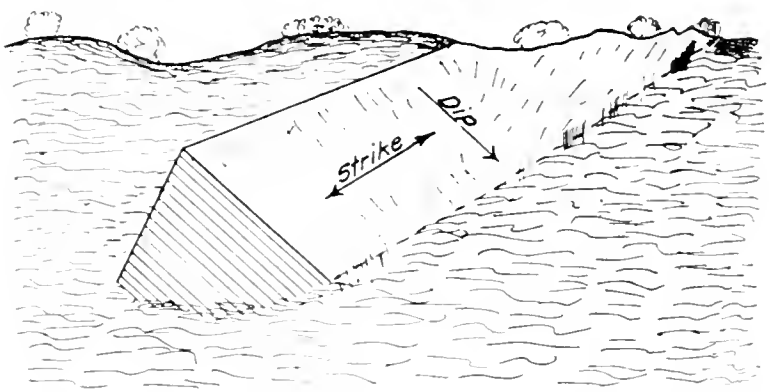
lode in its downward course penetrates land which has been previously patented to another as nonmineral land.[106]

§ 173. Course or Strike of Vein or Lode.

The course or strike of a vein or lode is the direction of the vein or lode across or through the country.[107] The most practical rule is to regard the course or strike of the vein or lode as that which is indicated by surface outcrop or surface exploraion and workings.[108] There can be no extralateral right on the strike of a vein.[109]

[106] Pacific Coast Co. vs. Spargo, 16 Fed 348; Amador Median Co. vs. South Spring Hill Co., 36 Fed. 668; distinguished in Colorado Central Co. vs. Turck, 50 Fed. 888; Reeves vs. Oregon Co., 127 Or. 686; 273 Pac. 389. See, also, Colwell vs. Lammers, 21 Fed. 206, cited approvingly in Davis vs. Weibbold, 139 U. S. 521; Golden Cycle Co. vs. Christmas Co., 204 Fed. 941; Anaconda Co. vs. Pilot-Butte Co., *supra* (55).

[107] King vs. Amy Co., *supra* (105); see Silver King Co. vs. Conkling Co., 256 U. S. 18; rev'g. 230 Fed. 553. The true strike of a vein or lode is a horizontal line, the line of a line run in a vein or lode and lengthwise of the vein or lode. Flagstaff Co. vs. Tarbet, *supra* (91). Section 2322 of the Revised Statutes calls for no effort of construction, and the distinction which obtains in the parlance of miners and in the cases between the strike or course and the dip of a vein, is compelled by the statute, and accurately marks the lineal and extralateral rights of a location, and the language of the section expresses the distinction which can be observed, and the strike and the dip of the vein must not be confounded nor the rights dependent upon them confused. Stewart vs. Ontario Co., *supra* (24).



Perspective view showing the direction of strike and dip.
From Spurr: Geology Applied to Mining; p. 134.

[108] Flagstaff Co. vs. Tarbet, *supra* (91); see Con. Wyoming Co. vs. Champion Co., *supra* (23); Alameda Co. vs. Success Co., *supra* (16).

[109] Stewart Co. vs. Ontario Co., *supra* (24); see Argentine Co. vs. Terrible Co., 122 U. S. 478; aff'g. 18 Utah 183, 55 Pac. 559; Larned vs. Jenkins, 113 Fed. 634; Southern Nevada Co. vs. Holmes Co., 27 Nev. 107, 73 Pac. 759. Any portion of the apex on the course or strike of the vein or lode within the limits of the claim is sufficient discovery to validate the location. Larkin vs. Upton, *supra* (55). The case of Bullion Beck Co. vs. Eureka Co., *supra* (9), is a case where the croppings were cut on the strike of the vein by a side line of a location. The court gave the vein to the senior locator. Where a vein is found to have a certain course, so far as it is disclosed, the inference may be drawn that it will continue in the same direction. Hence, if it crosses an end line and for some distance is parallel to the side lines, it is not unreasonable to conclude that it continues in that direction. Bourne vs. Federal Co., 243 Fed. 469.

In Carson City Co. vs. North Star Co., 73 Fed. 597, it is said: "As ledges may in their depths change their course, and as the surface course or the course of the apex is to govern the miner's rights, the workings nearest the surface are the better guides to the course of the apex than those far below." In Pennsylvania Co. vs. Grass Valley Co., 117 Fed. 509, it is said: "It is contended that the strike of the vein at this point is such that it can not be the same vein as the one found at or near the surface. This fact would be of some importance if the vein was an ideal one, maintaining a uniform strike and dip throughout its entire course, but it is not an ideal vein, and there are very few such to be found." In Last Chance Co. vs. Bunker Hill Co., 131 Fed. 579, it is held that where the end lines of a lode claim cross the surface outcroppings of a vein they determine the extralateral right of the claim without regard to the angle at which they cross the general course of the vein, its course for that purpose being fixed by the course of the apex on the surface of the claim; and it is said: "The extralateral right to a vein or lode outcropping at the surface, where it exists, is fixed by the course of the vein or lode at the surface, and not by its course on a level."

§ 174. Following Course or Strike.

To follow the course, strike or trend is to work lengthwise of the vein or lode on a level, that is advancing along the vein or lode, neither rising towards the surface of the ground nor descending, but going on a level with the plane of the earth's surface[110] within the perpendicular planes of the end lines of the location, whether this be more upon the course or strike than the dip of the vein or lode.[111]

§ 175. Downward Course.

The downward course of a vein or lode is that direction which it takes underneath the surface on its downward course between vertical planes drawn through the end lines, and this gives a segment in length, throughout the depth, within vertical planes drawn through the parallel cross lines, equal to the length of apex covered by the surface boundaries, measured on lines on the plane of the vein.[112]

§ 176. Downward Course and Course Downward.

The words "downward course" and "course downward" are used interchangeably, and it was undoubtedly intended by the use of the words in the Mining Act to signify the course of the vein from the surface toward the center of the earth; and it may be perpendicular, or there may be a deflection in the downward course of a vein or lode, and such deflection is called the dip.[113]

§ 177. Dip.

The term "dip" is a miner's word not found in the mining act. The term there used is "downward course," which is synonymous with the term "dip." The direction of the vein or lode as it goes downward into the earth is called the dip. It may vary from a perpendicular to the earth's surface to an angle perhaps only a few degrees below the horizon. The same vein or lode may have different dips.[114]

§ 178. Measuring Dip.

It is practically the universal custom to measure the dip by its angular deflection from the horizontal. A dip of 20 degrees means 20 degrees from the horizontal.

In Stewart Co. vs. Ontario Co., *supra* (24), it is said: "It is rudimentary that extra-lateral rights to a vein depend upon the position of the top or apex." In cases where the apex has in part been disclosed, and, so far as known, its course is parallel to the side lines, it may be inferred that the strike of the hidden portion substantially is the same as that which has been exposed. But this is an inference of fact and not a presumption of law. It follows, not from the location of the claim, or the direction of the boundary lines thereof, but from the actual course of the apex of a portion of the vein. To that extent, and that only, do the decisions go, reason goes no further. Bourne vs. Federal Co., *supra*.

[110] King vs. Amy Co., *supra* (105).

[111] Bunker Hill Co. vs. Empire State Co., *supra* (69).

[112] Stewart Co. vs. Ontario Co., *supra* (24); see Duggan vs. Davey, *supra* (7); Gilpin vs. Sierra Nevada Co., 2 Ida. 662, 23 Pac. 547.

[113] Stewart Co. vs. Ontario Co., *supra* (24).

See § 1, subd. LIII.

[114] King vs. Amy Co., *supra* (105). Jim Butler Co. vs. West End Co., *supra* (85). In Dugan vs. Davey, *supra* (7), the court said: "I have spoken of the 'dip' or 'downward course' of the vein, treating these words as synonymous, and so I think they must be regarded. 'Dip' and 'depth' are of the same origin—'dip' is the direction or inclination toward the 'depth'—and it is throughout their depth or inclination that veins may be followed, and that is surely their downward course."

§ 179. Easement or Servitude.

The right to follow the dip, also termed the 'extralateral' right, is a sort of easement or servitude laid upon the mining claim adjoining.[115]

§ 180. Following the Dip.

The miner follows the dip of the vein or lode when he works downward, leaving the apex farther from and above him at each advance.[116]

§ 181. Walls of Vein or Lode.

The term "wall" in mining parlance is a body of rock bounding a vein or lode on either or both sides thereof and serving as a line of demarcation between the vein or lode and the neighboring or country rock.[117] The wall rock may be barren or be more or less impregnated with mineral.[118] A wall is called the "hanging wall" or the "foot wall" according to its relative position to the vein or lode with which it is connected.[119] Both the walls of a vein or lode may be of a similar character as to formation,[120] yet have different colors; one wall may be composed of yellow and the other wall be of purple porphyry[121] or one wall may be of limestone and the complemental wall be of porphyry[122] or, as in the Eureka Case, one wall may be quartzite and the other wall be composed of clay and shale,[123] or other dissimilar substances. It is not essential that both walls of a vein or lode be disclosed; their existence and continuance may be determined by assay and analysis.[124] Where there are well-defined walls, they determine the boundaries of the vein or lode, but where there are no walls, continuous orebodies determine the width; such continuity, however, not being affected by subsequent interruption through forces of nature.[125] To the practical miner the walls, in connection with the fissure, are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks.[126]

§ 182. Vug.

The term "vug" is the miners' name for that which the geologists more generally call a geode. In mining parlance a "vug" may be said

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[115] Mt. Diablo Co. vs. Callison, *supra* (7); King vs. Amy Co., *supra* (105). The true average dip of a vein is always at right angles to strike of the vein. Gilpin vs. Sierra Nevada Co., *supra* (112).

[116] King vs. Amy Co., *supra* (105).

[117] See Grand Central Co. vs. Mammoth Co., *supra* (1). It is not necessary for the formation of a disseminated lode that there should be any walls or any sheering. It simply requires a more or less porous rock through which the solutions may pass. They may have indefinite boundaries. Thus, while what are spoken of as structural boundaries are not always necessary to constitute a vein or lode, there must be orebodies coming from the same source, impressed with the same form and appearing to have been created by the same processes. Moulton vs. Anaconda Co., *supra* (17).

[118] Golden vs. Murphy, *supra* (15).

[119] Cheesman vs. Shreeve, *supra* (15); Grand Central Co. vs. Mammoth Co., *supra* (1). In many veins or lodes having distinct hanging and footwalls the country beyond either is more or less mineralized and at times even small deposits of ores are found beyond the limits of such walls, yet it can not be said that such mineralized country rock constitutes a part of the vein or lode. Bunker Hill Co. vs. Empire State Co., 134 Fed. 273.

[120] Ilinois Co. vs. Raff, *supra* (38); Duffield vs. San Francisco Co., *supra* (45); Utah Co. vs. Utah Co., *supra* (15).

[121] Hyman vs. Wheeler, *supra* (10); Book vs. Justice Co., *supra* (1).

[122] Iron Co. vs. Cheesman, *supra* (4).

[123] Eureka Co. vs. Richmond Co., *supra* (2).

[124] Hyman vs. Wheeler, *supra* (10); Cheesman vs. Shreeve, *supra* (15).

[125] Star Co. vs. Federal Co., *supra* (65). Though the term 'mineral-bearing vein or lode' is not susceptible of arbitrary definition applicable to every case, its controlling characteristic is a continuous body of mineral-bearing rock in place, having boundaries, though they may not have been ascertained, separating it from the general mass of the surrounding formation. Utah Co. vs. Utah Co., *supra* (26).

[126] Eureka Co. vs. Richmond Co., *supra* (2).

to be any cavity set around with crystals in a vein or lode. Where deposits of ore are only found in vugs in small quantities, lying in no general direction, widely separated, and found in excavations only after driving a tunnel for a considerable distance through hard quartz rock, and where such vugs lie in detached cavities, more or less like a trough, and wholly surrounded by or enveloped in such quartzite rock, such deposits would not constitute a vein or lode within the meaning of the mining act.[127]

§ 183. Impregnations.

An impregnation, to the extent to which it may be traced as a body of ore, is as fully within the broad terms of the act of congress as any other form of deposit.[128]

§ 184. Indications.

While the mere existence of outcroppings do not constitute a mine[129] still, the necessary knowledge of the existence of mineral may be obtained from the outcrop of the vein or lode.[130] But the discovered vein or lode on which a location can be based must be one that from all indications has a present or prospective value.[131]

§ 185. Proof of Existence.

In determining either the fact or the likelihood of the existence of a vein or lode a court or a jury may consider the topography of the mountain, its geological formation, with its sands, limes, porphyry, quartzite, and granite formation, together with the mineralized rock in body and detachments.[132] Proof of ore in mass and a position in the body of a mountain is sufficient to show the existence of a lode or vein of the dimensions of such ore, and so far as it prevails the ore is a lode, whatever its form or structure may be; and it is unnecessary to decide any question of fissures, contacts, selvages, slickensides, or other marks of distinction.[133] The presence of a vein or lode may be determined by assay and analysis.[134] Any dispute as to whether a given parcel of land is a vein or lode is a question of fact to be determined by men experienced in mining, and it can not be determined as a matter of law.[135]

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[127] Cheesman vs. Shreeve, *supra* (15).

[128] Hyman vs. Wheeler, *supra* (10); Cheesman vs. Shreeve, *supra* (15). See, also, Beals vs. Cone, *supra* (16).

[129] Colorado Coal Co. vs. U. S., 137 U. S. 307; Frees vs. State, 22 L. D. 510. See *supra*, § 165.

[130] Iron Co. vs. Reynolds, *supra* (63); Diamond Coal Co. vs. U. S., 233 U. S. 236; S. P. Co. vs. U. S., 251 U. S. 1; Castle vs. Womble, 19 L. D. 455.

[131] Montana Co. vs. Migeon, *supra* (60); Madison vs. Octave Oil Co., 154 Cal. 768, 99 Pac. 176. See Erhardt vs. Boaro, 113 U. S. 527, *but see* Oregon Basin Co. (on review), 50 L. D. 253; s. c. 6 Fed. (2d) 676. See Freeman vs. Summers, 52 L. D. 201.

[132] Cheesman vs. Shreeve, *supra* (15).

[133] Hyman vs. Wheeler, *supra* (10); Cheesman vs. Shreeve, *supra* (15).

[134] Hyman vs. Wheeler, *supra* (10).

[135] Bluebird Co. vs. Largey, *supra* (103); Bullion Beck Co. vs. Eureka Co., *supra* (9); Illinois Co. vs. Raff, *supra* (58); see Eureka Co. vs. Richmond Co., *supra* (2); Columbia Co. vs. Dutchess Co., *supra* (20).

In Moulton Co. vs. Anaconda Co., *supra* (17), it is said: "the existence or nonexistence of a vein is often dependent upon mixed questions of law and fact, in this instance the evidence of mineral showing and of the physical characteristics of a vein are so strong that as a matter of law the only conclusion that could properly be reached was that it was a vein."

CHAPTER VIII.

PLACERS.

§ 186. Placer Deposits.

The federal mining act[1] extends and enlarges the signification commonly given to 'placer claims,' and makes such locations include all forms of deposit, except veins of quartz or other rock in place.[2] The term as used in the act has been defined as meaning "ground within defined boundaries which contains mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place, that is, not fixed in the rock, but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling."[3] It is apparent that this definition of a placer is not as broad as the act which includes "all forms of deposits," etc. Judge Ross[4] holds that a placer location may contain "gold, silver, quicksilver, or petroleum."

§ 187. Characteristics.

Since the passage of the "placer mining law" the term "placer location" has become the generic name or description which comprehends, says the United States Supreme Court,[5] "the location of a tract or parcel of land located for the sake of the loose deposits of mineral upon or near the surface" of the ground. But neither the mode of occurrence of such deposits nor their depth from the surface is a material factor. For instance, a placer deposit may lie under a stratum of lava some six hundred feet in thickness, and in mining and extracting the same the deposit has to be detached from its position by the use of picks and gads;[6] a deposit of petroleum or gas may be some hun-

[1] Rev. St. § 2329, 6 Fed. St. Ann. p. 575.

[2] Deffeback vs. Hawke, 115 U. S. 392; Reynolds vs. Iron Co., 116 U. S. 687; Freezer vs. Sweeney, 8 Mont. 513, 21 Pac. 20; see U. S. vs. Ohio Oil Co., 240 Fed. 1000. All forms of mineral deposits, except veins of quartz or other rock in place, are subject to entry as placer mining claims unless specifically withdrawn from location. Meiklejohn vs. Hyde, 42 L. D. 145, rehearing denied, 42 L. D. 149. "It is enough for him (the mining locator) to know that a mineral deposit in place between walls of rock is a lode, and may be located as a lode claim, and that land containing mineral scattered or diffused through a superficial deposit of sand or gravel not in place may be entered as a placer claim." Duffield vs. San Francisco Co., 205 Fed. 484; see Cole vs. Ralph, 252 U. S. 295; *compare* Gregory vs. Pershbaker, 73 Cal. 109, 14 Pac. 401; Jones vs. Prospect Co., 21 Nev. 339, 31 Pac. 612.

[3] U. S. vs. Iron Co., 128 U. S. 679; U. S. vs. Ohio Oil Co., *supra* [2]; N. P. R. Co. vs. Soderberg, 188 U. S. 532, aff'g. 104 Fed. 425; Clipper Co. vs. Eli Co., 194 U. S. 228; aff'g. 68 Pac. 289; Duffield vs. San Francisco Co., *supra* [2].

The common understanding of the term 'placer' is deposits of debris or wash here and there upon the earth's surface valuable as a 'placer deposit' because carrying gold. Montague vs. Dobbs, 9 C. L. O. 166; see Stevens vs. Williams, Fed. Cas. 13, 414. Placers are superficial deposits which occupy the beds of ancient rivers or valleys or deposits of valuable mineral, found in particles in alluvium or diluvium, or in the beds of streams. Com'r to C. D. Richardson, September 7, 1892, citing Moxon vs. Wilkinson, 2 Mont. 421. See Conlin vs. Kelly, 12 L. D. 3. A placer claim is a place near the bank of a river where gold dust is found. A placer claim is a gravelly place where gold is found, especially by the side of a river or in he bed of a mountain torrent. Gregory vs. Pershbaker, *supra* [2]. A scientific definition of a placer deposit is "an alluvial deposit derived from the disintegration of metalliferous rocks and ore bodies of various origin." Geike, Struct. and Field Geology, p. 229.

[4] Gird vs. California Oil Co., 60 Fed. 541; see, also, Bevis vs. Markland, 130 Fed. 227; Steele vs. Tanana Co., 148 Fed. 680; Yard, 38 L. D. 69.

[5] Clipper Co. vs. Eli Co., *supra* [3].

[6] Gregory vs. Pershbaker, *supra* [2].

dreds[7] or thousands of feet below the surface;[8] a building stone placer is operated as a quarry;[9] a gold placer may be disclosed by "panning" upon the surface.[10]

§ 188. Differentiation.

Placer locations differ from lode locations in the amount of land which may be included within each location, the price per acre to be paid to the federal government for the land embraced therein in patent proceedings, the rights conferred by the respective patents and the conditions upon which the several classes of claims are held.[11] The fact that land is held as a placer claim does not necessarily prevent lode locations being made thereon by different persons and patented accordingly.[12] A lode location, however, carries with it the exclusive right of

[7] Weed vs. Snook, 144 Cal. 439, 77 Pac. 1023.

[8] Con. Mutual Oil Co. vs. U. S., 245 Fed. 525. In McLemore vs. Express Oil Co., 158 Cal. 559, 112 Pac. 59, the court said: "In the case of oil discovery, in the very nature of things, would rarely or never be made except at the end of much time and after the expenditure of much money, the discovery of oil involving the erection of a derrick, the installation of machinery and the laborious drilling of a well, frequently to the depth of three thousand feet or more."

[9] 5 U. S. Comp. St., p. 5678, § 4633; N. P. R. Co. vs. Soderberg, *supra* [3]. Mountain land covered with granite cliffs and rocks, the value of which is in the quarry in the face of the cliff, is mineral land and may be entered as a placer claim. N. P. R. Co. vs. Soderberg, *supra* [3]; Pacific Coast Co. vs. N. P. R. Co., 25 L. D. 233; Meiklejohn vs. Hyde, *supra* [2]. Land that is rough and rocky, covered with boulders and sharp jutting ledges of rock, but wholly unfit for cultivation and containing a valuable ledge or quarry of building granite of great length, is subject to entry as a placer claim, when shown to be more valuable for its stone than for agricultural or grazing purposes. Mordecai vs. California, 17 L. D. 144.

Deposits of marble are not vein or lode deposits within the meaning of the mining laws, and are not subject to location and patent under the provisions applicable to lode claims. Henderson vs. Fulton, 35 L. D. 652; see Palmer, 38 L. D. 294; McDonald, 41 L. D. 403. Land valuable for deposits of fire clay is subject to entry under placer mining laws. Messmer vs. Geith, 22 Fed. (2d) 690; Aldritt vs. N. P. R. Co., 28 L. D. 349. So, also, is colloidal clay. Ortman, 52 L. D. 469.

[10] Lange vs. Robinson, 148 Fed. 799.

[11] Reynolds vs. Iron Co., *supra* [2]; U. S. vs. Iron Co., *supra* [4]; Clipper Co., vs. Eli Co., *supra* [6]; Pike's Peak Lode, 10 L. D. 205; Aurora Lode vs. Bulger Hill Placer, 23 L. D. 95; Daphne Lode, 32 L. D. 513; Jaw Bone Lode vs. Damon Placer, 34 L. D. 72; Henderson vs. Fulton, *supra* [9]; Largey, 17 C. L. O. 4; Mt. Rosa Co. vs. Palmer, 26 Colo. 59, 56 Pac. 176. The federal mining law provides that placer mining claims shall be subject to entry and patent the same as vein or lode claims, but with wholly different provisions as to extra lateral rights, area, survey and price. Harry Lode, 41 L. D. 403. See Dennis vs. Utah, 51 L. D. 229. The rule of the land department is that while one discovery of mineral is a sufficient basis for an association location of a placer mining claim, otherwise valid, yet if it is subsequently shown by an adverse claimant or by a protestant that any area of such association located, amounting to a legal subdivision, does not contain mineral, or is not valuable for the mineral contained, then such legal subdivision must be excluded from the application for patent. Ferrell vs. Hoge, 27 L. D. 129; American Co., 39 L. D. 299. Ten-acre tracts, normally in square forms, are the units of investigation and determination as to the character of land embraced within a placer location, and if such a unit of area is found on subsequent investigation or development to be in fact nonmineral it should be eliminated. The land department does not hold that actual disclosure of mineral must be made on each ten-acre tract; but in a contest the locator can only succeed as to the area shown to be mineral in character, and for this purpose the land may be divided into ten-acre tracts. Crystal Marble Co. vs. Dantice, 41 L. D. 642.

See § 722, note 32.

[12] Noyes vs. Mantle, 127 U. S. 348; Hughes vs. Ochsner, 27 L. D. 398; Henderson vs. Fulton, *supra* [9]; see Reynolds vs. Iron Co., *supra* [2]; Aurora Lode vs. Bulger Hill Placer, *supra* [11]; Daphne Lode Claim, *supra* [11]; Jaw Bone Lode vs. Damon Placer, *supra* [11].

A valid placer location confers a qualified right to the surface. Mt. Rosa Co. vs. Palmer, *supra* [11]; see Clipper Co. vs. Eli Co., *supra* [3]; Mutchmor vs. McCarty, 149 Cal. 603, 87 Pac. 85, although no person can legally enter thereon and prospect for any vein or lode therein without the consent of the placer claimant; hence, a stranger has no right to go upon a placer claim and by sinking shafts or otherwise explore for any lode or vein and on finding one obtain a patent thereto. An entry against the will of the placer claimant, for the purpose of prospecting, undoubtedly is a trespass, and such a trespass can not be relied upon to sustain a claim of a right to veins or lodes. Clipper Co. vs. Eli Co., *supra;* Campbell vs. McIntyre, 295 Fed. 45. The placer location also confers the right to all placer deposits and to all veins or lodes not known to exist at the time of its location. Mt. Rosa Co. vs. Palmer, *supra;*

possession and enjoyment of all the surface ground included within the lines of the location.[13]

§ 189. Similarity of Conditions.

The rule of law that no valid location of a mining claim is made until there is an appropriate discovery of mineral within the limits of the location[14] and that annual assessment expenditure must be made applies alike to both lode and placer claims.[15]

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see Clipper Co. vs. Eli, *supra*; Mutchmor vs. McCarty, *supra*; except that where the placer was located prior to the mining act of 1872, "known veins" within its area are included therein. Cranes Gulch Co. vs. Scherrer, 134 Cal. 350, 66 Pac. 487. It may not be easy to define the words "known to exist" in this act. Reynolds vs. Iron Co., *supra* (2).

See § 792, note 1.

A "known lode" within the confines of a placer location is subject to a separate location by the placer claimant. Noyes vs. Clifford, 37 Mont. 138, 94 Pac. 842, or may be specifically included in the application for patent for the placer ground. Reynolds vs. Iron Co., *supra*; Noyes vs. Clifford, *supra*. The formal location of a lode is not necessary to exclude it from a placer patent, the only requisite to such exclusion by operation of law being (1) that it was known to exist at the date of the application for the placer patent, and (2) that it was not included in such application. Railroad Lode vs. Noyes Placer, 9 L. D. 26.

A quartz claim upon a patented placer depends for ultimate validity and value upon its claimant's ability to prove that at the time application for patent was made the placer claim contained a known vein. Kift vs. Mason, 42 Mont. 232, 112 Pac. 392; see Iron Co. vs. Campbell, 135 U. S. 286. A quartz vein which contains so small a percentage of gold, silver, etc., as to be of no value for mining purposes is not a "known" vein within the meaning of the law. Iron Co. vs. Mike & Starr Co., 143 U. S. 403.

If the placer applicant neither makes separate location of the known lode nor specifically includes the same in his application for the placer the known lode is subject to adverse location. McCarthy vs. Speed, 11 S. Dak. 362, 77 N. W. 590. See Costigan Min. Law, p. 267, §§ 75–77. In fact a known vein or lode may be located by another party either before or after the issuance of the placer patent if not included therein. Reynolds vs. Iron Co., *supra*; Mt. Rosa Co. vs. Palmer, *supra* (11). Such lode claim is limited to twenty-five feet on each side of such lode. 6 Fed. St. Ann., p. 581, § 2333; Reynolds vs. Iron Co., *supra*; Noyes vs. Clifford, *supra* (8). This limitation does not apply to a subsisting valid location of a known lode embraced within the lines of a junior placer location. Noyes vs. Mantle, *supra* (12).

For right to surface conflict ground see Aurora Lode vs. Bulger Hill Placer, *supra* (11); Elda Co. vs. Mayflower Co., 26 L. D. 574; Cape May Co. vs. Wallace, 27 L. D. 679.

[13] Gwillim vs. Donnellan, 115 U. S. 49; Clipper Co. vs. Eli, *supra* (3); St. Louis Co. vs. Montana Co., 171 U. S. 655; Brown vs. Gurney, 201 U. S. 191; Swanson vs. Sears, 224 U. S. 180, aff'g. 17 Ida. 321, 105 Pac. 1059; Cole vs. Ralph, *supra* (2), *but see* Lavagnino vs. Uhlig, 198 U. S. 443, aff'g. 71 Pac. 1046; Jones vs. Wild Goose Co., 177 Fed. 97; Chilberg vs. Con. Co., 3 Alaska 238; Worthen vs. Sidway, 72 Ark. 225, 79 S. W. 777; Lalande vs. McDonald, 2 Ida. 307, 13 Pac. 347; McFeters vs. Pierson, 15 Colo. 204, 24 Pac. 1076; Peoria Co. vs. Turner, 20 Colo. A. 479, 79 Pac. 915; Nash vs. McNamara, 30 Nev. 132, 93 Pac. 405; Duffey vs. Mix, 24 Or. 268, 33 Pac. 807; Gorman Co. vs. Alexander, 2 S. Dak. 564, 51 N. W. 346; *but see* Del Monte Co. vs. Last Chance Co., 171 U. S. 55.

See §§ 788, 789.

[14] Union Oil Co. (on review), 25 L. D. 351. To justify the location of a placer mining claim there must be such a discovery of mineral as gives reasonable evidence of the fact that it is valuable for such mining. "Three things are provided for, discovery, location, and patent. The first is the primary, the essential fact." Creede Co. vs. Uinta Co., *supra* (10); Chrisman vs. Miller, 197 U. S. 323, aff'g. 146 Cal. 440, 73 Pac. 1083, 74 Pac. 444; Cole vs. Ralph, *supra* (2); Steele vs. Tanana Co., 148 Fed. 679; Multnomah Co. vs. U. S., 211 Fed. 100; U. S. vs. Ohio Oil Co., *supra* (1); Tomera Claim, 33 L. D. 560; Garibaldi vs. Grillo, 17 Cal. A. 542, 120 Pac. 425; Miller vs. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, aff'd. 197 U. S. 313; New England Oil Co. vs. Congdon, 152 Cal. 213, 92 Pac. 180; that is to say, not a discovery of a lode or vein, but of placer mineral; but the strictness as to proof of discovery in lode claims is not required in placer claims. Cook vs. Johnson, 3 Alaska 533; Granlick vs. Johnston, 29 Wyo. 329, 213 Pac. 98; see, also, S. P. Co. vs. U. S., 251 U. S. 1; Freeman vs. Summers, 52 L. D. 201. A single discovery is sufficient, irrespective of the extent of the placer location. Hall vs. McKinnon, 193 Fed. 57; Ferrell vs. Hoge, *supra* (11); Crystal Co. vs. Dantice, *supra* (11); McDonald vs. Montana Wood Co., 1 Mont. 88, 35 Pac. 668; Whiting vs. Straup, 17 Wyo. 1, 95 Pac. 849.

[15] St. Louis Co. vs. Kemp, 104 U. S. 636; Jackson vs. Roby, 109 U. S. 440; Carney vs. Arizona Co., 65 Cal. 41, 2 Pac. 734; Reeder vs. Mills, 62 Cal. A. 581, 217 Pac. 562. See, also, Morgan vs. Tillotson, 73 Cal. 520, 15 Pac. 88; Sweet vs. Webber, 7 Colo., 443, 4 Pac. 752; McDonald vs. Montana Wood Co., *supra* (14); see, generally, Anvil Co. vs. Code, 182 Fed. 205; Rooney vs. Barnette, 200 Fed. 700; U. S. vs. Stockton Midway Oil Co., 240 Fed. 1008; Con. Mutual Oil Co. vs. U. S., *supra* (8); Hodgson vs. Midwest Oil Co., 17 Fed. (2d) 71.

§ 190. Subsequent Discovery of Vein or Lode.

The subsequent discovery of veins or lodes within a placer location and their successful working does not affect the good faith of the placer claimant. That must be determined at the time the application for patent is made.[16]

§ 191. Beach Claims.

The beach is termed in law "tide lands"[17] and is defined as "land uncovered at low tide and covered with water at ordinary high tide."[18] The term "shore" is synonymous with tide lands[19] or "flats."[20] Title to such lands is in the particular state which abuts tide water,[21] or, in the case of a territory so abutting, the title thereto is in the United States[22] but is not deemed to be "mineral land of the public domain."[23] From the respective governments must come any mining or other right in these lands.

§ 192. Void Locations.

Mining locations lying below the line of ordinary high tide are without authority of law, and, therefore, void; but lands lying on the beach above the line of ordinary high tide, if mineral in character, and not otherwise appropriated, may be located as a mining claim.[24]

§ 193. Alaskan Exception.

Congress, by specific enactment,[25] has made the land between low and high mean high tide on the shores, bays, and inlets of Bering Sea subject to temporary exploration and mining, but did not extend this provision to other shore lands within Alaska, nor to the banks of navigable rivers.[26]

§ 194. Restrictions.

These Alaskan lands when between high and low tide are subject to the reasonable rules and regulations of the miners of organized mining

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[16] Dahl vs. Raunheim, 132 U. S. 260; Iron Co. vs. Mike & Starr Co., *supra* (12); see U. S. vs. Iron Co., *supra* (3); Clipper Co. vs. Eli Co., *supra* (3).

[17] See People vs. Davidson, 30 Cal. 379. For prospecting permits and leases for oil and gas on overflowed tide, submerged lands, river beds and lake beds in California, see Kerr's Bien. Supp. 1921, p. 1143, § 3.

See Mining Leases.

[18] Shiveley vs. Bowlby, 152 U. S. 1; Baer vs. Moran Bros., 153 U. S. 287. "The limits of the monthly spring tides is in one sense the usual high water mark for as often as those tides occur, to that limit the flow extends, but it is not the limit to which we refer when we speak of 'usual' or 'ordinary' high water mark. By that designation we mean the limit reached by the neap tides, that is, those tides which happen between the full and change of the moon, twice in every twenty-four hours." Forgens vs. Santa Cruz Co., 24 Cal. A. 193, 140 Pac. 1093.

[19] Andrus vs. Knot, 12 Or. 501, 8 Pac. 763; Bay City Co. vs. Craig, 72 Or. 31, 143 Pac. 911; Hardy vs. Cal. Trojan Co., 109 Or. 76, 219 Pac. 197. The term "shore" technically means all the ground between ordinary high and low water mark where the tide ebbs and flows. Proctor vs. Maine Co., 96 Me. 472, 52 Atl. 933; see, also, Pearl Oyster Co. vs. Heuston, 57 Wash. 533, 107 Pac. 349–832. "Shore line" means "high water line." See, Nome Co., 29 L. D. 447; Wright, 29 L. D. 684.

[20] Jones vs. Jeanney, 8 Watts & S. 443.

[21] Shively vs. Bowlby, *supra* (18); Mann vs. Tacoma Co., 153 U. S. 273; see S. P. Co. vs. W. P. Co., 144 Fed. 160; S. F. Sav. Union vs. Petroleum Co., 144 Cal. 134, 77 Pac. 823; see, Messinger vs. Kingsbury, 158 Cal. 611, 112 Pac. 65.

[22] Shiveley vs. Bowlby, *supra* (18); The Abbey Dodge, 223 U. S. 173. Congress has power to make grants of lands below high water mark of navigable waters in a territory. Brewer Co. vs. U. S., 260 U. S. 77, aff'g. 270 Fed. 100.

[23] Alaska Co. vs. Barbridge, 1 Alaska 315.

[24] Logan, 29 L. D. 395; see Alaska United Co. vs. Cincinnati Co., 45 L. D. 330; see Alaska Co. vs. Barbridge, *supra* (23).

[25] 31 Stats., p. 329, § 26; see Alaska Fish Co. vs. U. S. 248, 78, aff'g. 240 Fed. 474.

[26] Heine vs. Roth, 2 Alaska 425; see Alaska United Co. vs. Cincinnati Co. *supra* (24).

districts until otherwise provided by law, and when below low tide, to the general rules and regulations prescribed by the Secretary of War for the preservation of order and the protection of the interests of commerce; such rules and regulations, however, are not to deprive miners on the beach of the right to dump tailings into, or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation.[27]

§ 195. Navigable Rivers.

The beds of navigable rivers below low-water mark are the property of the state and consequently so are minerals found therein. In the absence of a grant or lease from the state to take them, anyone who appropriates them is, as against everyone except the state, the owner. They are the property of him who so takes them; but as against the state he is a trespasser.[28]

§ 196. Nuisance.

All unlawful intrusions upon a waterway for purposes unconnected with the rights of navigation or passage[29] as, for instance, dredging, or drilling or operating oil wells upon the seashore or within navigable waters, constitutes a nuisance[30] and may be enjoined.[31] Such intrusion in unnavigable waters may be trespass.[32]

§ 197. Deep Placers.

Deep placers have been defined as "the sandy or gravelly beds or bottoms of ancient streams long since covered over by lava."[33]

§ 198. Dredge Claims.

The bed of an unnavigable river is open to location and patent as public land, when the opposite banks thereof have not passed into private ownership. Proprietors bordering on such streams, unless restricted by the terms of their grant from the government, hold to the center of the stream, notwithstanding the running of meander lines on

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[27] See *supra*, note 25.

[28] See Coosaw Co. vs. South Carolina, 144 U. S. 550; Malcomson vs. Wappoo Mills, 86 Fed. 192; State vs. Black River Co., 27 Fla. 276; 32 Fla. 82; Brandt vs. McKeever, 18 Pa. St. 70; Penn. Co. vs. Winchester, 109 Pa. St. 572; State vs. Guano Co., 22 S. C. 50. See *supra*, note 17. See, also, Ball vs. Tolman, 119 Cal. 358, 51 Pac. 546. The bank of a river is that elevation of land which contains its waters at the highest flow. Oklahoma vs. Texas, 260 U. S. 609.

The question of the navigability in fact of nontidal streams is sometimes a doubtful one. It has been held in effect that what are navigable waters of the United States, within the meaning of an act of congress, in contradistinction to the navigable waters of the state depends upon whether the stream in its ordinary condition affords a channel for useful commerce. The Montello, 20 Wall. 430; Leovy vs. U. S., 177 U. S. 632; The Parsons, 191 U. S. 28; Donnelly vs. U. S., 228 U. S. 262.

See California Act of May 25, 1929, Stats. 1929, p. 404.

[29] People vs. Gold Run Co., 66 Cal. 138; 4 Pac. 1152; see, generally, Travis Placer Co. vs. Mills, 94 Fed. 909; Alaska Co. vs. Barbridge, *supra* [23]; Jones vs. Robertson, 116 Ill. 543, 6 N. E. 890; Lord vs. Carbon Co., 38 N. J. Eq. 452; McMechen vs. Hitchman Coal Co., 88 W. Va. 633, 107 S. E. 481; *but see* McCarthy vs. Bunker Hill Co., 164 Fed. 927; *certiorari* denied, 212 U. S. 583.

[30] See S. F. Sav. Union vs. Petroleum Co., *supra* [21]; see, also, Yates vs. Milwaukee Co., 77 U. S. 497; Shiveley vs. Bowlby, *supra* [18]; Logan, *supra* [24]; Alaska Co. vs. Barbridge, *supra* [23]; Long Beach Co. vs. Richardson, 70 Cal. 206, 11 Pac. 695; Forgens vs. Santa Cruz Co., 24 Cal. A. 193, 140 Pac. 1093.

[31] See S. F. Sav. Union vs. Petroleum Co., *supra* [21].

[32] Producers Oil Co. vs. U. S., 245 Fed. 651.

[33] Costigan Min. Law, p. 136, § 34; see Gregory vs. Pershbaker, *supra* [2]; *compare* Jones vs. Prospect Co., *supra* [2].

the banks thereof, as the true boundary of the land is the thread of the stream.[34]

§ 199. Location.

When the bed of an unnavigable river is subject to location[35] it is sufficient, under the mining act, to mark the location by the posting of a notice of location upon some natural object in the stream,[36] or on the bank,[37] giving measurements of the location, identifying the stream and showing a definite relation between the stream and the object upon which the notice is posted.[38]

§ 200. Use of Water.

As to the water itself, the locator obtains only a usufruct therein.[39]

§ 201. Dry Lake Bed.

Land included within meander lines as a body of water when in fact not covered by a permanent body of water, or when it is the bed of a dry lake, remains a part of the unsurveyed public domain.[40] If mineral in character the lake bed is subject to location under the mining law.[41] If the lake bed itself is unsurveyed the claimant may protract the government's survey lines terminating at the meander lines and describe the location as if laid upon a subsisting subdivision of the public surveys.[42]

§ 202. Proof of Character.

Testimony in relation to the erroneous return of the public land surveys may properly include both hearsay and opinion evidence, and may conclusively show that no lake nor permanent body of water could possibly have been within the meander lines for many years previous to such return.[43]

§ 203. Gold Placer.

In a gold placer location there must be some gold not in place[44] found within the lines of the claim[45] as gives reasonable evidence that the ground is valuable for placer mining.[46]

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[34] St. Paul Co. vs. Schurmeir, 74 U. S. 272; Hardin vs. Jordan, 140 U. S. 371; Horne vs. Smith, 159 U. S. 40; Rablin, 2 L. D. 764; Hoel, 13 L. D. 588; Lessard, 13 L. D. 724; Loibl, 21 L. D. 429; N. P. R. Co., 40 L. D. 441; Lux vs. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Kirby vs. Potter, 138 Cal. 686, 72 Pac. 338; see Snow Flake Fraction, 37 L. D. 250; Webb vs. Board, 124 Kan. 38, 257 Pac. 966.

[35] Rablin, *supra* (34).

[36] McKinley Creek Co. vs. Alaska United Co., 183 U. S. 563.

[37] Haws vs. Victoria Copper Co., 160 U. S. 303.

[38] McKinley Creek Co. vs. Alaska United Co., *supra* (36).

[39] Rablin, *supra* (34); Snow Flake Fraction, *supra* (34); see Schwab vs. Beam, 86 Fed. 43; Madigan vs. Kougarok Co., 3 Alaska 69; *but see* Snyder vs. Colorado Co., 181 Fed. 62.

[40] Chapman Co. vs. St. Francis District, 232 U. S. 186, rev'g. 100 Ark. 94, 139 S. W. 625; Little vs. Williams, 231 U. S. 335; U. S. vs. Lee Wilson Co., 214 Fed. 631, aff'd. 227 Fed. 827, aff'd. 245 U. S. 24; Arkansas Sunk Lands, 37 L. D. 462. If the water way is navigable the title to the soil underlying the waters thereof is in the state. Morris vs. U. S., 174 U. S. 196; Shumway, 47 L. D. 71; Stroehle, 47 L. D. 72. If, on the other hand, the lake is nonnavigable, the title to the soil would under the common law rule be in the riparian owners. Hardin vs. Jordan, 140 U. S. 371; Shumway, *supra;* Phebus, 48 L. D., 128; Erickson, 50 L. D. 281; Malcolm, 50 L. D. 284. See U. S. vs. Holt Bank, 294 Fed. 161.

[41] See Cataract, 43 L. D. 248. For sufficiency of annual assessment work see Ring vs. U. S. Gypsum Co., 62 Cal. A. 87; 216 Pac. 409.

[42] West vs. Rutledge, 210 Fed. 189; see Johnson, 33 L. D. 593.

[43] Lee Wilson Co. vs. U. S., *supra* (40); State, 28 L. D. 318; State, 30 L. D. 128; State, 48 L. D. 421.

[44] Lange vs. Robinson, *supra* (10); U. S. vs. Ohio Oil Co., *supra* (2).

[45] Waskey vs. Hammer, 223 U. S. 85, aff'g. 170 Fed. 31; U. S. vs. Ohio Oil Co., *supra* (2).

[46] Cole vs. Ralph, *supra* (2); Charlton vs. Kelly, 150 Fed. 436.

§ 204. Gulch Claims.

A "gulch claim" is one laid upon and along the bed of an unnavigable stream winding through a canyon, with precipitous, nonmineral, and uncultivable banks, wherein have accumulated placer deposits, which are embraced within the location.[47] It may also be defined as a location upon surveyed land upon and along the bed of a stream, whose banks are enclosed or surrounded by precipitous cliffs, barren of mineral, the boundaries of the location embracing and following the opposite shores.[48] It may also be a location laid upon and along the bed of an old river channel or gravel deposit lying beneath the surface of the earth.[49] As, under the circumstances, gulch claims can not practicably be conformed to legal subdivisions it is sufficient if they conform as near as is reasonably practicable.[50]

§ 205. Hydraulic Claims.

Hydraulic mining is defined as mining by means of the application of water, under pressure, through a nozzle, against a natural bank.[51] It may be carried on within the State of California wherever and whenever the same can be carried on without material injury to the navigable streams, or the lands adjacent thereto.[52] Parties desiring to engage in hydraulic mining within the drainage systems of the Sacramento and San Joaquin rivers must submit themselves to the jurisdiction of the commission created by the "Caminetti Act."[53]

§ 206. Assessment Work Upon Hydraulic Claim.

The value of assessment work upon an hydraulic claim is not determined by the wages of the men holding the nozzle, but by the result

[47] Rablin, *supra* (34).

[48] Wood Placer Co., 32 L. D. 363, 401.

[49] Mitchell vs. Hutchinson, 142 Cal. 404, 76 Pac. 55.

[50] Snow Flake Fraction, *supra* (34); Mitchell vs. Hutchinson, *supra* (49) see Rablin, *supra* (34); Pearsall, 6 L. D. 227.

[51] Cal. Civil Code, § 1425. Hydraulic mining is defined in Woodruff vs. North Bloomfield Co., 18 Fed. 756: "Hydraulic mining, as used in this opinion, is the process by which a bank of gold-bearing earth and rock is excavated by a jet of water, discharged through a converging nozzle of a pipe, under great pressure, the earth and debris being carried away by the same water through sluices and discharged on lower levels into the natural streams and water courses below. Where the gravel or other material of the bank is cemented, or where the bank is composed of masses of pipe-clay, it is shattered by blasting with powder, sometimes from fifteen to twenty tons of powder being used to break up a bank." In U. S. vs. North Bloomfield Co., 81 Fed. 245, the plaintiff alleged that "hydraulic mining as now, and for more than twenty years last past, practiced and understood in the State of California, is a process of gold mining by which hills, ridges, banks, and other forms of deposits of earth which contain gold, are mined and removed from their position by means of large streams of water, which, by great pressure, are forced through pipes terminating in nozzles known as 'monitors' or 'little giants'; that the water is discharged from such nozzles with great force, by a water pressure of from fifty to four hundred feet per second, against and upon the hills, ridges, banks, and other deposits, which are usually shattered or broken up by means of blasts of powder, and softened by running water over and along such shattered or broken banks of earth, and undermined by streams of water flowing at the foot of such banks, thus caving down and washing off portions thereof before water is discharged from the nozzles against them." In Lindley on Mines (3d ed.), page 2108, § 852, volume 3, it is said: "The essential feature which distinguishes hydraulic mining from other classes of mining is the substitution of the power of water, under pressure, applied through a nozzle, for manual labor, in moving the material into the sluices, whence, if not impounded, it is carried into the streams. Whether this application is made against a bank in its natural state or against one artificially created, is, in our judgment, immaterial."

See § 1, subd. LXXV.

For "Caminetti Act" see 27 Stats. 507; amended 34 Stats. 1001.

[52] Cal. Civil Code, § 1424.

[53] See *supra* (51). This act has been declared to be constitutional. U. S. vs. North Bloomfield Co., *supra* (51). Hydraulic mining is not of itself unlawful, but is restricted within certain areas because detrimental to other interests. North Bloomfield Co. vs. U. S., 88 Fed. 664; Yuba Co. vs. Cloke, 79 Cal. 239, 21 Pac. 740.

accomplished, including the use of the plant comprising the water rights, ditches, pipe lines and giants.[54] So, constructing a flume and bringing the water to the claim for the sole purpose of working it would be sufficient performance of the assessment work.[55]

§ 207. Oil Shale Lands.

Prior to the act of February 25, 1920,[56] oil shale lands could be located as placer claims.[57] Since the passage of that act such lands, situate upon land belonging to the United States, may be operated only under lease from the federal government.[58]

§ 208. Petroleum Oil Claims.

The dissonance existing among the authorities as to the mineral character of petroleum oil[59] caused the passage of the act of February 11, 1897,[60] providing that "lands containing petroleum or other mineral oils and chiefly valuable therefor" should be subject to entry and patent "under the provisions of the laws relating to placer mineral claims." This act also validated all oil locations made prior to its passage.

§ 209. Withdrawals.

The effectiveness of this act was impaired by presidential order of September 27, 1909,[61] withdrawing from entry in any form some millions of acres of public land within the states of California and Wyoming.[62] This procedure was approved by congress by its passage of the act of June 25, 1910,[63] and amended on August 12, 1912,[64] so as to include all nonmetalliferous minerals.

§ 210. Leasing Act as to Oil and Gas Lands.

Under the provisions of the act of February 25, 1920,[65] oil, oil shale, and gas, and lands containing such deposits are excluded from the

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[54] Anderson vs. Robinson, 63 Or. 228, 126 Pac. 988.

[55] See McClung vs. Paradise Co., 164 Cal. 517, 129 Pac. 774; see, also, Jacob vs. Day, 111 Cal. 571, 44 Pac. 243, and see, generally, Hammond Co. vs. Barth Corp., 202 Cal. 605, 610, 262 Pac. 29, 31.

[56] 2 Supp. U. S. Comp. St., p. 1414, § 4640¼*k*; Id. p. 1421, § 4640¼*r*.

[57] Instructions, 47 L. D. 548; Utah vs. Watson Oil Co., 50 L. D. 323, and see Utah vs. Lichliter (on rehearing), 50 L. D. 231; Foster vs. Hess, 50 L. D. 277; Freeman vs. Summers, *supra* [49]; Dennis vs. Utah, *supra* [11]; Empire Co., 51 L. D. 424.

[58] See *supra*, note 56. The area covered by a lease can not exceed five thousand one hundred and twenty acres of land, whether surveyed or unsurveyed. The lease may be for an indeterminate period upon such conditions as may be imposed by the Secretary of the Interior, including covenants relative to the method of mining, prevention of waste, and productive development. The right to a lease is limited to any one person, association or corporation. 41 Stats. 447.

See Oil Shale Lands.

[59] Gird vs. California Oil Co., 60 Fed. 532; Union Oil Co., *supra* [49]; Kennedy vs. Hicks, 180 Ky. 562, 203 S. W. 318; DeMoss vs. Sample, 143 La. 243, 78 So. 482; Rich vs. Doneghey, 71 Okla. 204, 177 Pac. 86; United Co. vs. Meredith, —— Tex. C. A. ——, 258 S. W. 550; Van Horn vs. State, 5 Wyo., 501, 40 Pac. 964; *contra* Union Oil Co., 23 L. D. 222; see Dunham vs. Kirkpatrick, 101 Pa. St. 36. Oil and gas within the ground are minerals and the fact that they have attributes not common to other minerals because of their fugitive nature or vagrant habit, and the disposition to wander and to percolate, and the possibility of their escape from beneath one part of the surface to another, does not remove them from the class of minerals. Texas Co. vs. Daugherty, 107 Tex. C. A. 226, 176 S. W. 719.

[60] 29 Stats. 526.

[61] See U. S. vs. Midwest Oil Co., 236 U. S. 459; U. S. vs. Midway Oil Co., *supra* [15]; U. S. vs. McCutchen, 234 Fed. 704; U. S. vs. Thirty Two Oil Co., 242 Fed. 730; Con. Mutual Oil Co. vs. U. S., *supra* [8].

[62] 36 Stats. 847. See U. S. vs. Stockton Oil Co., 240 Fed. 1009.

[63] 36 Stats. 847.

[64] 37 Stats. 497.

[65] 41 Stats. 437. For operating regulations to govern the production of oil and gas (revision of regulations of June 4, 1920, 47 L. D. 552), see 52 L. D. 1.

operation of the mining laws except as to prior vested rights therein.[65a] Under that law prospecting permits and leases are granted under rules and regulations prescribed by the Secretary of the Interior.

§ 211. Phosphate Claims.

Calcium phosphate or rock phosphate is found in sedimentary beds or deposits. While the deposits present some of the characteristics of lode formation in the broader sense of that term, in others they more nearly resemble placer ground. The indefinite nature of these deposits has induced the land department to vary somewhat inconsistently in its determination of the question of whether they are properly the subject of lode location and to be sold as such or to be located and sold as placer ground.[66]

§ 212. Remedial Act.

Under the provisions of the act of January 11, 1915,[67] all placer claims covering deposits of phosphate rock theretofore made in good faith and upon which assessment work has been annually performed, were declared to be valid and subject to patent as such, except as to lands within a subsisting adverse or conflicting claim.

§ 213. Severance of Rights.

The act of July 17, 1914,[68] provided for a severance of surface and mineral rights.

§ 214. Leasing Act as to Phosphate Lands.

Under the act of February 25, 1910,[69] commonly called the "Leasing Act," phosphate lands were withdrawn from the operation of the mining laws, excepting as to locations made prior to the date of said act, with the right to perfect discovery therein.

§ 215. Procedure.

All phosphate deposits on lands belonging to the United States now are subject to lease by the Secretary of the Interior under such restric-

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[65a] See West vs. U. S., 30 Fed. (2d) 742 aff'd. and mod. 280 U. S. 306.
See Mining Leases.

[66] Duffield vs. San Francisco Co., 198 Fed. 942. In this case the court upheld a placer location of rock phosphate or calcium phosphate. Upon appeal, 205 Fed. 480, reversing the lower court, it was held that a deposit of calcium phosphate lying in veins or beds of various thickness, having a dip and strike between solid and clearly defined walls of limestone, is a vein or lode of rock in place within the meaning of Rev. Stat. § 2320, and subject to entry thereunder only as a lode claim. It further held that the placer location was void and sustained a lode location of the ground involved. In the course of its opinion the court said: "Any scheme by which it is sought to locate lode mines as placers, and secure the same as placers, is a fraud upon the government, and a location so made is void. The appellants finding the lode mining ground so located had the right to regard the location as void, and locate the ground in a lawful manner in order to present to the Land Department the question of their right to acquire the same. If the appellee's contention is correct, there was no way in which that question could be brought on for hearing, either in the Land Department or before a court, and the wrongful possession of the land by placer claimants who were trespassers effectually barred the lawful entry of the same by the lode locators. Such is not the law. In Belk vs. Meagher, 104 U. S. 279, the court said: 'He had made no such location as prevented the land from being in law vacant. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force.' See, also, Johnson vs. Towsley, 13 Wall. 72; Nevada Sierra Oil Co. vs. Home Oil Co., 98 Fed. 673; Thallman vs. Thomas, 111 Fed. 277; San Francisco Co. vs. Duffield, 201 Fed. 830."

[67] 38 Stats. 792.

[68] 38 Stats. 509. See Dennis vs. Utah, *supra* [61]; McFayden, 51 L. D. 437.

[69] 41 Stats. 437.
See Mining Leases.

tions and upon such terms as are specified in the Leasing Act, through advertisement, competitive bidding or such other methods as said official may by regulation adopt.[70]

§ 216. Potash Claims.

The act of July 17, 1914,[71] providing for agricultural entry of lands withdrawn, classified, or reported as containing potash did not repeal nor suspend the mining laws. Potash lands still were subject to location under those laws, unless specifically reserved by executive order.[72] The specific repeal of the mining laws as to potash was effected by the act of October 2, 1917,[73] but it expressly provided that valid claims existent at the passage thereof and thereafter maintained in compliance with the laws under which initiated, might be perfected under such laws.[74] Potash lands now are subject to prospecting permits and lease by the Secretary of Interior under regulations promulgated by the land department.[75] Limited patents will issue to surface claimants.[76]

§ 217. River Bed Claims.

Unnavigable unmeandered streams belong to the United States and their beds may be located, if mineral in character.[77]

§ 218. Sodium and Borax Lands.

Prior to the surface act of July 17, 1914,[78] nitrate lands were subject to location as placer mining claims under the provisions of the general mining laws.[79] By the provisions of the act of February 25, 1920,[80]

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[70] Id.

[71] 5 U. S. Comp. St. p. 5683, §§ 4640*a*, 4640*b*, 38 Stats. 509. This act includes phosphate, nitrate, oil, gas or asphaltic mineral deposits. The Surveyor General of California is authorized "to accept and receive lists and patents to lands selected by the State of California as agricultural lands, which were subsequently withdrawn," etc., as provided by said statute by act of April 14, 1915. 1915 Stats. 70. See State of California, Robinson, Transferee, 48 L. D. 384; (on rehearing), 48 L. D. 387.

[72] Pollock, 48 L. D. 5.

[73] 40 Stats. 297.

[74] Pollock, *supra* (72).

[75] Regs., 46 L. D. 323, 330; Bond Requirements, 48 L. D. 221. For form of bond see 47 L. D. 245. For act of February 7, 1927, 44 Stats. 1057, authorizes the Secretary of the Interior, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of potassium in lands belonging to the United States for a period of not exceeding two years, excepting lands and deposits in or adjacent to Searles Lake, California. See 52 L. D. 96. For regulations thereunder, and for form of prospecting permit and form of lease, see 52 L. D. 84. See, also, 41 Stats. 437; 52 L. D. 97.

[76] 40 Stats. 297.

See Mining Leases.

[77] Cataract, *supra* (41). By the settled rule of decision in the Supreme Court of the United States, conveyances by the United States of public lands on unnavigable streams and lakes, when it is not provided otherwise, are to be construed and have effect according to the law of the state within which the lands are situate, in so far as the rights and incidents of riparian proprietorship are concerned. Snyder vs. Colorado Co., 181 Fed. 69.

See § 198.

[78] See Union Oil Co., *supra* (14); see Borax Deposits, C. M. L., pp. 62, 136.

[79] 5 U. S. Comp. St. 5654, § 4628; Rev. Stat., § 2329.

[80] 41 Stats. 447. Under the act of February 25, 1920, the Secretary of the Interior is authorized and directed, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium dissolved in and soluble in water, and accumulated by concentration in lands belonging to the United States for a period of not exceeding two years; *provided*, that the area to be included in such a permit shall be not exceeding two thousand five hundred and sixty acres of land in reasonably compact form. § 23. Under proper conditions a lease may be obtained for one-half of said area; with preference right to lease the remainder. Permittees or lessees of lands containing sodium deposits may obtain the exclusive right to use an additonal forty acres of nonmineral land necessary for the proper development and use of the deposits covered by the permit or lease. § 24.

sodium and borax lands, except in San Bernardino County, California, were withdrawn from entry and patent under such laws.

§ 219. Stone Lands.

Lands chiefly valuable for building stone may be located under the provisions of the law relating to placer claims unless reserved for the benefit of the public schools or donated to any state.[81]

§ 220. Discovery and Location.

While the law making stone lands subject to the provisions of the placer mining law in effect amends the mining statutes, it does not dispense with the rule requiring discovery and location. When made the claimant is protected in his possessory right so long as he complies with the laws and regulations.[82]

§ 221. Tailings Claims.

Public land upon which tailings have been deposited is not "mining land," although the only value attached thereto results from the precious metals that may be obtained from it, and which must be dug up and put through a certain milling process, as in the case of any ordinary metalliferous earth. Such ground may be taken up as "placer," but, strictly speaking, such a location is not a mining claim.[83]

§ 222. Deposition of Tailings.

Tailings deposited upon public land initiate no right to dump thereon.[84] Tailings may not be deposited so as to injure the land of another, without his consent.[85] When deposited on land belonging to such other person they become the property of the latter.[86]

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[81] See Timber and Stone Lands, 5 U. S. Comp. St. p. 5726. See § 4671; 5 U. S. Comp. St., p. 5678, § 4633. See Timber and Stone Land, *supra*, § 57. See Stanislaus Co., 41 L. D. 655; U. S. vs. Iron Co., *supra* (3); N. P. R. Co. vs. Soderberg, *supra* (3); and see, generally, Davis vs. Gibson, 38 L. D. 265; Zimmerman vs. Brunson, 39 L. D. 310; Hughes vs. Florida, 42 L. D. 401.

[82] Simon Randolph, 23 L. D. 329.

[83] Jones vs. Jackson, 9 Cal. 237; Rogers vs. Cooney, 7 Nev. 213; Rhodes Co. vs. Belleville Co., 32 Nev., 230, 106 Pac. 561; see, also, Ritter vs. Lynch, 123 Fed. 930; Miser vs. O'Shea, 37 Or. 231, 62 Pac. 491.

[84] Miser vs. O'Shea, *supra* (83); see Jones vs. Jackson, *supra* (83); O'Keiffe vs. Cunningham, 9 Cal. 589. A reservoir site within the limits of a forest reserve for the purpose of storing tailings produced by the milling and reduction of ores will be allowed. Walker, 47 L. D. 224.

[85] Arizona Co. vs. Gillespie, 230 U. S. 46; Woodruff vs. North Bloomfield Co., *supra* (51); Travis Placer Co. vs. Mills, 94 Fed. 909; Otaheite Co. vs. Dean, 102 Fed. 929; Hobbs vs. Amador Co., 66 Cal. 161, 4 Pac. 1147; Yuba Co. vs. Cloke, 79 Cal. 239, 21 Pac. 740; Lincoln vs. Rodgers, 1 Mont. 217; Fitzpatrick vs. Montgomery, 20 Mont. 181, 50 Pac. 416; Carson vs. Hayes, 39 Or. 97, 65 Pac. 814. No matter how completely the miner may conduct his operations, he has no lawful right to flood or wash away his neighbor's land or deposit mining debris thereon to its injury; and if by the deposit of mining debris in a stream he causes such a result, he is liable for the resulting damage. The fact that he uses all the care for the protection of his neighbor's property consistent with the successful conduct of his mining operations is immaterial. Salstrom vs. Orleans Bar Co., 153 Cal. 551, 96 Pac. 292; see Wash vs. East Butte Co., 66 Mont. 592, 214 Pac. 641; Goldfield Con. Co. vs. Old Sandstorm Co., 38 Nev. 426, 150 Pac. 313. It is well settled that the first locator on mining ground has no right, by custom or otherwise, to allow tailings to run free in the gulch and render valueless the mining claims of subsequent locators below him. Esmond vs. Chew, 15 Cal. 137; Robinson vs. Black Diamond Co., 57 Cal. 412; Fitzpatrick vs. Montgomery, *supra*.

While the land of the lower locator actually is invaded by "tailings," "slickens" or other material from the claim of the upper locator, it makes no difference how carefully the latter may have worked his mine. His liability does not depend upon negligence in the construction or use of this property. If his work in fact injures the property of another he is none the less liable, be he ever so cautious or careful to avoid injurious consequences. Hill vs. Smith, 27 Cal. 476; Levaroni vs. Miller, 34 Cal. 231; Dripps vs. Allison's Co., 45 Cal. A. 95, 187 Pac. 448. Generally on

question of damages by flow of tailings, see McCarthy vs. Bunker Hill Co., 146 Fed. 927; 147 Fed. 981; Bunker Hill Co. vs. Polak, 7 Fed. (2d) 585.

See Flooding of Mines.

[86] Jones vs. Jackson, *supra* [84]; Rogers vs. Cooney, *supra* [83]; see Savage vs. Nixon, 209 Fed. 122; *but see* Goldfield Co. vs. Old Sandstorm Co., *supra* [85].

Where the owner of a mill for crushing and reducing ore had constructed a reservoir by building a bulkhead across a ravine on unoccupied public lands of the United States adjoining his mill site and impounded his tons of tailings therein, paid all taxes and did all work to preserve the talings, he has a right of possession and ownership that precludes the initiation of any right in or to said tailings on the land covered by the reservoir through an attempted location thereof as a mining claim. Ritter vs. Lynch *supra*[83]. See generally Utah Copper Co. vs. Montana-Bingham Co., 69 Utah 423, 255 Pac. 672.

See Flooding of Mines.

CHAPTER IX.

SURVEYS.

§ 223. Cadastral Engineer.

The office of Surveyor General was abolished on July 1, 1925; and the administration of all activities theretofore in charge of surveyors general were transferred to the Field Surveying Service.[1]

§ 224. Application for Survey of Mining Claim.

Application for the survey for patent of a mining claim, accompanied by a certified copy of location notice and the requisite deposit, should be made to the Public Survey Office for the district within which the claim is located. The office cadastral engineer will receipt for the deposit, issue the order for survey, if appropriate, administer all work in connection therewith, approving plat and field notes of such survey, and otherwise perform the duties prescribed by mining regulations to be performed by the former Surveyor General, including certification as to expenditures made upon the claim.[2]

§ 225. Public Land Surveys.

There are two classes of surveys, viz, the system of public land surveys[3] and the official survey made in an application for patent for a mining claim.[3a]

§ 226. Division and Numbering of the Public Lands.

By the public surveys the public lands generally are divided into townships of six miles square. The corners of the townships are marked with progressive numbers from the beginning. Each distance of a mile between such corners is distinctly marked with marks different

[1] U. S. Comp. St. 1925, p. 310, § 4450*a*. By this legislation the entire surveying system of the General Land Office is brought under the immediate jurisdiction of the supervisor of surveys, who is charged with the administration of all matters pertaining to that service under the supervision of the commissioner and direction of the Secretary of the Interior. 51 L. D. 112. For administrative purposes, each local or branch office under the jurisdiction of the supervisor of surveys—former office of the surveyor general—will be designated "Public Survey Office" at the place where the office is located. 51 L. D. 279.

See § 270.

[2] 51 L. D. 279. The expense of the survey must be paid by the applicant. Waskey vs. Hammer, 223 U. S. 85, aff'g. 170 Fed. 31. Golden Empire Co., 36 L. D. 561; Fish & Hunter Co. vs. New England Homestead Co., 28 S. Dak. 588, 134 N. W. 798. The certification as to expenditures made upon the claim is conclusive. U. S. vs. Iron Co., 128 U. S. 673; U. S. vs. State Inv. Co., 285 Fed. 128.

[3] See 51 L. D. 112, 279. In the resurvey of public lands two distinct types have been adopted, viz, the dependent resurvey and the independent resurvey, each of which is dissimilar from the other; for a definition of both of which see Beard, on rehearing, 52 L. D. 451.

[3a] An official survey of a mining claim is one of the essential preliminaries prescribed in § 2325 of the Revised Statutes to obtain patent. The obvious and principal purpose of such official survey are to accurately fix the location of the claim with respect to public land surveys and adjacent and conflicting claims, to enable parties concerned to definitely ascertain and assert adverse rights if such are claimed and enable the land department to determine the exact limits of the ground that is claimed under the patent application and to convey by appropriate description in the patent, that part to which the applicant may be entitled. Opinion, 52 L. D. 561.

from those of the corners.[4] No marks are required by law to be placed at the quarter sections. Interior lines of sections are protracted under the direction of the United States Supervisor of Surveys.[5] The sections are one mile square, contain as near as may be six hundred and forty acres and are numbered, respectively, beginning with the number "1," in the northeast section of the township, thence running to the northwest section thereof, which is numbered "6," thence west and east, alternately through the township, with progressive numbers to the southeast section of the township, which is numbered "36."[6]

[4] 5 U. S. Comp. St., p. 5823, § 4803; Kean vs. Calumet Land Co., 190 U. S. 452; Finch vs. Ogden, 175 Fed. 20; Johnson vs. Johnson, 14 Ida. 561, 95 Pac. 499. See Kimball vs. McNee, 149 Cal. 439, 86 Pac. 1089.

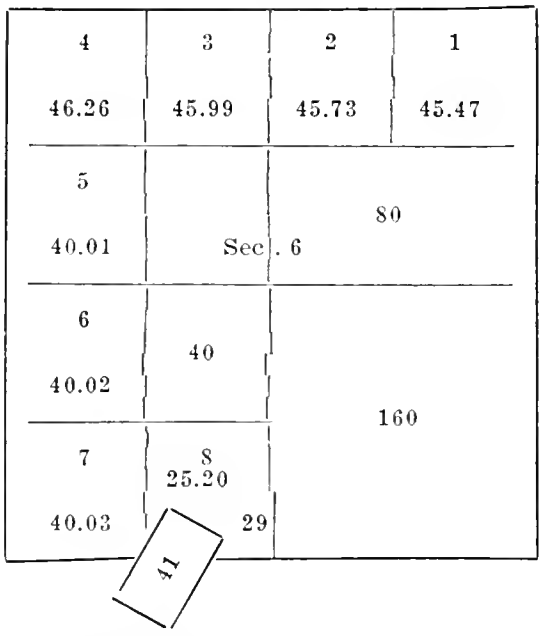
[5] See 51 L. D. 112; Chapman vs. Pollock, 70 Cal. 487, 11 Pac. 764; Bullock vs. Rouse, 81 Cal. 590, 22 Pac. 919; Smith vs. City of Los Angeles, 158 Cal. 702, 42 Pac. 307.

[6] 5 U. S. Comp. St., p. 5823, § 4803. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof.

A location notice describing the claim as embracing the E½ of E½ of SE¼ of SE¼ of the appropriate section, township and range would be regular as to this particular. Rev. Stat., § 2330; 2 Mason's U. S. Code, p. 2239, § 36. The law prescribes the chain as the unit of linear measure for the survey of the public lands, and all returns of measurement are to be made in true horizontal distances, in miles, chains and links. The units of linear measure are: 1 chain = 100 links = 66 feet; 1 mile = 80 chains = 5280 feet. The units of area are: 1 acre = 10 square chains = 43,560 feet. 1 square mile = 640 acres. Manual of Instructions for the Survey of the Public Lands. (1919.)

Anyone familiar with the public land surveys knows that, owing to the variations of the compass and the convergence of the meridian lines, the townships, while in theory six miles square, are in fact not perfect squares of these dimensions. The north and west tiers of sections, where the survey is progressing to the north, as is the case with most of the public lands where mineral is found, contain the irregular areas. An examination of any township plat will show along the outer edge of all these north and west sections, a line of tracts containing more or less than forty acres. These are described as lots, each one being given a number, beginning with No. 1 at the right of each section and continuing in successive numbers to the left.

Sec. 6, T. 8 N., R. 10 W.



The extreme northwest subdivision should be located as lot 4, of Sec. 6, containing 46.26 acres. If the location covers but a part of lot 4, the tract taken should be described by metes and bounds, the lot not being divisible as provided by § 2330, Rev. Stats. In this case an application for patent would have to be based upon a survey by metes and bounds as in applications for lode claims. Legal subdivisions of forty acres often are rendered fractional by the segregation of lode claims as indicated by the above diagram. In such cases the cadastral engineer designates the portions remaining of the legal subdivisions by appropriate lot numbers with their areas, the records of the land department are noted accordingly, and the same rule applies here as illustrated by lot 4. See Manual of Procedure, Min. Law Dig. 478.

§ 227. Duty of Surveyor.

Every surveyor when making a public survey is required by law to note in his field book the true situation of all mines, salt licks, salt springs and mill-seats which come to his knowledge, all water courses over which the line he runs may pass, and, also, the quality of the land.[7]

§ 228. Basis of Report.

The report of the surveyor in the above respects is the basis of the district cadastral engineer's return as to the character of the surveyed land. This classification of the land is not conclusive.[8]

§ 229. Inaccurate Surveys.

Inaccuracies in public land surveys are not uncommon.[9] Such errors can not be corrected by a court[10] nor by private survey.[11] The United States, however, may make a resurvey, a retracement, or an amended survey where title to the land remains still in them.[12]

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[7] 5 U. S. Comp. St., p. 5823, § 4803; Johnston vs. Morris, 72 Fed. 897; 1 L. D. 686; Gerhauser, 7 L. D. 390; see Barden vs. N. P. R. Co., 154 U. S. 288; Winscott vs. N. P. R. Co., 17 L. D. 274. The plat and field notes are *prima facie* evidence of the facts therein stated. Lattig vs. Scott, 17 Ida. 506, 107 Pac. 47. See Schwartz vs. Dibblee, 51 Cal. A. 451, 197 Pac. 125. The failure of a surveyor to properly segregate mineral from agricultural lands can not operate to defeat the rights of a mineral claimant, as the returns of a surveyor are not conclusive. Gold Hill Co. vs. Ish, 5 Or. 108. The return of the district cadastral engineer as to the mineral character of land constitutes but a small element of consideration when the question as to the true character of the land is at issue. C. P. R. Co., 45 L. D. 26.

The return of the district cadastral engineer, in connection with the survey of the public land to the effect that the land is mineral or nonmineral, is sufficient evidence of its character to cast the burden of proving the contrary upon one who alleges that the land is of a different character; but the opportunities and qualifications of surveyors for determining the mineral or nonmineral character of land are so uncertain that the presumption is only a slight one and may be readily overcome by evidence of a higher character. Barden vs. N. P. R. Co., *supra*; Magruder vs. O. & C. Co., 28 L. D. 174; see, also, Burke vs. S. P. R. Co. 234 U. S. 703; Cosmos vs. Gray Eagle Co., 104 Fed. 48; Leonard vs. Lennox, 181 Fed. 768.

Under the laws of Spain and Mexico the surveys of public lands were made in squares, noting streams of water and lakes, pools, mountains, mineral regions, climate of the locality, the character of the soil, and everything else which might give an idea of the improvement of which they might be susceptible, and the statutes of the United States contain substantially the same provisions. U. S. vs. San Pedro Co., 4 N. M. 304, 17 Pac. 337.

Plats and field notes referred to in patents issued by the United States may be resorted to for the purpose of determining the limits of the area that passed under such patent. The plat with all its notes, lines, descriptions and landmarks, becomes as such a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out in the deed. Alaska United Co. vs. Cincinnati Alaska Co., 45 L. D. 330, 336. Foss vs. Johnstone, 158 Cal. 119, 110 Pac. 294.

[8] Barden vs. N. P. R. Co., *supra* [7]; Cole vs. Markley, 2 L. D. 847; Winscott v. N. P. R. Co., *supra* [7]; Kinkade vs. California, 39 L. D. 491. See U. S. vs. State of Utah, 51 L. D. 432, 436.

[9] Kirwan vs. Murphy, 189 U. S. 35; rev'g. 109 Fed. 354; Security Co. vs. Burns, 193 U. S. 167; Lane vs. Darlington, 249 U. S. 331; Southern Co. vs. Meserve, 186 Cal. 157, 198 Pac. 1055; S. P. Land Co. vs. Dickerson, 65 Cal. A. 722, 204 Pac. 576, 225 Pac. 5. A survey of public lands does not *ascertain* boundaries; it creates them. Cox vs. Hart, 260 U. S. 436, aff'g. 270 Fed. 51. Sawyer vs. Gray, 205 Fed. 163; Robinson vs. Forrest, 29 Cal. 325.

[10] Id. Puget Co. vs. North Seattle Co., 120 Wash. 175, 206 Pac. 954.

[11] Schwartz vs. Dibblee, *supra* [7]; see Murphy vs. Summer, 74 Cal. 316, 16 Pac. 3; Barringer vs. Davis, 141 Iowa 419, 120 N. W. 65, rev'g. 112 N. W. 208. Where in reestablishing the lines of a public survey, by a private surveyor, the footsteps of the original surveyor should be followed, and it is immaterial that the lines actually run by him are not correct. Rev. Stats., § 2396; Ayers vs. Watson, 137 U. S. 584. Courses and distances yield to natural monuments and boundaries. This rule is so strict that even the government itself can not question it. U. S. vs. State Inv. Co., 264 U. S. 206; aff'g. 285 Fed. 128; Galt vs. Willingham, 11 Fed (2d) 757.

[12] Id. See Wiegert vs. N. P. R. Co., 48 L. D. 48; Miller vs. Marchus, 171 Cal. 254, 152 Pac. 730. The matter is summed up by the Supreme Court of the United States as follows: "Although the power to correct surveys of the public lands belongs to the political department of the government, the Land Department has jurisdiction to decide as to such matters while the land is subject to its supervision and before it takes final action." Cragin vs. Powell, 128 U. S. 691, 698; Knight vs. Land Association, 142 U. S. 161, 177; Kirwan vs. Murphy, *supra* [9]; Beard, *supra* [3]; this power of supervision and correction by the department is subject to the necessary and

§ 230. Province of Land Department.

It is the peculiar province of the land department to consider and determine what lands have been surveyed, what have been disposed of, what remain to be disposed of, and what are reserved.[13] Its action, when within the scope of its authority is unassailable in the courts, except in direct proceedings.[14]

§ 231. Questions of Fact.

The land department may make and correct surveys, whether public or official.[15] While the boundaries of a surveyed tract may not be open to dispute, yet whether the lines run by such a survey lie on the ground, and whether any particular tract is on one side or the other of that line are questions of fact which are open to inquiry in the courts.[16]

§ 232. Official Survey.

An official survey is one made in the course of patent proceedings[17] by or under the direction of the office cadastral engineer.[18]

§ 233. Procedure.

The official or patent survey must be made subsequent to the record of the location notice of the mining claim sought to be patented;[19]

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decided limitation' that when it has once made and approved a governmental survey of public lands, and has disposed of them, the courts may protect the private rights acquired against interference by corrective surveys subsequently made by the department. Cragin vs. Powell, *supra*, p. 699. A resurvey by the United States after the issuance of a patent does not affect the rights of the patentee; the government after conveyance of the lands, having 'no jurisdiction to intermeddle with them in the form of a second survey.' Kean vs. Canal Co., 190 U. S. 452, 461. And although the United States, so long as it has not conveyed its lands, may survey and resurvey what it owns, and establish and reestablish boundaries, what it thus does is 'for its own information' and 'can not affect the rights of owners on the other side of the line already existing.' Lane vs. Darlington, 249 U. S. 331, 333." U. S. vs. State Inv. Co., *supra* (11). In Churchill Co. vs. Beal, 99 Cal. A. 482, 278 Pac. 894, it is said: "The law, however, is well settled that when lands are sold by the general government with regard to a survey that has already been made, no resurvey can be made so as to affect, limit or change the boundaries of the lands which have theretofore conveyed. * * * In other words, as elsewhere stated in the note (110 Am. St. Rep. 666) 'The true corner of a patented governmental subdivision of land is where the United States survey in fact establishes it, whether such location is right or wrong as shown by a subsequent survey.'" See, also, Porter vs. Carstensen, 40 Wyo. 156, 274 Pac. 1072. But, in Beard, on rehearing, 52 L. D. 451, it is said that in the execution of resurveys the government is bound to protect only *bona fide* rights acquired through the exercise of good faith, and a claimant who fails to exercise that degree of good faith cognizable in law or equity is not entitled to protection.

[13] Kirwan vs. Murphy, *supra* (6); Schwartz vs. Dibblee, *supra* (7).

[14] Stoneroad vs. Stoneroad, 158 U. S. 240.; Kean vs. Calumet Co., *supra* (4); U. S. vs. State Inv. Co. *supra* (11); Murphy vs. Tanner, 176 Fed. 537; Brown vs. Yarrahan Gold Co., 3 Cal. A. 47, 86 Pac. 744.

[15] Russell vs. Maxwell Land Grant Co., 158 U. S. 253; see Blair vs. Brown, 17 Wash. 570, 50 Pac. 483; see Marco Island, 51 L. D. 322; Beard, 52 L. D. 444; Schwartz vs. Dibblee, *supra* (7).

[16] Russell vs. Maxwell Land Grant Co., *supra* (15); U. S. vs. State Inv. Co. *supra* (11).

[17] Rose Lode, 22 L. D. 83; Gowdy vs. Kismet Co., 24 L. D. 193; Tipton Co., 29 L. D. 720; Chicago Placer, 34 L. D. 11; Anderson, 48 L. D. 616. In Standart, 25 L. D. 262, it is said that surveys of mining claims are in their nature public surveys. A private survey can have no place among the official records as a part thereof and can not be accepted as a basis for patent. Holmes Placer, 29 L. D. 368. See *supra* (8a).

[18] See *supra*, § 2. The field work is done by a United States mineral surveyor, who is appointed by the supervisor of surveys. 51 L. D. 280. But the applicant for patent may choose any mineral surveyor to do his field work and may contract on the basis of such compensation as may be agreed upon, subject only as to the limitation of a maximum charge which is fixed by the General Land Office. Min. Regs., par. 90; Anderson, 26 L. D. 576; Golden Rule Co., 37 L. D. 98.

[19] Lincoln Placer, 7 L. D. 82; see Rose Lode, *supra* (17). It is the duty of the mineral surveyor to set forth in his field notes the exclusion of any conflict area when surveying a mining claim and to designate the claim or claims in favor of which such exclusion is made, and it is not to be presumed, in the absence of a

and be in accordance therewith,[20] but slight discrepancies as marked upon the ground are not material.[21] A serious discrepancy, however, will render such notice ineffectual[22] and the survey must be made in conformity with an amended location,[23] which can be made at once.

§ 234. Lode Claim Survey.

The owner of a lode claim is not compelled at any time to follow the lines of the public surveys nor to make his location in any manner correspond to such survey.[24]

§ 235. Placer Claim Survey.

A placer claim is the subject of an official survey only when the location is laid upon unsurveyed land,[25] or is a fractional part of an irregularly-shaped surveyed tract.[26]

§ 236. Connecting Line.

In the official or patent survey the location when upon unsurveyed land, or when not in conformity with legal subdivisions, must be connected or 'tied' to the nearest corner of the public survey or to a United States mineral monument, provided, the claim lies within two miles of such corner or monument.[27] If both corner and monument are within the said distance, the connection must be with the corner of the public

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showing to the contrary, that the application for patent or the public notice was in conflict with such exclusion. Round Mt. Co. vs. Round Mt. Co., 36 Nev. 543, 138 Pac. 71, rev'g. 35 Nev. 392, 129 Pac. 308.

[20] Rose Lode, *supra* [17]; Tipton Co., *supra* [17]. A survey made in accordance with the dictation of parties in interest and not in accordance with the location upon which it is ordered, is a private survey and not an official survey. This rule applies to amended as well as to original locations. Lincoln Placer, *supra* [19].

[21] Id. Proceedings of miners in the locating of mining claims are regarded with indulgence and lines are not required to be laid with severe accuracy. A claim is not rendered invalid because the surveyor, on the final survey, was required to draw in some of the lines as they were marked upon the ground in order to bring the boundaries of the claim within the limits prescribed by law. It is a rule that for the purpose of obtaining parallelism or casting off excess the surface lines may be drawn in. Doe vs. Sanger, 83 Cal. 203, 23 Pac. 365; Batt vs. Stedman, 36 Cal. A. 608, 173 Pac. 101.

[22] Id.

[23] Lincoln Placer, *supra* [19].

If after the issue of an order for the survey of a mining claim, an amended survey or a relocation is made embracing ground not included in the original order, a new order of survey must be obtained, which should bear its proper number in the current series. Tipton Co., *supra* [17].

[24] 5 U. S. Comp. St., p. 5653, § 4626; Del Monte Co. vs. Last Chance Co., 171 U. S. 55; Davis vs. Shepherd, 31 Colo. 150, 72 Pac. 59; State vs. Ross, 55 Wash. 242, 104 Pac. 216. "The area of surface is not a matter of moment; the thing of value is the hidden mineral below, and each locator ought to be entitled to make his location so as to reach as much of the unappropriated, and perhaps only partially discovered vein, as is possible." Del Monte Co. vs. Last Chance Co., *supra*.

[25] The mining laws make special provision for the survey of placer claims not on surveyed lands or which can not be conformed to legal subdivisions, and the return of the office cadastral engineer as to the quantity of land embraced in such claim is to be taken as conclusive. Mary Darling Claim, 31 L. D. 66; Green vs. Gavin, 10 Cal. A. 335, 101 Pac. 931. See Snow Flake Placer, 37 L. D. 256; Min. Regs. pag. 58.

[26] Chicago Placer, *supra* [17]; McNabb, 42 L. D. 416. A portion of an irregular legal subdivision is not sufficiently identified to enable the Land Department to accurately describe the same in a patent by an attempted description thereof in terms of the public land surveys, and where patent is sought for a placer mining claim embracing a portion of an irregular subdivision or lot, an official survey of the particular portion claimed will be required. Chicago Placer, *supra* [17]. See Standart, *supra* [17].

[27] Min. Regs., pars. 135–138; see Sulphur Springs Mine, 22 L. D. 715; Lloyd Co., 42 L. D. 485. The survey of the mining claim is governed by its own monuments just as the public land survey is controlled by the corners of the public land survey. The relation between the two is shown by the tie of the mining claim to one of the corners of the public land survey and the course and distances given in the respective surveys. Anderson, 48 L. D. 617. For 'ties' within Alaska, see Min. Regs., par. 39*b*.

survey,[28] unless good cause is shown for its being placed otherwise.[29] If there be no such corner or monument within the said distance, a permanent mineral monument must be established.[30]

§ 237. Published Notice.

A failure to incorporate proper reference to the connecting line with a natural object or permanent monument or mineral monument in the published notice of the application for patent renders the application defective and proceedings must be commenced anew from that point.[31]

§ 238. Survey of Group Claims.

As groups of lode mining claims often cover a considerable area, it is held to be indispensable that a corner of each of the locations be tied within a reasonable distance to an established survey monument in order to insure accuracy of survey, a correct *locus* of the locations upon the ground, full notice to any possible adverse claimant, and a correct depiction in the field notes and plats of the township and subdivisional surveys.[32]

§ 239. Amended Survey.

An amended official survey may be permitted where the good faith of the applicant for patent is not questioned, but is apparent; and where the error of the mineral surveyor was in inaccurately locating a connecting line, but the claim was otherwise sufficiently identified by the description given, an entry will be allowed.[33]

§ 240. Appeal.

An appeal lies from the ruling of the office cadastral engineer in relation to an official survey, or its amendment, in like manner as in other land office matters.[34]

§ 241. Adverse Claim Survey.

An adverse claim survey is one made in support of an adverse claim filed in the proper land office in opposition to an application for patent

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[28] See *Standart, supra* (17); Hallett & Hamburg Lodes, 27 L. D. 109; Lloyd Co., *supra* (27).

[29] Min. Regs., par. 139.

[30] Gross vs. Hughes, 29 L. D. 467; Wax, 29 L. D. 592; Alice Lode, 30 L. D. 481; Juno Claims, 37 L. D. 365; see Reed vs. Bowron, 32 L. D. 383. The *locus* of the initial point of a survey may be ignored where such initial point has been determined and fixed by actual survey of a tie line connecting it with an established corner of the public survey, and if the course and distance of the tie line were so erroneous as to appear to establish the *locus* of the claim wholly outside of the boundaries as marked upon the ground, yet this will not permit a relocation within the boundaries where the proof identifies the claim as actually located upon the ground by the monuments called for and by the outcropping lode, discovery shaft, shaft house, and surface improvements. Sinnott vs. Jewett, 33 L. D. 95; Drogheda Claim, 33 L. D. 185. See, also, Cardoner vs. Stanley Co., 193 Fed. 519; 10 Fed. St. Ann. 235. Where there is an erroneous length given to the tying line in a patent if the patent itself contains a sufficient description of the mining property intended to be conveyed so that the property can be identified from the remaining description given in the patent, the land is not open to adverse location. A new survey may be made for the purpose of correcting the erroneous connecting line. This new survey may follow the prior survey, saving in the one matter of the length of the tying line. Galbraith vs. Shasta Co., 143 Cal. 94, 76 Pac. 903; Cullacott vs. Cash Co., 8 Colo. 179, 6 Pac. 211; Bell vs. Skillicorn, 6 N. M. 399, 28 Pac. 768.

[31] Lloyd Co., *supra* (27).

[32] Veta Grande Lode, 6 L. D. 718; Childs, 10 L. D. 176; see Pikes Peak Lode, 10 L. D. 209; Quartzite Lode, 26 L. D. 646.

[33] Emma Lode, 7 L. D. 169.

[34] New Orleans vs. Payne, 147 U. S. 266.

for a conflicting mining claim.[35] Such survey need not be made by a mineral surveyor, but may be shown by an unofficial survey.[36]

§ 242. What Plat Must Show.

The plat of such a survey must show the adverse claimant's entire location, its relative situation or position with the one against whom he claims, and the extent of the conflict.[37]

§ 243. Boundaries and Extent.

In order that the boundaries and extent of the adverse claim may be shown, it is incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict; *provided, however*, that if the application for patent describes the claim by legal subdivisions, the adverse claimant, if also claiming by legal subdivisions, may describe his adverse claim in the same manner without further survey or plat. If the claim is not described by legal subdivisions, it will generally be more satisfactory if the plat thereof is made from an actual survey by a mineral surveyor, and its correctness officially certified thereon by him.[38] But as the adverse survey is not made by or under the direction of the district cadastral engineer the survey and plat may be made by such other person as the adverse claimant may select.[39] It will be sufficient if the boundaries and extent of the adverse claim are shown with reasonable certainty.[40] Where it is impossible to obtain a survey of an adverse claim the adverse claimant may show the boundaries and extent of his claim from other sources and give sufficient reason for not properly presenting an adverse claim.[41]

§ 244. When Survey Is Not Necessary.

Neither survey nor plat is necessary when the respective locations are described by legal subdivisions,[42] or where the boundary lines of respective lode locations are identical.

§ 245. Segregation Survey.

A segregation survey, as the term is used in the mining law, means a survey which expressly is made for,[43] or has the effect of separating

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[35] An adverse claim which alleges no surface conflict of claims will not be received as such, as the relative rights of the parties to work a lode upon its dip must be determined by the courts. New York Co. vs. Rocky Bar Co., 6 L. D. 318. In the case of Wallace, 1 L. D. 583, it is said: "But, if the application for patent in any case should be made at a time when it is impossible to secure a survey of a claim adverse thereto, then as the law does not require impossibilities, the adverse claimant might show the nature, extent and boundaries of his claim as nearly as practicable from information within his reach, and present under oath his reasons for not following more clearly the regulations of your office, and submit whether, under all the circumstances, he had not properly presented an adverse claim." Cited approvingly in Hoffman vs. Beecher, 12 Mont. 489, 31 Pac. 92.

[36] Anchor vs. Howe, 50 Fed. 366; McFadden vs. Mt. View Co. (on review), 27 L. D. 358; Kinney vs. Van Bokern, 29 L. D. 460; Hoffman vs. Beecher, 12 Mont. 489, 31 Pac. 92.

[37] Rev. Stats., § 2326; Min. Regs., par. 82.

[38] Min. Regs., par. 82.

[39] Anchor vs. Howe, *supra* [36].

[40] Kinney vs. Van Bokern, *supra* [36]; *see* McFadden vs. Mt. View Co., *supra* [36]; Gypsum Placer, 37 L. D. 489. If the application for patent describes the claim by legal subdivisions, the adverse claimant, if also claiming by legal subdivisions, may describe his adverse claim in the same manner without further survey or plat. Min. Regs, par. 82; see Del Monte Co. vs. Last Chance Co., *supra* [24].

[41] Hoffman vs. Beecher, *supra* [36]; see Wallace, *supra* [35]. See, also, Anchor vs. Howe, *supra* [36].

[42] Min. Regs., par. 58; Draper vs. Wells, 25 L. D. 550.

[43] Min. Regs., par. 108; Roedde, 39 L. D. 365.

mineral land from agricultural or railroad land.[44] An official survey has, but not always conclusively, the same effect.[45]

§ 246. When Necessary.

Where lands are applied for as mineral and are alleged to be agricultural in character and it becomes necessary to set apart the mineral from the agricultural land a survey thereof will be made by, or under the direction of, the district cadastral engineer at the expense of the government; and, thereafter, will become the basis for the disposal of such lands.[46]

§ 247. When Ordered.

A segregation survey is the result of a hearing within the land department to determine the character of land in a contest between a mineral claimant and an agricultural claimant for the same tract of land.[47] The work will be performed without expense to either of the claimants.[48]

§ 248. Surveys Under State Laws. Surface Survey.

The establishment or identification by survey of the exterior limits of a mining location prior to an official survey is authorized in some of the mining states.[49] The field notes of such survey accompanied by the certificate of the surveyor making the same should be incorporated in the original or amended notice of location. Such field notes and certificate thus become a part of the record of the claim, and are *prima facie* evidence of the facts therein contained.[50]

§ 249. Underground Surveys.

The court in which an action is pending for the recovery of real property, or for damages for an injury thereto, or a judge thereof may, on motion, upon notice by either party for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof, and of any tunnels, shafts, or drifts therein, for the purpose of the action, even though entry for such purpose has to be made through other lands belonging to parties to the action.[51]

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[44] Rev. St., § 2331; 6 Fed. St. Ann. 579; S. P. R. Co., 52 L. D. 419.

[45] Rev. St., § 2327; 6 Fed. St. Ann. 573; see Min. Regs., par. 37c.

[46] Min. Regs., par. 108; see Anderson, *supra* [17]. To determine the necessity of a segregation survey, it should be established with certainty by competent testimony that a mining claim includes or invades a subdivision of the public surveys and that the valuable mineral lands are within the boundaries of the claim. S. P. R. Co., 50 L. D. 577.

[47] Min. Regs., par. 108. The question of nonmineral character of a mining claim may be raised only by the government, or by one claiming the ground under some other than the mineral land law. Lorenz vs. Walton, 96 Cal. 243, 31 Pac. 54. See S. P. R. Co., 50 L. D. 578.

[48] Min. Regs., par. 108. See S. P. R. Co., *supra* [46].

[49] Cal. C. C., § 1426*i*; see Cal. Stats. 1907, p. 310; Mont. Pol. Code 1895, § 3616. Mr. Lindley says: "This section is omitted from the Revised Codes of 1907, but has never been repealed." Lindl. Mines (3d ed), § 250, p. 561. Nev. Rev. Laws 1912, § 2429.

[50] Cal. C. C., § 1426*i*.

[51] Cal. C. C. P., § 742.

Penny vs. Central Co., 138 Fed. 769; Bacon vs. Federal Co., 19 Ida. 136, 112 Pac. 1055. Courts of equity have inherent power to order survey and inspection and survey. Montana Co. vs. St. Louis Co., 152 U. S. 160; Duggan vs. Davey, 4 Dak. 110, 26 N. W. 887. It usually is regulated by statute in the several states. See Cal. C. C. P., §§ 742, 743; Colo. Mills Ann. St., §§ 3164, 3176; Nev. Comp. Laws, § 252; N. Dak. Rev. Codes, 1899, § 1442; S. Dak. Ann. St., 1899; § 2672; Utah Rev. St., 1898, §§ 3513, 3516. In Montana suit is not a condition precedent to the order. Montana Co. vs. St. Louis Co., *supra*. See State vs. District Court, 28 Mont. 528, 73 Pac. 230.

§ 250. Order for Survey.

The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter upon the property, with necessary surveyors and assistants, and make such survey and measurement; but if any unnecessary injury be done to the property he is liable therefor.[52]

§ 251. Unverified Application.

An application for a survey of mining property in patent proceedings is a written unverified request therefor subscribed by the claimant, his agent or attorney, addressed to the Public Survey Office for the district within which such property is situate.[53]

§ 252. Accompanying Papers.

The application must be accompanied by a duly certified copy of each location named therein,[54] or a verified statement showing sufficient reason for its absence,[55] together with the actual money, or a certificate of deposit, sufficient to cover the cost of the preliminary work in the public survey office. This certificate formerly was issued only by a United States depositary.[56]

§ 253. United States Mineral Surveyor.

The mineral surveyor is chosen by the applicant for survey,[57] and his charges must be met by him.[58] Such surveyor must have no interest in the claim,[59] and he must not act as a notary public, nor as an attorney in the same case.[60] He must transmit to the office cadastral engineer his field notes of survey, a preliminary plat of the survey, affidavits of expenditure upon the property, and, in placer applications, a descriptive report.[61]

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[52] Cal. C. C. P., § 743.

[53] 51 L. D. 280. Circular to Applicants, subd. 1. The signature to an application for an official survey must be in the handwriting of the claimant, his agent or attorney. Tipton Co., *supra* (17). No survey is required for placer claims located by the legal subdivisions. Reins vs. Murray, 22 L. D. 411. But where an application for patent is made for a placer mining claim embracing a portion of an irregular subdivision from the description of which it would be impossible to identify the land it must be accompanied by a survey and plat as required. Chicago Claim, *supra* (17); McNabb, *supra* (26).

[54] Circular to Applicants, subd. 2. The survey should follow the description in the notice of location. Rose Claims, *supra* (17), but the surveyor may make the end lines parallel. Doe vs. Waterloo Co., 54 Fed. 935; Doe vs. Sanger, *supra* (21).

[55] See Min. Regs., par. 43.

[56] See Min. Regs., par. 91; Circular to Applicants, subd. 6. *But see* § 224 showing that the necessary deposit must now be made directly to the local Public Survey Office. Unused deposits or any excess in the amount thereof in the actual cost of such work in the Public Survey Office, 51 L. D. 115, will be refunded by the special disbursing agent at Denver, as at present. 51 L. D. 116.

[57] Min. Regs., par. 90.

If found incompetent as a surveyor, careless in the discharge of his duties, or guilty of a violation of the mining regulations his appointment will be promptly revoked. Min. Regs., par. 169.

If the applicant is damnified he can pursue his remedy in the courts upon the contract; or if that is a barren pursuit he may obtain from the office cadastral engineer an officially certified copy of the mineral surveyor's bond, and bring suit thereon in the name of the United States to his use, as the real party in interest. Golden Rule Co., 37 L. D 97.

[58] Min. Regs., pars. 120–127; Golden Rule Co., 37 L. D. 95; see Waskey vs. Hammer, *supra* (2); Wolfley vs. Lebanon Co., 4 Colo. 112.

[59] Foote, 2 L. D. 773; Tipton Co., *supra* (17).

[60] Min. Regs., par. 128.

[61] Min. Regs., pars. 161–166.

No return by a mineral surveyor will be recognized as official unless it is made over his signature as a United States mineral surveyor, and made in pursuance of a special order from the office cadastral engineer. After he has received an order for survey he is required to make the survey and return correct field notes thereof to the Public Survey Office without delay. Min. Regs., par. 126. See Id., par. 169. See § 271.

§ 254. Errors of Mineral Surveyor.

Where errors occur in the survey through the carelessness or negligence of the mineral surveyor the claimant should apply for an amended survey.[62] The surveyor's failure to amend the survey within the time prescribed by the General Land Office is ground for his suspension or removal from office.[63]

§ 255. Statutory Expenditure.

It is usual, but not essential, for the office cadastral engineer to certify upon the plat of survey that the statutory expenditure precedent to patent has been made.[64]

§ 256. Duty of Applicant.

The filing of this certificate is the prerequisite to the allowance of entry, and this duty is placed upon the applicant for patent; and it is no part of the duty of the local land officers to see to the filing of such certificate.[65]

§ 257. Proof of Expenditures.

The mere proof that the statutory amount has been expended upon the claim is not sufficient. The work done or improvements made must be for the benefit of the claim in the development of its mineral resources.[66]

§ 258. Meander Lines.

The rule as to meander lines is, both in principle and reason, as applicable to mining claims as to other classes of claims. In the description of a mining claim a meander line is a line run in the survey of the claim bordering on a stream or other body of water, not as a boundary of the tract surveyed, but for the purpose of defining the sinuosities of the bank or shore of the water, and as a means of ascertaining the quantity of land within the surveyed area. In preparing official plats such a line is represented as a border line of the water and shows ordinarily to a demonstration that the water course and not the meander line is the boundary.[67]

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[62] Golden Rule Co., *supra* [57]; Basin Co. vs. White, 22 Mont. 147, 55 Pac. 1049. See Vanderbilt Lode, 16 L. D. 105; see, also, St. Lawrence Co., 4 L. D. 117.

[63] Id.

[64] 5 U. S. Comp. St., p. 5587, § 4622; Min. Regs., par. 50; see Neilson vs. Champagne Co., 29 L. D. 491; Draper vs. Wells, *supra* [58]; Floyd vs. Montgomery, 26 L. D. 122. At the time of filing the application for patent, or within sixty days thereafter, the applicant must file with the register of the land office a certificate of the office cadastral engineer that five hundred dollars has been expended upon or improvements made upon or for the benefit of the claim. U. S. vs. King, 83 Fed. 190; McCornick, 40 L. D. 501. See Little Pet Lode, 4 L. D. 17; Floyd vs. Montgomery, *supra;* Douglas Lodes, 34 L. D. 556.

[65] Schlessinger, 29 L. D. 496; see Copper Glance Lode, 29 L. D. 544.

[66] Floyd vs. Montgomery, 26 L. D. 132. The expenditures may be upon or underneath the surface. Min. Regs., par. 157. It may consist of assessment work. See US vs. Iron Co., 24 Fed. 568. Drill holes. Min. Regs., par. 157, or a mining dredge placed upon a placer claim have been held to be sufficient. Garden Gulch Placer, 38 L. D. 28. But a lime kiln erected upon a placer claim containing limestone, Schirm vs. Casey, 37 L. D. 404, and buildings, machinery, or roadways are insufficient unless it is clearly shown that they are associated with actual excavations, such as cuts, tunnels, shafts, etc., and are essential to the practical development of and actually facilitate the practical development of and actually facilitate the extraction of mineral from the claim. Min. Regs., par. 157. See Tacoma & Roche Co., 43 L. D. 132; Pacific Co., 51 L. D. 601.

[67] Alaska United Co. vs. Cincinnati Co., *supra* [7]. See, generally, Mitchell vs. Smale, 140 U. S. 406; Niles vs. Cedar Point Club, 175 U. S. 300; Kean vs. Calumet Co., *supra* [4]; Argillite Co., 29 L. D. 585; Johnson, 33 L. D. 593; Phebus, 48 L. D. 129; Heine vs. Roth, 2 Alaska 416; Kirby vs. Potter, 138 Cal. 686, 72 Pac. 338.

§ 259. Purpose of Meander Lines.

The purpose of running meander lines in connection with the survey of public lands of the United States does not rest upon a specific statutory provision but is one of expediency. The difficulty of following the edge or margin of projections and all the various sinuosities of the water line is the occasion and cause of running the meander line which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in lots bordering on a lake or stream. This rule is applied to lode mining claims abutting upon a body of water.[68]

§ 260. Location Survey.

The California mining act provides that where a locator, or his assigns, has the boundaries and corners of his claim established by a United States mineral surveyor, or a licensed surveyor of that state, and his claim connected with the corner of the public or minor surveys of an established initial point, and incorporates into the record of the claim, the field notes of such survey, and attaches to and files with such location notice a certificate of the surveyor, setting forth: first, that such survey actually was made by him, giving the date thereof; second, the name of the claim surveyed and the location thereof; third, that the description incorporated in the record is sufficient to identify; such survey and certificate becomes a part of the record, and such record is *prima facie* evidence of the facts therein contained.[69]

[68] Alaska United Co vs. Cincinnati Co., *supra* (7).
[69] Cal. C. C. P., § 1426*i*; see Cal. Stats. 1909, p. 315.

CHAPTER X.

LAND DEPARTMENT.

§ 261. Composition and Jurisdiction.

The land department of the United States, including in that term the Secretary of the Interior, the Commissioner of the General Land Office and their subordinate officers, constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to the public lands and authorized to dispose of and to execute its judgments by conveyances to the parties entitled to them[1] according to rules and regulations promulgated by it under the provisions of law regarding the disposition of the public domain[2] of which the courts take judicial notice.[3] Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land and whether or not it is open for sale. Its judgment upon these matters is unassailable except by direct proceedings for its annulment or limitation.[4] The courts have no revisory

[1] 1 U. S. Comp. St., pp. 348, 360; Id., p. 360, § 699; 5 U. S. Comp. St., p. 5299, § 4469; Id., p. 6071, § 5120; Cragin vs. Powell, 128 U. S. 691; Knight vs. U. S. Land Assn., 142 U. S. 161; Michigan Co. vs. Rust, 168 U. S. 593; U. S. vs. Winona Co., 67 Fed. 948, aff'd. 165 U. S. 463; New Dunderberg Co. vs. Old, 79 Fed. 604; U. S. vs. Lee Wilson Co., 214 Fed. 630; Reed vs. St. Paul Co., 234 Fed. 123; Jessie's Heirs, 259 Fed. 700; Wilson vs. Elk Co., 300 Fed. 474; Nichols & Smith, 46 L. D. 21; Independent Co. vs. Levelle, 47 L. D. 169; see S. P. R. Co. vs. McKittrick, 49 Cal. A. 634, 194 Pac. 80. The test of the jurisdiction of the land department is whether or not it has the power to enter upon the inquiry, and not whether its conclusions were right or wrong. Work Co. vs. Doctor Jack Pot Co., 194 Fed. 620. The courts will not interfere by mandamus or injunction with the performance of the duties of the land department under the public land laws. Isaacs vs. DeHon, 11 Fed. (2d) 943; *but see* Work vs. Braffet, 19 Fed. (2d) 666, aff'd. 276 U. S. 560; West vs. U. S. 30 Fed. (2d) 742, aff'd. with mod. 280 U. S. 306; and see Mandamus and Injunction. But the courts have power to enforce contracts with reference to lands while title thereto is held by the government. Isaacs vs. DeHon, *supra.*

[2] Cosmos Co. vs. Gray Eagle Co., 190 U. S. 301, aff'g. 104 Fed. 20, 112 Fed. 4; U. S. vs. George, 228 U. S. 14; Burke vs. S. P. R. Co., 234 U. S. 669; Leonard vs. Lennox, 181 Fed. 760; Sawyer vs. Gray, 205 Fed. 160; Gage vs. Gunther, 136 Cal. 338, 68 Pac. 710. The Commissioner of the General Land Office has authority to make regulations respecting the disposal of the public lands, and such regulations when not repugnant to the acts of congress have the full force and effect of laws. U. S. vs. Nelson, 199 Fed. 474; Rose vs. Wood Co., 73 Cal. 388, 15 Pac. 19. As to binding effect of rules of law as administered by the courts upon the Land Department, see Day, 50 L. D. 23. When a rule is established in the land department it will not be overcome nor ignored by the courts unless they are clearly convinced that it is wrong or tends to confusion and conflict of claim. Holt vs. Murphy, 207 U. S. 407; see Southern Cross Co. vs. Sexton, 147 Cal. 758, 82 Pac. 433. The attitude of the land department is that the duty of administration imposed upon it by law should be performed in the absence of any final court decision holding the statute to be unconstitutional. Hudson, 50 L. D. 520.

[3] Caha vs. U. S., 152 U. S. 221; Leonard vs. Lennox, *supra* [2]; Sawyer vs. Gray, *supra* [2]; U. S. vs. Nelson, *supra* [2]; Peters vs. U. S., 2 Okla. 116, 37 Pac. 1081. Until the issuance of patent the United States has the right to ascertain if the lands are in fact mineral or not. Stockley vs. U. S., 271 Fed. 636.

[4] Steel vs. St. Louis Co., 106 U. S. 454; Burfenning vs. Chicago Co., 163 U. S. 321; Diamond Coal Co. vs. U. S., 233 U. S. 236; Payne vs. New Mexico, 255 U. S. 367; Wyoming vs. U. S. 255 U. S. 489; Cosmos Co. vs. Gray Eagle Co., *supra* [2]; Cameron vs. U. S., 250 Fed. 943, aff'd. 252 U. S. 450; Pelham, 39 L. D. 201; Chamberlin, 48 L. D. 411; Murphy vs. Howard Co., 28 Ariz. 42, 235 Pac. 147; Standard Co. vs. Habishaw, 132 Cal. 118, 64 Pac. 113; Brown vs. Almasie, 91 Or., 668, 178 Pac. 931. The land department when it rejects an application for a mineral patent can go further and set aside the mining location; and it can therefore by direct proceedings, upon notice, set aside and restore the land to the public domain. Cameron vs. U. S., *supra*; see, also, Clipper Co. vs. Eli Co., 194 U. S. 223; Daniels vs. Wagner, 205 Fed. 238, aff'g. 194 Fed. 973; Cameron vs. Bass, 19 Ariz. 246, 168 Pac. 645; *but see* the following cases to the effect that such cancellation in no way affects the location: Shank vs. Holmes, 15 Ariz. 229, 137 Pac. 871; Rebecca Co. vs. Bryant, 31 Colo. 119, 71 Pac. 1110; Peoria Co. vs. Turner, 20 Colo. 474, 79 Pac. 915; Beals vs. Cone, 27 Colo. 473, 62 Pac. 948. In Clark vs. Jones, 30 Ariz. 535, 249 Pac. 552, the court said: "The

power over its decisions upon questions of fact,[5] or mixed law and fact.[6] But the jurisdiction of the land department is not an arbitrary, capricious nor unlimited one.[7]

§ 262. Judgment Not Conclusive.

The decisions or rulings of the land department are open to relitigation in the courts on the ground of its want of jurisdiction in the case,[8] or that it misconstrued the law,[9] or in cases of fraud[10] (when extrinsic

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effect of a decision of the Commissioner of the General Land Office holding a mining claim to be null and void for want of discovery was not to oust applicants from the possession of the land, nor even to determine that they had no further right to such possession, but on the contrary as stated by the Secretary of the Interior in affirming the Commissioner's decision, left them 'in possession, free to conduct such further exploration as they may desire' and such possession they may maintain against the world, save and except the United States and persons claiming by legal or equitable title under it. 32 Cyc. 822." The land department has authority at any time before patent is issued to inquire whether or not an original mineral entry was in conformity with the act of congress. Kirk vs. Olson, 245 U. S. 225, aff'g. 35 S. Dak. 620, 153 N. W. 893. The mere fact that a tract of the public domain is covered by a mining location and that the owner does not and may never desire a patent does not deprive the land department of its jurisdiction and authority to investigate and adjudicate the facts establishing the character of the land or the status of any claim asserted thereto, under the public land laws. Such jurisdiction exists until patent has issued. Independent Co. vs. Levelle, *supra*[1]; see Clipper Co. vs. Eli Co., *supra*; Lane vs. Cameron, 45 App. D. C., 404.

[5] Quinby vs. Conlan, 104 U. S. 420; Craig vs. Leitensdorfer, 123 U. S. 212; De Cambra vs. Rogers, 189 U. S. 119; Love vs. Flahive, 205 U. S. 198; West vs. Standard Oil Co., 278 U. S. 200, rev'g. 23 Fed (2d) 750; U. S. vs. Caster, 271 Fed. 620; Murphy vs. Howard Co., *supra*[4]; Gage vs. Gunther, *supra*[2]; McLaren vs. Fleischer, 181 Cal. 609, 185 Pac. 967; Bowen vs. Hickey, 53 Cal. A. 253, 200 Pac. 47; Van Patten vs. Boyd, 20 N. M. 259, 150 Pac. 919. It would lead to endless litigation and be fruitful of evil if a supervisory power vested in the courts over the action of the numerous officers of the land department on mere questions of fact presented for its examination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, that the courts interfere, and we may also add, in this connection, that a misconstruction of the law by the officers of the land department which will authorize such interference of the court must be clearly manifest, and not alleged upon a possible finding of the facts from the evidence different from that reached by them. Quinby vs. Conlan, *supra*; Gage vs. Gunther, *supra*. See West vs. U. S. *supra*[1].

[6] Bates vs. Guild Co., 194 U. S. 109; Whitcomb vs. White, 214 U. S. 17; Ross vs. Day, 232 U. S. 110; West vs. Standard Oil Co., *supra*[5]; Murphy vs. Howard Co., *supra*[4]. The decision of the land department may not be controlled by injunction, in the absence of a showing of capricious or arbitrary action. Brady vs. Fall, 280 Fed. 1017.

[7] Orchard vs. Alexander, 157 U. S. 372; Cameron vs. U. S., *supra*[4]; Southern Cross Co. vs. Sexton, *supra*[2]. In Works vs. Beachland Co., 19 Fed. (2d) 701, the court said: "It is the contention of the secretary that he is vested with sole authority to ascertain and determine what constitutes public lands, what have been surveyed, what have been disposed of, what remains to be disposed of and what are reserved. Unquestionably he possesses the authority, where the determination and investigation relates to the public lands of the United States, but in the matter of resurveys, and the correction of public land surveys, this authority is subject to limitations. When the United States has already conveyed lands the secretary is without jurisdiction to 'intermeddle with them in the form of a second survey.' Kean vs. Calumet Land Co., 190 U. S. 461." See, also, Cragin vs. Powell, *supra*[1]. Until an act dealing with the public lands is finally determined by the courts to be unconstitutional, it is the duty of the land department to administer it as congress directs. Hudson, 50 L. D. 521.

[8] Burfenning vs. Chicago Co., *supra*[4].

[9] Hawley vs. Diller, 178 U. S. 476; Strong vs. Buffalo Co., 203 U. S. 582, aff'g. 91 Minn. 84; Daniels vs. Wagner, 237 U. S. 547, rev'g. 205 Fed. 235; Wilbur vs. Krushnic, 280 U. S. 306, aff'g. 30 Fed. (2d) 742; Oregon Basin Co. vs. Work, 6 Fed. (2d) 676, con. case, 50 L. D. 253; Southern Cross Co. vs. Sexton, *supra*[2]. The judgment and conveyance of the department do not conclude the rights of the claimants to the land. They rest upon established principles of law and fixed rules of procedure which condition their initiation and prosecution, the application of which to the facts of each case determines its right decision, and if the officers of the land department are induced to issue a patent to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless. He may avoid this decision, and charge the legal title derived from the patent which they issue with his equitable right to it on either of two grounds: (1) That upon the facts found, conceded or established without dispute at the hearing before the department its officers fell into error in the construction of the law applicable to the case which caused them to refuse to issue the patent to him, and to give it to another, or, (2) that through fraud or gross mistake they fell into a misapprehension of the facts proved before them, which had the like effect. If he would attack the patent on the latter ground,

or collateral and do not consist of perjury or false proofs[11]), inadvertence, mistake,[12] etc., which permit any determination to be reexamined.[13]

§ 263. Termination of Jurisdiction.

The jurisdiction of the land department over the land and over the title which it has conveyed ceases upon the actual issuance of the patent;[14] that is, its due issuance and recordation, not necessarily accompanied by actual delivery.[15]

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and avoid the department's finding of facts, however, he must allege and prove not only that there was a mistake in the findings, but the evidence before the department from which the mistake resulted, the particular estate that was made, the way in which it occurred, and the fraud, if any, which induced it, before any court can enter upon the consideration of any issue of fact determined by the officers of the department at the hearing. James vs. Germania Co., 107 Fed. 600; see Weyerhauser vs. Hoyt, 219 U. S. 404; Howe vs. Parker, 190 Fed. 746; U. S. vs. Debell, *supra* (9); Dixon vs. Cox, 268 Fed. 290. A patent for a mining claim within the jurisdiction of the land department is the judgment of that tribunal upon the evidence before it that the patentee is entitled to the mining claim therein described and the conveyance of the legal title to him. The validity, the extent and the boundaries of the claim are unavoidable issues which that tribunal must adjudge in sustaining any part or all of the claim, and in such case the adjudication of matters within the jurisdiction of the land deparment are not subject to collateral attack, but can be avoided only by direct suit for that purpose on the ground of fraud or error of law. Conkling Co. vs. Silver King Co., 230 Fed. 553. See, also, U. S. vs. Record Oil Co., 242 Fed. 748.

[10] U. S. vs. Iron Co., 128 U. S. 673; Whitcomb vs. White, *supra* (6); James vs. Germania Co., *supra* (9); Le Marchal vs. Tegarden, 175 Fed. 682; Edwards vs. Bodkin, 241 Fed. 931, aff'd. 265 Fed. 621; Elliott vs. Robbins, 33 Cal. A., 577, 165 Pac. 1042. See Conklin vs. Silver King Co., 255 U. S. 161, rev'g. 230 Fed. 553; U. S. vs. Boucher, 15 Fed. (2d) 783.

[11] U. S. vs. Atherton, 102 U. S. 372; U. S. vs. White, 17 Fed. 561; Kennedy vs. Dickie, 34 Mont. 205, 85 Pac. 982; see Cragie vs. Roberts, 6 Cal. A. 309, 92 Pac. 97; Wiseman vs. Eastman, 21 Wash. 163, 57 Pac. 398.

[12] Germania Co. vs. U. S., 165 U. S. 379; U. S. vs. Boucher, *supra* (10).

[13] Johnson vs. Towsley, 80 U. S. 72; St. Louis Co. vs. Kemp, 104 U. S. 636; Steel vs. St. Louis Co., *supra* (4); Wright vs. Roseberry, 121 U. S. 488; Heath vs. Wallace, 138 U. S. 573; McCormick vs. Hayes, 159 U. S. 332; Thallman vs. Thomas, 111 Fed. 277; U. S. vs. Porter Fuel Co., 247 Fed. 773; U. S. vs. Boucher, *supra* (10); Southern Cross Co. vs. Sexton, *supra* (2). In Marquez vs. Frisbie, 101 U. S. 476, it is said: "The principle is that the decisions of the officers of the land department, made within the scope of their authority on questions of this kind is, in general, conclusive everywhere, except when considered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive, even in courts of justice, when the title afterwards comes in question. But in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that those officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give appropriate relief." See, also, Wisconsin Co. vs. Foroyite, 159 U. S. 61; Christie vs. Great Northern Co., 284 Fed. 703; Reynolds vs. Brooks, 49 Okla. 191, 152 Pac. 412.

See, generally, West vs. Standard Oil Co., *supra* (5).

[14] Moore vs. Robbins, 96 U. S. 530; West vs. Standard Oil Co., *supra* (5); see Hawley vs. Diller, *supra* (9); U. S. vs. Ramsey, 22 L. D. 101; Baldwin Co. vs. Quinn, 28 L. D. 307. The rulings and acts of the officers of the land department, made and done in the course of proceedings to obtain title to public land before the issuance of a patent, are interlocutory; and until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself or his successor as are the interlocutory decrees of a court open to review upon final hearing. New Orleans vs. Payne, 147 U. S. 266; see, also, Cornelius vs. Kessel, 128 U. S. 456. When a patent for a mining claim is issued, the functions of the land department terminate, as this is the culmination of the proceedings *in rem* and the final judgment of the tribunal charged with passing the government title, and with the title passes all authority or control of the executive department over the land and the title which it conveys. Round Mt. Co. vs. Round Mt. Co., 36 Nev. 543, 138 Pac., rev'g. 35 Nev. 392, 129 Pac. 308. See, also, West vs. Standard Oil Co., *supra* (5), citing Barden vs. N. P. R. Co., 154 U. S. 331; Riverside vs. Hitchcock, 190 U. S. 316; Courtright vs. Wisconsin Co., 19 L. D. 410; Creciat, 40 L. D. 623.

[15] U. S. vs. Schurz, 102 U. S. 378; U. S. vs. Laam, 149 Fed. 581; Rosetti vs. Dougherty, 50 L. D. 16. The execution and record of a patent are the final acts of the officers of the government for the transfer of its title, and as these can be performed only after certain steps have been taken, the patent duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands is entrusted that all the requirements preliminary to its issuance have been complied with. The presumptions thus attending a patent are not open to rebuttal in an action at law; and it is this unassailable character which gives the

§ 264. Board of Equitable Adjudication.

The Board of Equitable Adjudication consists of the Secretary of the Interior and the Attorney General acting as a board. It operates only to divest the United States of the title of the lands embraced thereby, without prejudice to the rights of conflicting claimants.[16]

§ 265. Jurisdiction.

This board is vested with jurisdiction to decide upon principles of equity and justice that an entry may be saved from rejection notwithstanding the entryman may not have strictly complied with the terms of the law;[17] or, that a valid patent may be issued in lieu of a patent previously issued upon a voidable entry.[18] There is no appeal from its decisions,[19] which, however, may not be binding upon the courts.[20]

§ 266. Officers of Land Department.

The officers of the land department are:

The Secretary of the Interior, who is charged with the supervision of the public lands, including mines,[21] and is authorized to employ special agents to aid in the enforcement of the law.[22]

The Commissioner of the General Land Office,[23] who is required to perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands, or in any wise respecting such lands, and, also, such as relate to private claims of land and the issuing of patents for mining claims.[24]

§ 267. Regulations.

The Commissioner is empowered, under the direction of the Secretary of the Interior, to enforce "by appropriate regulations" every part of the public land laws, as to which it is not otherwise specially

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patent its chief, and, in fact, its only value as a means of quieting its possessor in the enjoyment of the lands it embraces. St. Louis Co. vs. Kemp, 104 U. S. 636; Thomas vs. Horst, 54 Mont. 260, 169 Pac. 733; Pittsmont Co. vs. Vanina, 71 Mont. 44, 227 Pac. 46. See, also, Stewart Co. vs. Bourne, 218 Fed. 328; Conkling Co. vs. Silver King Co., *supra* (10). The physical delivery of the patent to the patentee is not necessary to pass the title to him of the land described therein. Rosetti vs. Dougherty, 50 L. D. 16; Eltzroth vs. Ryan, 89 Cal. 135, 26 Pac. 647.

[16] 5 U. S. Comp. St., p. 6061, § § 5107, 5108; see Id. p. 6063, § 5112; Foley vs. Harrington, 56 U. S. 433; Hawley vs. Diller, *supra* (9); Stimson Co. vs. Rawson, 62 Fed. 429; Gage vs. Gunther, *supra* (2); see 6 L. D. 799; 10 L. D. 502; 39 L. D. 320. Entries of mining claims should not be referred to the board of equitable adjudication where there has been a plain, undeniable violation of the law relating to such entry; but entries are only referred where the law has been substantially complied with and some error or informality has arisen from ignorance, accident or mistake. Peacock Mill Site, 27 L. D. 374; New York Claim, 5 L. D. 513 (denied). An entry may be referred to the board of equitable adjudication where the law has been complied with except in the matter of proof of posting the notice, which notice was furnished to the department, but lost. Cornell Lode, 6 L. D. 717; see South End Co. vs. Tinney, 22 Nev. 19, 35 Pac. 89.

Questions pertaining to the reformation of restricted patents issued in accordance with the provisions of the act of July 17, 1914, 38 Stats. 509, do not come within the jurisdiction of the board of equitable adjudicaton. Heirs of Corder, 50 L. D. 185.

[17] Gage vs. Gunther, *supra* (2).

[18] Hawley vs. Diller, *supra* (9); 19 Opinions Atty. Gen. 188.

[19] Foley vs. Harrington, *supra* (16).

[20] Stimson Co. vs. Rawson, *supra* (16).

[21] 1 U. S. Comp. St., pp. 348, 681; Knight vs. U. S. Land Assn., *supra* (1).

[22] U. S. vs. Schlierholz, 133 Fed. 335; U. S. vs. Van Wert, 195 Fed. 976; U. S. vs. Lee Wilson & Co., *supra* (1).

[23] Rev. St. 453, 1 U. S. Comp. St., pp. 360, 699; Bishop vs. Gibbons, 158 U. S. 155; U. S. vs. Nelson, *supra* (2).

[24] 1 U. S. Comp. St., pp. 360, 699; U. S. vs. Nelson, *supra* (2); Leonard vs. Lennox, *supra* (2); Rose vs. Wood, *supra* (2).

See § 270.

provided.[25] When such regulations are not repugnant to the paramount law[26] or are not in excess of his powers[27] they have the force and effect of law.[28]

§ 268. Suspension of Entry.

The Commissioner is authorized to decide all cases of suspended entries upon principles of equity and justice[29] and in accordance with the regulations of the Secretary of the Interior, the Attorney General and the Commissioner conjointly.

§ 269. Cancellation of Entry.

It is within the jurisdiction of the Commissioner to cancel an entry for a failure by the claimant to comply with some statute or a rule of the land department.[30] But an entry canceled without due notice to the parties interested is in excess of his jurisdiction and void.[31]

§ 270. Subordinate Officers.

The subordinate officers of the land department are the United States supervisors of surveys, the cadastral engineers and their deputies[32] and the registers of the local land office.[33]

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[25] Leonard vs. Lennox, *supra* (2); U. S. vs. Nelson, *supra* (2). The equitable title to land acquired by a lawful entry can not be divested nor affected by subsequent decisions of the land department or subsequent rules or modifications of rules of practice therein. Love vs. Flahive, 205 U. S. 199; James vs. Germania Co., *supra* (9); Howe vs. Parker, *supra* (9).

[26] 1 U. S. Comp. St., pp. 360, 699; Leonard vs. Lennox, *supra* (2); Alford vs. Hesse, 100 Cal. A. 66, 279 Pac. 831.

[27] Brandon vs. Ard, 74 Kan. 424, 87 Pac. 366.

[28] Cosmos Co. vs. Gray Eagle Co., *supra* (2). The courts take judicial notice of the regulations of the General Land Office; and such regulations need not be pleaded. Leonard vs. Lennox, *supra* (2); Daniels vs. Wagner, 194 Fed. 975, aff'g. 205 Fed. 238.

[29] Caha vs. U. S., *supra* (3); Hemmer vs. U. S., 204 Fed. 898; rev'g. 195 Fed. 790; U. S. vs. Lavenson, 206 Fed. 758; U. S. vs. Gumm, 9 N. M. 621, 58 Pac. 398; see U. S. vs. Sugar, 243 Fed. 432.

See § 264.

[30] 5 U. S. Comp. St., p. 6060, § 5106; Hawley vs. Diller, *supra* (9); *but see* El Paso Co. vs. McKnight, 233 U. S. 257, rev'g. 16 N. M. 721, 120 Pac. 694; Cameron vs. U. S., *supra* (4). The decision of the Land Office canceling an entry is conclusive that the entryman failed to meet the conditions prescribed by law and the legal regulations made pursuant thereto which entitle him to the full legal right to acquire title to the land. Shank vs. Holmes, 15 Ariz. 229, 137 Pac. 871; Roberts vs. Gebhart, 104 Cal. 67, 37 Pac. 782. As to conclusiveness of decision or findings of the land department see L. R. A. 1918 D, 634, 637.

[31] Parsons vs. Venzke, 164 U. S. 89, aff'g. 61 N. W. 1036, following Orchard vs. Alexander, *supra* (7); Kirk vs. Olson, *supra* (3); Cameron vs. U. S. 252 U. S. 461, aff'g. 250 Fed. 943; Stockley vs. U. S., 271 Fed. 638. The power of cancellation is not unlimited, nor to be exercised arbitrarily, and is in some cases, at least, subject to judicial review—as when the opportunity to be heard was not accorded the claimant—still even in such cases the claimant seeking relief in the courts assumes the burden of showing that he has in fact earned a patent. Pfund vs. Valley Co., 52 Neb. 473, 72 N. W. 480, following Parsons vs. Venzke, *supra*.

[32] 51 L. D. 280. The office of the surveyor general was abolished and his activities transferred to the field surveying service under the jurisdiction of the United States Supervisor of Surveys under regulations of the Secretary of the Interior by act of March 3, 1925. 2 Mason's U. S. Code, p. 2854, § 51. All official books, papers instruments of writing, documents, archives, official seals, stamps or dies, which have been authorized by law to be collected and deposited in the Surveyor General's office in California, shall be safely and securely kept by the Supervisor of Surveys in the archives of his office and copies thereof, authenticated by the Supervisor of Surveys under his seal of office shall be evidence in all cases where the originals would be evidence. 2 Mason's U. S. Code, p. 2856, § 59.

[33] The offices of register and receiver were consolidated by act of March 3, 1925. 2 Mason's U. S. Code, p. 2856, § 71.

Except where otherwise specifically provided by statute the territorial and official jurisdiction of the register is limited to the boundaries of his land district and to those matters the care and administration of which are charged to him. He may issue commissions to the officers designated therein to take depositions of witnesses in counties outsde of his land district, he can not administer oaths to such witnesses nor issue a commission to himself to take such depositions. Instructions, 52 L. D. 673.

§ 271. Mineral Surveyors.

The Supervisor of Surveys appoints in each land district, without limitation, competent surveyors[34] who are termed "mineral surveyors."[35] Their field of operations is confined to the surveying of mining claims and of matters incident thereto. Within the limits of their authority they act in the stead of the office cadastral engineer and under his direction, and, in that sense are his deputies.[36] Mineral surveyors act only at the solicitation of owners of mining claims and are paid by such owners and not by the government; but the work that they do is the work of the government and the surveys which they make are governmental surveys. It is upon the reports of the mineral surveyors that the cadastral engineers make the certificate required by the mining act as a prerequisite to the issuance of a patent for a mining claim.[37] Mineral surveyors are prohibited from having any interest, by location, or otherwise, in a mining claim surveyed for patent.[38]

§ 272. Jurisdiction of Cadastral Engineer.

The office cadastral engineer can not decide the rights of the parties in case of conflicting claims.[39] He may contract the lines and draw in the monuments of a mining claim so as to make the location conform to the requirements of the mining act.[40]

§ 273. Office Cadastral Engineer's Certificate.

The claimant at the time of filing his application for patent, or at any time thereafter, within the sixty days of publication, must file with the register a certificate of the office cadastral engineer that five hundred dollars worth of labor has been expended or improvements made upon the claim by himself or his grantors,[41] except where a placer mining

[34] 5 U. S. Comp. St., p. 5685, § 4642, 51 L. D. 280. The land district for which mineral surveyors are appointed is a division of a state or territory, as the case may be, created by law, within which is located such a district for the disposition of the public lands. U. S. vs. Smith, 11 Fed. 487.

Whoever in any manner by threats or force shall interrupt, hinder or prevent a United States mineral surveyor in the discharge of his official duties is subject to a fine of not more than three thousand dollars and imprisonment for not more than three years. Rev. Stats. § 2412; 44 U. S. Code, p. 468, § 112.

Whenever the President is satisfied that forcible opposition has been offered, or is likely to be offered, to any surveyor or deputy surveyor in the discharge of his duties in surveying the public lands, it may be lawful for the President to order the marshal of the state or district, by himself or deputy, to attend such surveyor or deputy surveyor with sufficient force to protect such officer in the execution of his duty, and to remove force should any be offered. Id. § 2413; Id. p. 1382, § 774.

[35] 5 U. S. Comp. St., p. 5685, § 4642; Hand vs. Cook, 29 Nev. 541, 92 Pac. 3; Gowdy vs. Kismet Co., 24 L. D. 51. The law does not in express terms require that a mineral surveyor shall be either a legal or an actual resident of the district for which he is appointed. Helmick, 30 L. D. 163.

[36] Waskey vs. Hammer, 223 U. S. 85, aff'g. 170 Fed. 31.

[37] Id. Silver King Co. vs. Conkling Co., *supra* [(10)].

[38] Waskey vs. Hammer, *supra* [(36)]; U. S. vs. Havenor, 209 Fed. 990; *but see* Lavagnino vs. Uhlig, 26 Utah 16, 71 Pac. 1046, aff'd. 198 U. S. 443. (The latter case is distinguished in Lockhart vs. Farrell, 31 Utah 160, 86 Pac. 1077.) See Floyd vs. Montgomery, 26 L. D. 122; *but see* Leffingwell, 30 L. D. 139.

See § 253.

[39] Del Monte Co. vs. Last Chance Co., 171 U. S. 80.

[40] Howeth vs. Sullinger, 113 Cal. 551, 45 Pac. 841; see Doe vs. Sanger, *supra* [(21)]; Harper vs. Hill, 159 Cal. 255, 113 Pac. 163.

[41] Rev. St., § 2325; U. S. vs. King, 83 Fed. 190; Broad Ax Lode, 22 L. D. 245; White Cloud Co., 22 L. D. 253; Milton vs. Lamb, 22 L. D. 340; see Emily Lode, 6 L. D. 220. The cadastral engineer may derive his information upon which to base his certificate as to the value of labor expended or improvements made from the mineral surveyor who actually makes the survey and examination of the premises, in so far as such matters rest in the personal knowledge of the mineral surveyor. The mineral surveyor should specify with particularity and full detail the character and extent of such improvements. As to when and by whom the improvements were made and other essential matters not within such mineral surveyor's personal

claim is located according to legal subdivisions. In such a case the affidavit of two or more disinterested persons takes the place of such a certificate.[42] Unless attacked by the land department, the certificate of the office cadastral engineer is conclusive of the facts therein stated.[43]

§ 274. Register.

Applications for patent[44] and adverse claims[45] must be filed with the register of the proper land office. In the event the application be denied by him the applicant has thirty days within which to appeal to the Commissioner of the General Land Office under the Rules of Practice.[46]

§ 275. Duty of Register.

When the proper application for patent is made, the register is required to publish a notice of such application for a period of sixty days in a newspaper designated by him and to post such notice in his office for the same period.[47]

§ 276. Appeals.

An appeal lies from the decision of the office cadastral engineer[48] to the Commissioner of the General Land Office[49] and from him to the Secretary of the Interior[50] and, "under special circumstances, to the President."[51]

§ 277. Rehearings.

No motion for rehearing of any decision rendered by the Commissioner of the General Land Office will be allowed.[52]

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knowledge, recourse may be had by the cadastral engineer to corroborate affidavits by persons possessing such personal knowledge, or the best evidence in this behalf otherwise obtainable. This showing should accompany the report of the mineral surveyor as to improvements. Min. Regs., par. 49.

[42] Min. Regs., par. 25; Draper vs. Wells, 25 L. D. 550.

[43] Deffeback vs. Hawke, 115 U. S. 392; U. S. vs. Iron Co., 128 U. S. 685; Olive Land Co. vs. Olmstead, 103 Fed. 568; U. S. vs. King, 9 Mont. 75, 22 Pac. 498; Bash vs. Cascade Co., 29 Wash. 50, 69 Pac. 402; see Russell vs. Maxwell Land Grant Co. 158 U. S. 253; Horne vs. Smith, 159 U. S. 40; U. S. vs. King, 83 Fed. 191.

[44] Min. Regs., pars. 40 and 41. The register has no powers except as are derived from the acts of congress and such regulations of the General Land Office as are made in pursuance of law. Parker vs. Duff, 47 Cal. 562; see, also, Germania Co. vs. James, 89 Fed. 815.

[45] Min. Regs., par. 78.

[46] Upon the presentation for filing of an application for patent for a mining claim it will be rejected by the register if the ground described therein be included in a prior or pending application for patent or entry; or if the land is embraced in a railroad selection; or for which publication is pending or has been made by any other claimant, or if the application papers be considered as lacking in either form or substance. The reason for the rejection must be stated by the register. Min. Regs., par. 44.

[47] The notice of application for patent must be published in the newspaper nearest to the claim, not by actual measurement in a direct line between the newspaper offices in the same town or city, but in the nearest town or city in which a paper or papers of established character and general circulation is published. Condon vs. Mammoth Co., 14 L. D. 139, on review; 15 L. D. 330; Pike's Peak Lodes, 34 L. D. 285; see, also, Arnold, 2 L. D. 759.

[48] Rules of Practice, 51 L. D. 556, Rule 47; see *infra*, note 53. No appeal may be had from the action of the Commissioner affirming the decision of the register in any case where the party adversely affected shall have failed to appeal from the decision of such register. Rules of Practice, 51 L. D. 560, Rule 75.

[49] Rules of Practice, 51 L. D. 547, Rule 74. Oral arguments before the secretary are allowed on motion. Counsel for each party are limited to one-half hour, which may be extended. Rules of Practice, 51 L. D. 560, Rule 82. The Commissioner of the General Land Office and the Secretary of the Interior may review findings made by the register, though no appeal was taken. Stockley vs. U. S., *supra* [31].

[50] Rules of Practice, 51 L. D. 559, Rule 74.

[51] Shepley vs. Cowan, 91 U. S. 330.

[52] Rules of Practice, 51 L. D. 559, Rule 72.

Motions for rehearing before the Secretary of the Interior must be filed within thirty days after the receipt of notice of the decision complained of and will act as a supersedeas of the decision until otherwise directed by the Secretary. Such motions, briefs, and arguments must not be served on the opposite party and must be filed directly with the Secretary of the Interior.[53] Any such motion must state concisely and specifically the grounds upon which the motion for rehearing is based and be accompanied by brief and argument in support thereof.[54]

§ 278. Procedure.

If proper grounds are not shown the rehearing will be denied and sent to the files of the General Land Office, whereupon the Commissioner will proceed to execute the decision before rendered. If upon examination grounds sufficient for a rehearing are shown, a rehearing will be granted and the moving party will be notified that he will be allowed fifteen days from receipt of notice within which to serve a copy of his motion, together with all argument in support thereof, on the opposite party, who will be allowed thirty days thereafter in which to file and serve answer, brief and argument. Thereafter the cause or matter will be again considered and appropriate action taken, which may consist either in adhering to the former decision or modifying or vacating the same, or the making of any further or other order deemed warranted.[55] Motions for review and rereview are abolished.[56]

§ 279. Supervisory Power of Secretary.

Motion for the exercise of supervisory power of the Secretary of the Interior will be considered only when accompanied by positive showing of extraordinary emergency or exigency demanding the exercise of such authority.[57]

§ 280. No Right of Appeal.

A mere protestant having no interest in the ground in controversy, but appearing as an *amicus curiae*, has no right of appeal.[58]

§ 281. Rule for the Determination of the Character of Land.

The land department has adopted the rule that lands will be considered mineral or agricultural as they are more valuable in the one class or the other.[59]

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[53] Rules of Practice, 51 L. D. 561, Rule 83.

[54] Id.

[55] Id. As applied to Alaska, the periods of time granted by this rule are doubled. Id.

[56] Rules of Practice, 51 L. D. 561, Rule 84.

[57] Rules of Practice, 51 L. D. 561, Rule 85.

[58] Bright vs. Elkhorn Co., 8 L. D. 122; Smuggler Co. vs. Trueworthy Lode, 19 L. D. 358. An attempted relocation of a mining claim after the allowance of entry is not an intervening adverse right and the relocator is a mere protestant without interest and is not entitled to an appeal. Woodman vs. McGilvary, 39 L. D. 575; see Marburg Lode, 30 L. D. 202.

[59] The return of the United States Supervisor of Surveys, in connection with the survey of public land, to the effect that the land is mineral or nonmineral is sufficient evidence of its character to cast the burden of proving the contrary upon one who alleges that the land is of a different character; but the opportunities and qualifications of surveyors for determining the mineral or nonmineral character of the land are so uncertain that the presumption of corrections of the returns is a slight one and may be readily overcome by evidence of a higher character. Barden vs. N. P. R. Co., 154 U. S. 320; Winscott vs. N. P. R. Co., 17 L. D. 276; Magruder vs. O. & C. Co., 28 L. D. 174; see also, Burke vs. S. P. R. Co., *supra* [2]; Cosmos vs. Gray Eagle Co., *supra* [2]; Leonard vs. Lennox, *supra* [2].

The rule respecting the sufficiency of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the

§ 282. Practice.

The Rules of Practice[60] and the Mining Regulations, as far as applicable, govern in all cases. The testimony is directed to both the mineral and the agricultural character of the land.[61] If it can be shown by an adverse claimant that the land is more valuable for mineral than for agricultural purposes, the homestead entry may be cancelled and a mineral entry allowed.[62] But the discovery of mineral, however valuable, after the due issuance of final homestead certificate will not in any manner affect the right and title of a homestead claimant.[63]

§ 283. Contests.

Contests may be initiated by any person seeking to acquire title to, or claiming an interest in, the land involved, against a party to any entry, filing or other claim, under the laws of congress relating to the public lands, because of priority of claim, or for any sufficient cause affecting the legality or validity of the claim, not shown by the records of the land department. Any protest or application to contest filed

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reason that where the land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between mineral claimants, the question simply is which is entitled to priority; but even then the existence of mineral should be shown, without, however, the weighing of scales to determine the value of the mineral found. Chrisman vs. Miller, 197 U. S. 313, aff'g. 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444; see Steele vs. Tanana Co., 148 Fed. 678; Lange vs. Robinson, 148 Fed. 803; Bonner vs. Meikle, 82 Fed. 697.

The mineral character of land may be established by proof of the existence of mineral therein in paying quantities, and the actual operation of a mine on the land is not necessary to show the fact, as it may be demonstrated by experiment, prospecting and "panning." Johns vs. Marsh, 15 L. D. 196. A change in the conditions which occur subsequently to the sale whereby new discoveries are made by means whereof it may become profitable to work the mineral deposit as a mine can not affect the title as it passed at the time of the sale, as the question must be determined according to the facts existing at the time of the sale. Shaw vs. Kellogg, 170 U. S. 312; see Mullan vs. U. S. 118 U. S. 278; Olive Land Co. vs. Olmstead, *supra*.[43]; Leonard vs. Lennox, *supra*[2]; Riley, 33 L. D. 70; Hirshfeld vs. Chrisman, 40 L. D. 114. The doctrine of the decision in the case of Lawson vs. U. S. Co., 207 U. S. 1, is that an adjudication by the Land Department of the question of surface rights does not necessarily determine the question of underground rights, and that those rights not being subject to adverse claim does not estop the parties to litigate the question of priority. Butte & S. Co. vs. Clark-Montana Co., 248 Fed. 615; aff'g. 233 Fed. 547; aff'd. 249 U. S. 12; see, also, Star Co. vs. Federal Co., 265 Fed. 897.

See § 285.

[60] 51 L. D. 547. See Appendix A.

[61] Min. Regs., pars. 105, 106, 107 and 108. The question of the character of land always is one of fact. Evidence of the actual use to which it has been placed by those who occupy it and make it a means of livelihood is not conclusive evidence, but tends to establish its character and is relevant and material for that purpose. Lyneh vs. U. S., 138 Fed. 535. That one person in perfect good faith may assert a mineral claim for a particular parcel of public land, and another person, equally in good faith, may assert an agricultural claim to the same ground is beyond question. The same land may be valuable for both mining and agricultural purposes. In such circumstances the controversy is settled by the Land Department determining whether the land, in whole or in part, is more valuable for one purpose than another. Murray vs. White, 42 Mont. 423, 113 Pac. 754.

[62] Bunker Hill Co. vs. U. S., 226 U. S. 549; Bay vs. Oklahoma Co., 13 Okla. 434, 73 Pac. 936; see Rea vs. Stephenson, 15 L. D. 37; Jones vs. Driver, 15 L. D. 514. Where land is returned as mineral the burden is upon an agricultural claimant to show that it is nonmineral, but he is not bound to prove it to be valuable for agriculture. Mulligan vs. Hansen, 10 L. D. 311. Where land is returned as agricultural and is so claimed, a mineral claimant must show it to be more valuable for mining than for agricultural purposes. Tinkham vs. McCaffrey, 13 L. D. 517.

Probably in a majority of cases where a placer claim is located, other matters than the existence of valuable deposits of mineral enter into the estimate of its worth. Its accessibility to places where supplies and medical attendance can be obtained for the men engaged in working upon it, and timber required to support the drifting or tunneling which may be necessary, the facility with which water can be brought to wash the mineral from the earth, sand or gravel with which it may be mingled and the uses to which the land may be subjected when the claim is exhausted, may be proper subjects of consideration. U. S. vs. Iron Co., *supra* [10]; see State vs. McBride, 18 L. D. 199.

[63] Dufrene vs. Mace, 30 L. D. 219.

by any other person shall forthwith be referred to the chief of field division, who will promptly investigate the same and recommend appropriate action.[64]

§ 284. Adjustment of Controversy.

Where there is a *bona fide* contest between a mineral claimant and an agricultural claimant for the same land an amicable adjustment of the difficulty by a division of the land between them may be made. Patent may issue to either claimant according to the classification of the land by the land department and subsequent transfer may then be made by the patentee to the other claimant.[65] The specific performance of such a contract will be enforced by the courts.[66]

§ 285. Hearings to Determine Character of Lands.

The Revised Statutes provide in detail for acquisition under homestead entry of any unappropriated public lands of the United States other than mineral and intrust the disposal of both classes of lands to the land department, and provide that the issues of fact that arise in all cases in regard to the patenting of agricultural or mineral lands, whether in a contest between different claimants for agricultural lands, or between different claimants for mineral lands, or in a contest between claimants for the same tract of land (in which one party may claim as agricultural, and the other as mineral, any public land of the United States), shall be submitted to the determination of the proper officials of the land department. Their findings on all issues of fact in cases thus submitted to them for determination are made conclusive the same as judgments of courts of record, and can only be collaterally attacked when invalid by reason of fraud in their procurement.[67]

§ 286. Result of Hearing.

The character of the land conclusively is determined by the judgment, either in a contest or protest proceeding.[68] Where it is held that

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[64] Rules of Practice, 51 L. D. 547, Rule 1. For contents of contest or protest see Id.

Land Department rules "clearly refer only to contests arising out of entries of land initiated in a local land office and in which the contest also originated in that office. These rules have no application to mining claims, for the reason that mining locations are not initiated in any local land office of the government, but take their origin under authority of the United States statutes 'under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining districts so far as the same are applicable and not inconsistent with the laws of the United States.'" Double Eagle Co. vs. Hubbard, 42 Cal. A. 39, 183, Pac. 282.

[65] Murray vs. White, *supra* [61]; see St. Louis Co. vs. Montana Co., 171 U. S. 650 aff'g. 20 Mont. 394, 51 Pac. 394.

[66] Id.

[67] Marquez vs. Frisbie, 101 U. S. 473; Casey vs. Vassor, 50 Fed. 258; Verde Co. vs. Salt River Ass'n., 22 Ariz. 311, 197 Pac. 229. See, also, West vs. Standard Oil Co., *supra* [5].

See § 281.

[68] Marquez vs. Frisbie, *supra* [67]; Casey vs. Vassor, *supra* [67]; McCullough vs. Lane, 269 Fed. 204; Shanks vs. Lane, 269 Fed. 206; Verde Co. vs. Salt River Ass'n., *supra* [67]. A final decision of the Land Department as to the character of land is conclusive up to the period covered by the hearing, but such decision will not preclude a further consideration as to the character of the land based upon subsequent exploration and development. The burden of proof rests upon the attacking party, and the testimony must be conclusive to warrant a reversal of the former judgment. McCharles vs. Roberts, 20 L. D. 564. See, also, Stinchfield vs. Pierce, 19 L. D. 12; Oregon vs. Puckett, 39 L. D. 169; Bunte, 41 L. D. 520. An order for hearing is discretionary and interlocutory and is not appealable. American Co., 39 L. D. 299. A failure to order a hearing upon an adverse report of a forest ranger to an application for patent is ground for cancellation of patent by a court. U. S. vs. Lavenson, *supra* [29].

the land partly is mineral and partly agricultural a segregation survey will be made.[69]

§ 287. Judgment Not Equivalent to Patent.

The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award to the miner. In order to secure a patent for such land, he must proceed as in other cases, in accordance with law and the regulations thereunder.[70]

§ 288. Subsequent Legal Proceedings.

After the land department shall have disposed of the questions within its jurisdiction if any legal right of either party to the proceedings has been invaded, he may seek redress in the courts.[71]

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[69] Min. Regs., par. 108. See Bond, 18 L. D. 418.

[70] Min. Regs., par. 111.

[71] Litchfield vs. Reg. & Rec., 76 U. S. 575; Kirwan vs. Murphy, 189 U. S. 35; Lane vs. Darlington, 249 U. S. 333; West vs. Standard Oil Co., *supra* (5); Wilbur vs. Krushnic, *supra* (9); Mickadiet vs. Payne, 269 Fed. 197; Van Ness vs. Rooney, 160 Cal. 131, 116 Pac. 392.

A patent for land within its jurisdiction, issued by the land department, is the judgment of that tribunal, and a conveyance of the legal title to the land to the patentee in execution of the judgment. When such a patent to land within the jurisdiction of the department is issued, it is like the judgments of other judicial tribunals, impervious to collateral attack. The test of the jurisdiction of this tribunal is the true answer to the question: had the department the power to hear and determine the claims of the applicants of the land and to dispose of it in accordance with its decision? If that question can be answered in the affirmative the land department had jurisdiction of the case, and the patent which evidences its decision conveys the legal title, and is impervious to collateral attack. If it must be answered in the negative, then its conveyance is void, and is as vulnerable in a collateral action at law as in a direct proceeding in equity to avoid it. Land the title to which has passed from the United States before the claim on which the patent is based was initiated, land reserved from sale or disposition for military or other like purposes, land reserved under a Mexican or Spanish grant *sub judice*, and land for the disposition of which congress has made no provision, is not intrusted to the disposition of the land department, is not within its jurisdiction, and hence its patents for such land are void on their face, and may be collaterally attacked in an action at law. But land which the department is vested with the power and charged with the duty to hear and decide the claims of applicants for, and to dispose of in accordance with its decision, is within its jurisdiction, and its patent for such land conveys the legal title to it, and is impervious to collateral attack, whether its decision is right or wrong. The test of jurisdiction is not right decision, but the right to enter upon the inquiry and to make some decision. Hence a patent, evidencing an erroneous decision of a question of law or a mistaken determination of an issue of fact, which the department was vested with power, and charged with the duty to decide, is as impervious to collateral attack as one which is the result of correct conclusions. The remedy for an error of law in the action of the department regarding the title to land intrusted to its disposition is by a direct proceeding by a bill in equity to correct it. King vs. McAndrews, 111 Fed. 863.

CHAPTER XI.

FEDERAL AND STATE COURTS.

§ 289. Court of Competent Jurisdiction.

The mining act provides that an "adverse" suit must be commenced in a court of competent jurisdiction.[1] What is a court of competent jurisdiction is not specifically stated in the act, but undoubtedly it is a court of general jurisdiction, whether it be a federal or a state court, and the usual rules of practice, including appeals, must prevail.[2] It follows that actions affecting mining claims and rights in connection therewith may be commenced in either a federal or a state court, depending, in the first instance, that diversity of citizenship of the respective parties exists[3] and that the controversy involves the sum or value of three thousand dollars, exclusive of interest and costs[4]; or, that a federal question is presented.[5]

§ 290. Removal of Cause.

An action brought in a state court may be removed to a federal court where the jurisdictional facts exist and appear of record upon a petition

[1] 5 U. S. Comp. St., p. 5622, § 4623. The mere fact that an action or proceeding is an "adverse suit" is not, of itself, sufficient to confer jurisdiction upon a federal court. Bushnell vs. Crooke, 148 U. S. 682; Shoshone Co. vs. Rutter, 177 U. S. 505; aff'g. Blackburn vs. Portland Co., 175 U. S. 571; Beals vs. Cone, 188 U. S. 184; dis. 27 Colo. 473, 62 Pac. 948; McMillen vs. Ferrum, 197 U. S. 347.

[2] Chambers vs. Harrington, 111 U. S. 351; Blackburn vs. Portland Co., *supra* (1). Jurisdiction at law and in equity are as separate in the federal courts as if administered by different tribunals. O'Connor vs. O'Connor, 142 Fed. 449. Forty Fort Co. vs. Kirkendall, 233 Fed. 706. If at any time it appears that a suit commenced in equity should have been brought on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential. Equity Rule 22. Unless otherwise prescribed by statute or the Rules of Practice in Equity, the technical forms of pleading in equity are abolished. Equity Rule 18. Where matters of law and matters of equity are commingled, the action will be classed on the equity side. Williams vs. Hopkins, 11 Fed. (2d) 795. See Twist vs. Prairie Co., 6 Fed. (2d) 317; *certiorari* granted, 270 U. S. 639; revsd. 274 U. S. 684.

[3] P. R. Co. vs. Ketchum, 101 U. S. 289, 298; Timmons vs. Elyton, 139 U. S. 378; Smith vs. Kansas City Co., 255 U. S. 199; Baltimore Railroad Co. vs. Portersburg, 268 U. S. 35; Risty vs. Chicago Co., 270 U. S. 389, rev'g. 296 Fed. 74; Tracy vs. Morel, 88 Fed. 801; Danks vs. Gordon, 272 Fed. 822.

[4] Salander vs. Tacoma, 208 Fed. 427. Where parties are in a representative character their citizenship alone conditions the jurisdiction of the court, and that of their beneficiaries is immaterial. Mexican Co. vs. Hyman, 187 U. S. 434; Daniels vs. Portland Mining Co., 202 Fed. 647.

[5] Jud. Code, § 24; 2 Mason's U. S. Code, p. 1972, § 41; Salander vs. Tacoma, *supra* (4). A federal question does not necessarily arise under the mining act, as the case may not involve any question as to the construction or effect of the constitution or laws of the United States. It may simply present a question of facts as to the time of the discovery of mineral, the location of the claim on the ground, or of a determination of the meaning and effect of the local rules and customs prescribed by the miners of the district, or the effect of state statutes. Blackburn vs. Portland Co., *supra* (1); Shoshone vs. Rutter, *supra* (1); McMillen vs. Ferrum Co., *supra* (1). Questions affecting the character of the land, or as to the party entitled to purchase it from the government are wholly within the jurisdiction of the land department. Marquez vs. Frisbie, 101 U. S. 473; Steel vs. St. Louis Co., 106 U. S. 447; Lee vs. Johnson, 116 U. S. 48; Sanford vs. Sanford, 139 U. S. 642; Logan vs. Davis, 233 U. S. 613; Burke vs. S. P. R. Co., 234 U. S. 692; Cameron vs. U. S., 252 U. S. 460, aff'g. 250 Fed. 943; U. S. vs. Primrose Co, 216 Fed. 557; U. S. vs. Whitted, 245 Fed. 636; Martin vs. Bartmus, 189 Cal. 91, 207 Pac. 550; Germania Co. vs. Hayden, 21 Colo. 136, 40 Pac. 456; see Craig vs. Leitensdorfer, 123 U. S. 212; Edwards vs. Bodkin, 267 Fed. 1010. As to decisions of the land department upon matters of law, see Hastings Co. vs. Whitney, 132 U. S. 357; Menotti vs. Dillon, 167 U. S. 719; Cosmos Co. vs. Gray Eagle Co., 190 U. S. 301; Diamond Coal Co. vs. U. S., 223 U. S. 236; Ross vs. Day, 232 U. S. 117; U. S. vs. Omaha Indians, 253 U. S. 281; U. S. vs. Whitted, *supra*.

Where the right claimed is founded on a federal question, diversity of citizenship is immaterial. Elk vs. Wilkins, 112 U. S. 94.

affirmatively showing such facts and filed within the statutory period,[6] together with a bond, usually for five hundred dollars, running to the plaintiff, for costs; and, notice filed and served upon the adverse party.[7]

§ 291. Dismissal of Cause.

A cause, pending in a federal court, may be dismissed upon motion, or by the trial court, upon its own motion, at any time before its final disposition when it appears that it is not within the jurisdiction of the court,[8] or that it has been improperly or collusively brought for the purpose of creating a case cognizable therein or removable thereto.[9]

§ 292. Appeal. Federal Courts.

An appeal lies from the judgment of a federal district court to a circuit court of appeals within the proper judicial district[10] or it can be reviewed by appeal or writ of error direct to the Supreme Court of the United States[11] when it appears that the jurisdiction of the court is in issue or that the case involves the construction or application of the Constitution of the United States, or when he Consitution or law of a state is claimed to be in contravention of the Constitution of the United States.[12]

§ 293. Writ of Error.

A writ of error lies from a final decision, not necessarily of the supreme court of a state, but the highest court of a state in which a

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[6] Jud. Code, § 28; Tennessee vs. Union Bank, 152 U. S. 454; Montana Ore Co. vs. Boston & M. Co., 93 Fed. 274.

[7] Jud. Code, § 29. The filing of the bond, conditioned as provided, within the term fixed, is a condition precedent, and essential to the enjoyment of the right of removal. Thomas vs. Delta Co., 258 Fed. 758; see Nebb vs. Southern Ry. Co., 248 Fed. 618; Vadner vs. Vadner, 259 Fed. 614. The general rule of law is undoubtedly that if the case be a removable one, the mere filing of the bond and petition in the state court removes the case. Traction Co. vs. Saint Bernard Co., 196 U. S. 239; Iowa Ry. vs. Bacon, 236 U. S. 305. But written notice of the petition and bond for removal must be given the adverse party prior to the filing of the same. Hansford vs. Stone Co., 210 Fed. 185; Cropsey vs. Sun Ass'n., 215 Fed. 132. This is mandatory and imperative. Vadner vs. Vadner, *supra*. As to sufficiency of notice, see Lewis vs. Eri Co., 257 Fed. 868; Cropsey vs. Sun Ass'n., *supra*. Where a federal court has jurisdiction of the subject matter irregularity of removal may be waived. Handley-Mack Co. vs. Goachauy Co., 2 Fed. (2d) 435.

[8] Morris vs. Gilmer, 129 U. S. 315; Sleigleder vs. McQuestin, 198 U. S. 142; Newcomb vs. Burbank, 181 Fed. 334; Hare vs. Birkenfield, 181 Fed. 825; Jones vs. Casey-Hedges Co., 213 Fed. 47.

[9] Hawes vs. Oakland, 104 U. S. 450; Shreveport vs. Cole, 129 U. S. 36; Cotting vs. Kansas City Stockyards, 183 U. S. 113; Whitaker vs. Whitaker Co., 238 Fed. 939.

[10] Jud. Code, § 238; 2 Mason's U. S. Codes, p. 2103, § 345; Lish vs. Roff, 141 U. S. 661; Ayres vs. Polsdorfer, 187 U. S. 585; Spreckels Co. vs. McClain, 192 U. S. 397; Boston Co. vs. Gokey, 210 U. S. 155; Con. Textile Corp. vs. Dickey, 269 Fed. 944.

[11] McFadden vs. Mt. View Co., 97 Fed. 670, see 180 U. S. 533.

[12] Jud. Code, § 238; 2 Mason's U. S. Code, p. 2103, § 345; Harris vs. Rosenberger, 145 Fed. 449, rev'g. 136 Fed. 1001, *certiorari* denied, 203 U. S. 591. The decision appealed from must either be against the validity of a statute of the United States or authority exercised thereunder, or in favor of the validity of the statute of a state where repugnancy to the constitution or laws of the United States was raised. Jud. Code, § 237; 2 Mason's U. S. Code, p. 2091, § 344. If the jurisdiction of the district court as a federal court were the sole question involved, an appeal will lie only to the Supreme Court under the very terms of § 238 of the Judicial Code (Comp. St., § 1215). However, where another question than that of jurisdiction arises, although the question also is presented, an appeal properly is taken to the circuit court of appeals. Con. Textile Corp. vs. Dickey, *supra*, [10]. The act of February 13, 1925, 43 Stats. 935, 942, took away the right of appeal allowed by the fifth and sixth paragraphs of § 250 of the Jud. Code, 2 U. S. Comp. St., p. 1798, § 1227, from the court of appeals of the District of Columbia to the Supreme Court of the United States in certain enumerated cases as follows: "Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question. Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant."

decision of the suit could be had,[13] when it affirmatively, or by fair implication appears, that some federal question was involved which was necessary to the determination of the case; or the Supreme Court of the United States may require, by *certiorari*, or otherwise, that the matter be brought before it for review.[14]

§ 294. Controlling Decisions.

Decisions rendered by the United States Supreme Court in relation to questions arising under the provisions of the mining act are conclusive upon the state courts;[15] and those of the lower federal courts are entitled to great weight in determining federal questions.[16]

§ 295. Practice in State Courts.

When relief is afforded by the courts of a state, the rules of pleading and the methods of procedure of the state must be followed, yet the matters settled in mining cases should be under the provisions of the federal law, or the relief will be wholly inadequate and the determination would be of no advantage either to the litigants or to the government.[17]

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[13] Sullivan vs. Texas, 207 U. S. 416, aff'g. 95 S. W. 645.
The procedure on writs of error is applicable to appeals. Essgee vs. U. S. 262 U. S. 153; Ringling Bank vs. U. S., 32 Fed. (2d) 94.

[14] Jud. Code, § 237; 2 Mason's U. S. Code, p. 2091, § 344; Broughton vs. Exchange Bank, 104 U. S. 427; St. Louis Co. vs. Taylor, 210 U. S. 281.

[15] Gruwell vs. Rocca, 141 Cal. 417, 74 Pac. 1028. When a conflict exists between a decision of the Supreme Court of the United States and that of another appellate court regarding federal questions, the former prevails. Quigley vs. Gillett, 101 Cal. 462, 35 Pac. 1040; Foss vs. Johnstone, 158 Cal. 119, 110 Pac. 294; Stock vs. Plunkett, 181 Cal. 193, 183 Pac. 658; Duncan vs. Fulton, 15 Colo. A. 140, 61 Pac. 244; Nash vs. McNamara, 30 Nev. 114, 93 Pac. 405. It is the special prerogative of the former court to construe federal statutes. Mechanics vs. Coleman, 204 Fed. 24.

[16] Stock vs. Plunkett, *supra* [15] State vs. Hyde, 88 Or. 16, 169 Pac. 762.

[17] Iba vs. Central Ass'n., 5 Wyo. 360, 40 Pac. 527, 42 Pac. 20. See Leach vs. Peirson, 275 U. S. 120. Congress, while authorizing a suit upon an adverse claim, has no power to regulate the practice nor to prescribe the form of action in the state courts. Upton vs. Santa Rita Co., 14 N. M. 108, 89 Pac. 275; see 420 Co. vs. Bullion Co., Fed. Cas. 4989; 9 Nev. 240; Nome and Sinook Co. vs. Simpson, 1 Alaska 590; Altoona Co. vs. Integral Co., 114 Cal. 100, 45 Pac. 1047; Gruwell vs. Rocco, *supra* [15]. In Rose vs. Richmond Co., 17 Nev. 25, 27 Pac. 1105, aff'd. 114 U. S. 576, the court said: "Congress did not, by the passage of this act (Sec. 2326 Rev. St.), * * * confer any additional jurisdiction upon the state courts. The object of the law, as we understand it, was to reequire parties protesting against the issuance of a patent to go into the state courts of competent jurisdiction, and to institute such proceedings as they might, under the different forms of action therein allowed, elect and there try 'the right of possession' to such claim, and have the question determined. The acts of congress do not attempt to confer any jurisdiction not already possessed by the state courts, nor to prescribe a different form of action * * *. We are of the opinion that when the action is brought, whatever may be its character, it must be tried by the same rules, governed by the same principles and controlled by the same statutes that apply to such actions in our state courts irrespective of the acts of congress." The question of the right of possession determines simply as between the litigants which one has the superior right to the possession of the premises in dispute; and as the title of the land is in the government the judgment or decree does not affect the title, except in so far as it may be binding on or influence the land department. San Francisco Co. vs. Duffield, 201 Fed. 833; see Duffield vs. San Francisco Co., 205 Fed. 480; and, see, also, Perego vs. Dodge, 163 U. S. 168; Clipper Co. vs. Eli Co., 33 L. D. 667; Alice Placer vs. Addie Stevens Lodes, 3 Brainard Leg. Prac. 246. State courts adopt the forms of action by which the title to land is tried, and these may be ejectment or to quiet title, but the real question to be determined is who is entitled to possession. Murray vs. Polglase, 23 Mont. 414, 59 Pac. 439; see Garfield Co. vs. Hammer, 6 Mont. 53, 8 Pac. 153; Hoffman vs. Beecher, 12 Mont. 489, 31 Pac. 92. A suit to quiet title can not be maintained in the federal courts when the defendant is in possession of the property. Frost vs. Spitley, 121 U. S. 552; Scott vs. Neely, 140 U. S. 106; see Twist vs. Prairie Co., *supra* [2]; Smyth vs. Ames, 169 U. S. 516; S. P. R. Co. vs. Goodrich, 57 Fed. 879; Davidson vs. Calkins, 92 Fed. 230; New Jersey Co. vs. Gardener Co., 190 Fed. 861; Campbell vs. Farmers Co., 203 Fed. 571; Hyde vs. Redding, 74 Cal. 493, 16 Pac. 380, but such suit can be maintained in the state courts even though the defendant holds adverse possession. Boston Co. vs. Montana Co., 188 U. S. 632; Baum vs. Longwell, 200 Fed. 450; Davis vs. Crump, 162 Cal. 513, 123 Pac. 294. The proceedings in the federal courts are regulated by the provisions of section 2326 of the Revised Statutes. Shoshone Co. vs. Rutter, *supra* [1].

§ 296. Mandamus and Injunction.

Neither mandamus nor an injunction will lie against an officer of the land department to control him in discharging an official duty which requires the exercise of his judgment.[18]

§ 297. When Court Will Not Interfere.

Pending final action of the land department with respect to title to public lands, generally the state or federal court will not interfere, nor

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[18] Litchfield vs. Reg. & Rec., 76 U. S. 576; Marquez vs. Frisbie, *supra* (5); Riverside Oil Co. vs. Hitchcock, 190 U. S. 324; Ness vs. Fisher, 223 U. S. 683; Louisiana vs. McAdoo, 234 U. S. 634; Alaska Smokeless Co. vs. Lane, 250 U. S. 555, aff'g. 46 App. D. C. 443; Cameron vs. U. S., *supra* (5); Hall vs. Payne, 254 U. S. 343, aff'g. 48 App. D. C. 279; Wyoming vs. U. S., 255 U. S. 505; Work vs. Mosier, 261 U. S. 352, 50 App. D. C. 219, rev'g. 269 Fed. 871; Com. Solvent Co. vs. Mellon, 277 Fed. 551, and cases therein cited; Oregon Basin Co. vs. Work, 6 Fed. (2d) 676; Cameron vs. Bass, 19 Ariz. 252, 168 Pac. 647; Bank of Italy vs. Johnson, 200 Cal. 33, 251 Pac. 784, and cases therein cited. In the above cited federal cases it was sought to control and reverse rulings of the Secretary of the Interior, on the ground that he had in the administration of the land laws made a ruling contrary to law against an applicant for action by him. In each case it was held that as the statute intended to vest in the secretary the discretion to construe the land laws and make such rulings, no court could reverse nor control them by mandamus in the absence of anything to show that they were capricious or abritrary. It was pointed out that a mandamus could not be made to serve the function of a writ of error, and the mere fact that the court might deem the ruling erroneous in law gave it no power to intervene. All rest upon the case of Decatur vs. Paulding, 39 U. S. 497; *compare* U. S. vs. Babcock, 250 U. S. 328.

There is a class of cases in which a relator in mandamus has successfully sought to compel action by an officer who has discretion concededly conferred upon him by law. The relator in such cases does not ask for a decision in any particular way, but only that it may be made one way or the other. Work vs. Rives, 267 U. S. 184; U. S. vs. McVeagh, 214 U. S. 131; rev'g. 54 App. D. C. 84, 295 Fed. 225.

In Bank of Italy vs. Johnson, *supra*, the court said: "An important exception to the foregoing general rule is that if the facts as admitted or proved be susceptible of but one construction or conclusion the right to the writ becomes a matter of law and the officer may be compelled to act in accordance with the facts as admitted or established (Dufton vs. Daniels, 190 Cal. 577, and cases cited on page 581, 213 Pac. 491). Cases further illustrating the exception to the general rule are Inglin vs. Hoppin, 156 Cal. 483, 105 Pac. 582; Hammel vs. Neylan, 31 Cal. A. 21, 159 Pac. 618; Walker vs. Kingsbury, 36 Cal. A. 617, 173 Pac. 95."

It has been pointed out in *Ex parte* Virginia, 100 U. S. 339, that mandate is a flexible writ, whose use in modern times has been much extended. "It does not lie to control judicial discretion, except when that discretion has been abused, but it is a remedy when the case is outside of the exercise of this discretion, and outside of the jurisdiction of the court or officer to which or to whom the writ is addressed." In McDougall vs. Bell, 4 Cal. 179, the court said: "It is not now denied that mandamus may be resorted to by the superior tribunal to compel an inferior officer to do the act which is sought to be enforced, in all cases where the officer has no discretion, and when he is under obligation to do the specific act. * * * In such cases the writ is always liberally interposed for the benefit of the citizen and the advancement of justice." To the same effect see Tasker vs. Warmer 202 Cal. 450, 261 Pac. 474. See, also, Lane vs. Hoglund, 244 U. S. 182, citing Roberts vs. U. S., 176 U. S. 231.

It has often been adjudged that where the duty is purely ministerial, Roberts vs. U. S., *supra*; Noble vs. Union River Co., 147 U. S. 165, wherein is cited many cases and distinction drawn between them, mandamus may be issued to enforce performance. U. S. vs. McVeagh, *supra*; Ballinger vs. U. S. 216; Id. 240, citing Cornelius vs. Kessel, 128 U. S., 461; Orchard vs. Alexander, 157 U. S. 378; Payne vs. C. P. R. Co., 255 U. S. 228; aff'g. and mod'g. 46 App. D. C. 374 and following Ballinger vs. U. S., *supra*; U. S. vs. West, 30 Fed. (2d) 742, aff'd. with mod. in Wilbur vs. Krushnic, 280 U. S. 306; citing Roberts vs. U. S., *supra*; Lane vs. Hoglund, 244 U. S. 174; Payne vs. C. P. R. Co., *supra*; see, also, Barney vs. Dolph, 97 U. S. 656; Simmons vs. Wagner, 101 U. S. 261; American School vs. McNulty, 187 U. S. 94; Castle vs. Kapena, 5 Hawaii 37, *compare* Metson vs. O'Connell, 52 L. D. 313.

The writ of mandamus is not a writ of right and will issue only in the exercise of the sound discretion of the court. It will not issue where no right is shown to exist, nor will it issue to perpetrate a fraud. Garfield vs. U. S., 31 App. D. C. 332, or to perform the office of an appeal. Moore vs. Heandy, 34 App. D. C. 31, or writ of error, McFadden vs. Federal Comm., 37 Fed. (2d) 822, nor be perverted to serve the purpose of an ordinary suit. U. S. vs. Capital Co, 35 Fed. (2d) 1012; U. S. vs. Gongwer, 37 App. D. C. 555.

For instances of mandatory injunction to compel issuance of patent, see Work vs. Braffet, 19 Fed. (2d) 666, aff'd. 276 U. S. 560; U. S. vs. West, *supra*. See, generally, McCauley vs. Brooks, 16 Cal. 11; Inglin vs. Hoppin, 156 Cal. 489, 105 Pac. 582, 52 L. R. A. N. S. 416, note.

For distinction between mandamus and injunction see Castle vs. Kapena, *supra*.

entertain actions relating thereto.[19] But the courts have power to enforce contracts with reference to lands while title thereto is held by the government.[20]

§ 298. Effect of Patent.

The issuance of a patent, or such other act as passes the legal title from the government, is the final act of the land department and is the expression and entry of final judgment of the officers of that department; and this is the act that marks the termination of the jurisdiction of these officers and the beginning of the jurisdiction of the courts.[21]

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[19] Marquez vs. Frisbie, *supra* (5); U. S. vs. Schurz, 102 U. S. 378; Bishop vs. Gibbons, 158 U. S. 155; Cosmos Co. vs. Gray Eagle Co., 190 U. S. 301, aff'g. Cameron vs. U. S. *supra* (5); Wyoming vs. U. S., *supra* (18); Sullivan vs. Mammoth Oil Co., 22 Fed. (2d) 663; Low vs. Katalla Co., 40 L. D. 534; Warnekros vs. Cowan, 13 Ariz. 42, 108 Pac. 238; Potter vs. Randolph, 126 Cal. 458, 58 Pac. 906; LeFevre vs. Amonson, 11 Ida. 45, 81 Pac. 72; Tiernan vs. Miller, 69 Neb. 764, 96 N W. 661; see Phipps vs. Stancliff, 110 Or. 299, 214 Pac. 335, aff'd. 222 Pac. 328. A court, however, will intervene when there exists the necessity of preserving the peace or to determine controversies arising out of temporary rights in the public lands. Warnekros vs. Cowan, *supra*, or to prevent waste which will result in a serious and permanent injury to the land. Humbird vs. Avery, 110 Fed. 465; Lightner Co. vs. Superior Court, 14 Cal. A. 642, 112 Pac. 909; State vs. Hyde, *supra* (10); *but see* L. E. White Co. vs. Mendocino, 177 Cal. 715, 171 Pac. 801. In the absence of fraud or gross mistake, decisions of officers of the land department made within the scope of their authority upon questions of fact, or where questions of law and of fact are inseparably commingled can not be reviewed by the courts. But if by manifest mistake of law these officers deprive a man of his right, a court of equity will grant appropriate relief. West vs. Edward Rutledge Co., 210 Fed. 189; see El Paso Co. vs. McKnight, 233 U. S. 250, rev'g. 16 N. M. 721, 120 Pac. 694; Hoover vs. Salling, 110 Fed. 43; Saunders vs. Dutcher, 168 Cal. 353, 143 Pac. 599. See U. S. vs. West, *supra* (18).

In Fuller vs. Fuller, 176 Cal. 638, 169 Pac. 369, the court said: "The point that the state courts are without jurisdiction to determine conflicting claims to the possession of land after a homestead entry has been made is without merit. Gauthier vs. Morrison, 232 U. S. 7; Whittaker vs. Pendola, 78 Cal. 296; Thompson vs. Basler, 148 Cal. 646, 84 Pac. 161; 32 Cyc. 833."

[20] Marquez vs. Frisbie, *supra* (5); Isaacs vs. DeHon, *supra* (18); Pappe vs. Trout, 3 Okla. 260, 269, 41 Pac. 399.

[21] Moore vs. Robbins, 96 U. S. 533; Brown vs. Hitchcock, 173 U. S. 473; Bockfinger vs. Foster, 190 U. S. 116; see, also, Peyton vs. Desmond, 129 Fed. 1, and cases therein cited.

CHAPTER XII.

LOCAL RULES, REGULATIONS AND CUSTOMS.

§ 299. Local Rules, Regulations and Customs.

The basic principle of the rules, regulations and customs of miners are discovery, appropriation and development.[1] They were introduced into California by the early miners, who obtained them from various foreign sources.[2] The absence of all statutory law regulating mining and the use of water upon the public domain was the cause of their establishment.[3]

§ 300. Common Law of Mining.

They were in their general features adopted throughout all the mining regions of the United States, and are deemed the common law of mining within the United States.[4] Their binding force is recognized by the national and state legislatures,[5] the decisions of the courts and of the land department.[6] They now are practically superseded by legislative enactments, although miners still are permitted, in their respective districts,[7] to make rules and regulations, and to adopt customs not in conflict with paramount law,[8] and, while in force, must

[1] Jennison vs. Kirk, 98 U. S. 453; Morton vs. Solambo Co., 26 Cal. 527.

[2] Yale on Mining Claims and Water Rights, 58.

[3] Id. Morton vs. Solambo Co., *supra* (1).

[4] King vs. Edwards, 1 Mont. 235; see Morton vs. Solambo Co., *supra* (1). The customs of any particular mining district have the force and effect of laws, or, in other words, are laws. King vs. Edwards, *supra*; Mallett vs. Uncle Sam Co., 1 Nev. 188.

[5] St. Louis Co. vs. Kemp, 104 U. S. 636; Chambers vs. Harrington, 111 U. S. 350. Morton vs. Solambo Co., *supra* (1); Gropper vs. King, 4 Mont. 367, 1 Pac. 755. In 1851 it was provided by statute in California that, "In actions respecting mining claims, proof shall be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claims; and such customs, usages or regulations when not in conflict with the constitution and laws of this state, shall govern the decision of the action. Stats. 1851, p. 149; Cal. Code of Civil Procedure, § 748. A similar provision may be found in Montana 3 Rev. Codes, p. 307, § 9499.

[6] Jennison vs. Kirk, *supra* (1); Jackson vs. Roby, 109 U. S. 440; Parley's Park Co. vs. Kerr, 130 U. S. 256; Glacier Co. vs. Willis, 127 U. S. 471; Gillis vs. Downey, 85 Fed. 486. The courts have always sustained rights that grew up under the district rules and customs. Boggs vs. Merced Co., 14 Cal. 378; St. John vs. Kidd, 26 Cal. 272; Lux vs. Haggin, 69 Cal. 383, 10 Pac. 674. See Johnson vs. McLaughlin, 1 Ariz. 493, 4 Pac. 130. As to the manner of formation of mining districts, see Morton vs. Solambo Co., *supra* (1).

[7] Jennison vs. Kirk, *supra* (1); Del Monte Co. vs. Last Chance Co., 171 U. S. 55; Creede Co. vs. Uinta Co., 196 U. S. 346; aff'g. 119 Fed. 1164; Yosemite Co. vs. Emerson, 208 U. S. 29, aff'g. 149 Cal. 50, 85 Pac. 122; Doe vs. Waterloo Co., 70 Fed. 459; aff'g. 55 Fed. 11; County of Kern vs. Lee, 129 Cal. 362, 61 Pac. 1124; O'Donnell vs. Glenn, 8 Mont. 248, 19 Pac. 302. Under the express provisions of the California mining act the mining district or the rules and regulations thereof within that state are not in any manner to be construed as thereby affected or abolished. Civil Code, § 1426*r*. It is not necessary in order to acquire title to mining claims that mining districts should be organized and local rules and regulations adopted, but in the absence of local rules (state or district) compliance with the United States statutes is sufficient. Golden Fleece Co. vs. Cable Con. Co., 12 Nev. 323; see, also, Haws vs. Victoria Co., 160 U. S. 303; Dwinnell vs. Dyer, 145 Cal. 18, 78 Pac. 247; Stock vs. Plunkett, 181 Cal. 193, 183 Pac. 657; Anderson vs. Caughey, 3 Cal. A. 22, 84 Pac. 223; McKay vs. McDougall, 25 Mont. 258, 64 Pac. 669; see Sears vs. Taylor, 4 Colo. 38.

[8] Butte City Co. vs. Baker, 196 U. S. 119, aff'g. 28 Mont. 222, 72 Pac. 617; Clason vs. Matko, 223 U. S. 646, aff'g. 10 Ariz. 175, 85 Pac. 721; Northmore vs. Simmons, 97 Fed. 386; Wright vs. Killian, 132 Cal. 56, 64 Pac. 98; Riborado vs. Quang Pang Co., 2 Ida. 144, 6 Pac. 125; Mallett vs. Uncle Sam Co., *supra* (4). When the local rules and customs of a mining district are not in conflict with the

be complied with if valid, and penalty for non-observance is provided.[9] In the absence of proof of their existence it is presumed that none exist.[10]

§ 301. When Void.

When the district rules, regulations and customs are unreasonable, in conflict with the higher law,[11] fall into disuse or are generally disregarded, they are void.[12]

§ 302. Construction.

A miner's rule is subject to the same rule of construction as a statute, although it does not, like a statute,[13] acquire validity by its mere enactment,[14] as its validity depends upon the customary obedience and acquiescence of the miners of the district.[15]

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mining act such rules and customs become part of the law of the land and when complied with in the location of mining ground, a grant from the government follows and title vests in the locator. Gropper vs. King, *supra* (5); Lockhart vs. Rollins, 2 Ida. 540, 21 Pac. 413. The customs, usages and regulations accepted by the miners of a particular district are binding only as to possessory rights within that district, and they must be proved as facts. Lux vs. Haggin, *supra* (6). See, also, Gird vs. California Oil Co., 60 Fed. 534.

[9] Butte City Co. vs. Baker, *supra* (5); Clason vs. Matko, *supra* (8). Whether the law is in force at any given time is for the jury. Harvey vs. Ryan, 42 Cal. 626; King vs. Edwards, *supra* (4). No forfeiture follows noncompliance unless the rules or local laws expressly so provide. Jupiter Co. vs. Bodie Con. Co., 11 Fed. 666; Last Chance Co. vs. Bunker Hill Co., 131 Fed. 579; Zerres vs. Vanina, 134 Fed. 610; aff'd. 150 Fed. 564; Wailes vs. Davies, 158 Fed. 667; Sturtevant vs. Vogel, 167 Fed. 448; Clark-Montana Co. vs. Butte & S. Co., 233 Fed. 555, aff'd. 248 Fed. 609, aff'd. 249 U. S. 12; Rush vs. French, 1 Ariz. 99, 25 Pac. 816; Johnson vs. McLaughlin, 1 Ariz. 493, 4 Pac. 130; Stock vs. Plunkett, *supra* (); Emerson vs. McWhirter, 133 Cal. 510, 65 Pac. 1036; Yosemite Co. vs. Emerson, *supra* (7); Ford vs. Campbell, 29 Nev. 578, 92 Pac 206. It will be presumed that a party in possession of a mining claim holds it in accordance with the local law or rule. Robertson vs. Smith, 1 Mont. 410; see Anderson vs. Caughey, *supra* (7).

See § 309.

[10] Doe vs. Waterloo Co., *supra* (7); Anderson vs. Caughey, *supra* (7); McKay vs. McDougall, *supra* (7); Golden Fleece Co. vs. Cable Con. Co., *supra* (7). If the local rules and regulations are not produced and admitted in evidence they can not be considered. Meydenbauer vs. Stevens, 78 Fed. 791.

[11] Haws vs. Victoria Co., *supra* (7). As to rules and customs invalid because inconsistent with the paramount law or because unjust or unreasonable see Woodruff vs. North Bloomfield Co., 18 Fed. 763; Butler vs. Good Enough Co., 1 Alaska 246; Price vs. McIntosh, 1 Alaska 286; Woody vs. Barnard, 69 Ark. 579, 65 S. W. 100; Prosser vs. Parks, 18 Cal. 47; Table Mt. Co. vs. Stranahan, 21 Cal. 548; Strang vs. Ryan, 46 Cal. 34; Original Co. vs. Winthrop, 60 Cal. 678; Cleary vs. Skiffich, 28 Colo. 362, 65 Pac. 59; Penn vs. Oldhauber, 24 Mont. 287, 61 Pac. 649. Instances of valid rules are as follows, limiting the width of a lode claim to twenty-five feet on each side of the middle of a vein or lode. North Noonday Co. vs. Orient Co., 1 Fed. 527; Jupiter Co. vs. Bodie Con. Co., *supra* (9); Prosser vs. Parks, 18 Cal. 47, aff'g. 17 Cal. 107, that a placer claim may be limited to eighty rods in length, Rosenthal vs. Ives, 2 Ida. 244, 12 Pac. 906; see Parley's Park Co. vs. Kerr, *supra* (6); requiring a shaft to be sunk to a depth of ten feet within ninety days of location. Northmore vs. Simmons, *supra* (8); *but compare* Original Co. vs. Winthrop, *supra*; prescribing the time to be allowed for tracing the course of the vein or lode before the surface claim is defined and allowing a reasonable time for such tracing. Gleeson vs. Martin White Co., 13 Nev. 460; providing that all records of mining claims shall contain certain stated matters, Gregory vs. Pershbaker, 73 Cal. 118, 14 Pac. 401.

But mining laws can not restrict the quantity of ground or number of claims which a party may acquire by purchase. Prosser vs. Parks, *supra*.

[12] Parley's Park Co. vs. Kerr., *supra* (6); Harvey vs. Ryan, *supra* (9); Poujade vs. Ryan, 21 Nev. 659, 33 Pac. 659. The fact that a mining rule was adopted and kept on foot as the law for a considerable period of time would be *prima facie* evidence that it was in force at one time, and being in force once a presumption would arise that it continued in force until it is shown to have fallen into disuse and another practice generally adopted and followed. North Noonday Co. vs. Orient Co., *supra* (11); Jupiter Co. vs. Bodie Con. Co., *supra* (9).

[13] Rush vs. French, *supra* (9).

[14] Harvey vs. Ryan, *supra* (9); see Haws vs. Victoria Co., *supra* (7).

[15] The local rule depends for its validity upon the customary obedience and acquiescence of the miners following its enactment, and it becomes void whenever it falls into disuse or generally is disregarded. North Noonday vs. Orient Co., *supra* (11); Harvey vs. Ryan, *supra* (9); see Haws vs. Victoria Co., *supra* (7).

§ 303. Proof.

Courts do not take judicial notice of miners' rules, regulations and customs.[16] The proof of their existence is governed by the ordinary rules of evidence.[17] In a legal sense there is no distinction between a written rule or regulation and a custom or usage.[18] The common law doctrine as to customs does not prevail.[19] It is a question of fact whether or not a given rule, regulation or custom is in force.[20] When introduced in evidence they are to be construed by the court.[21]

§ 304. Noncompliance With Local Rules.

The federal mining law does not require a record of a mining location.[22] If such record is required either by local statute or local rule such record is obligatory.[23] If not so required it is inadmissible as evidence of location.[24]

§ 305. No Forfeiture

The failure to comply with any one of the mining rules and regulations or the provisions of a state mining law is not a forfeiture of a title unless it is expressly provided therein that a failure to comply therewith shall work a forfeiture.[25]

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[16] See *supra* (5); Butte City Co. vs. Baker, *supra,* (8); Meydenbauer vs. Stevens, *supra* (10); Sullivan vs. Hense, 2 Colo. 424. See 12 Ann. Cas. 433.

[17] Orr vs. Haskell, 2 Mont. 225; English vs. Johnson, 17 Cal. 107; Sears vs. Taylor, *supra* (7). A regulation of miners within a mining district may be evidenced by a written rule or by a specific custom, though not in writing. Doe vs. Waterloo Co., *supra* (7); Harvey vs. Ryan, *supra* (9). If the rule or regulation be in writing it must be proved by the books. Campbell vs. Rankin, 99 U. S. 261; Doe vs. Waterloo Co., *supra;* Pralus vs. Pacific Co., 35 Cal. 30. In Roberts vs. Wilson, 1 Utah 292, it is said: "In order to introduce the written local mining laws of a district, it is necessary that it should appear *aliunde* that the copy comes from the proper repository, and that such party was empowered to give certified copies so as to become evidence, and that such was a copy of the laws prevailing and in force in the district at the required date. These things have not been, and could not be, shown by the certificate attached to the alleged laws. Nor is there any authority for showing them by affidavit. This could only be done by express statute, and no such statute exists. In attempting to prove these facts the opposite party is entitled to his right of cross examination from which he is cut off if *ex parte* affidavits are sufficient." Flaherty vs. Gwinn, 1 Dak. 509.

[18] Doe vs. Waterloo Co., *supra* (7); Harvey vs. Ryan, *supra* (9); Flaherty vs. Gwinn, *supra* (17).

[19] Smith vs. North American Co., 1 Nev. 427.

[20] North Noonday Co. vs. Orient Co., *supra* (11); Jupiter Co. vs. Bodie Con. Co., *supra* (9).

[21] Fairbanks vs. Woodhouse, 6 Cal. 435; Ralston vs. Plowman, 1 Ida. 595; see Rush vs. French, *supra* (9).

[22] Haws vs. Victoria, *supra* (7); Zerres vs. Vanina, *supra* (9); Miller vs. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444.

[23] Haws vs. Victoria Co., *supra* (7); Walton vs. Wild Goose Co., 123 Fed. 209; Daggett vs. Yreka Co., 149 Cal. 357, 86 Pac. 968; McCleary vs. Broaddus, 14 Cal. A. 60, 111 Pac. 125; Indiana Co. vs. Gold Hills Co., 35 Nev. 158, 126 Pac. 967; ***but see*** Stock vs. Plunkett, *supra* (7).

[24] Golden Fleece Co. vs. Cable Con. Co., *supra* (7).

[25] Yosemite Co. vs. Emerson, *supra* (7); Stock vs. Plunkett, *supra* (7); see *supra,* note 9; *but see* Sisson vs Sommers, 24 Nev. 379, 55 Pac. 830.

See § 309.

CHAPTER XIII.

SUPPLEMENTAL STATE LEGISLATION.

§ 306. Congressional Assumption.

Congress took it for granted that the states and territories had the power to legislate on the matter of regulating mining claims; and state statutes, not in conflict with congressional legislation, may enlarge requirements for the location of mining claims.[1] But such supplementary enactments are of no more force and effect than miners' rules, regulations and customs;[2] both are authorized by the one federal statute and are but another form of expressing local rules, regulations and customs.[3]

Subsidiary state legislation has been held to be constitutional.[4]

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[1] U. S. vs. Sherman, 288 Fed. 197; O'Donnell vs. Glenn, 8 Mont. 258, 19 Pac. 302; aff'd. 9 Mont. 452, 23 Pac. 1018; see Ferris vs. McNally, 45 Mont. 20, 121 Pac. 889; Northmore vs. Simmons, 97 Fed. 386. "It is insisted that the disposal of the public lands is an act of legislative power and that it is not within the competency of a legislature to delegate to another body the exercise of this power; that congress alone has the right to dispose of the public lands and can not transfer its authority to any state legislature or other body. The authority of congress over the public lands has been granted by Section 3, Article V of the Constitution, which provides that 'the congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' In other words, congress is the body to which is given the power to determine the conditions upon which the public lands may be disposed of.

"The nation is an owner and has made congress the principal agent to dispose of its property. Is it conceivable that congress, having regard to the interests of this owner, shall, after prescribing the main and substantive conditions of disposal, believe that those interests will be subserved if minor and subordinate regulations are entrusted to the inhabitants of the mining district or state in which the particular lands are situate? While the disposition of these lands is provided for by congressional legislation, such legislation savors somewhat of mere rules prescribed by an owner of property for its disposal. It is not of a legislative character in the highest sense of the term, and as an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion, so it would seem that congress might rightfully entrust to the local legislature the determination of minor matters respecting the disposal of these lands." * * * "If congress had power to delegate to a body of miners the making of additional regulations respecting locations, it can not be doubted that it has equal power to delegate similar authority to a state legislature." Butte City Co. vs. Baker, 196 U. S. 125 aff'g. 28 Mont. 222, 72 Pac. 617. In Black vs. Elkhorn Co., 49 Fed. 549, the court held that while the location was unpatented the right to dower existed; that when application for patent was made by the successors in interest of the locator, the widow loses the right of dower by failure to adverse. The case was criticised on this point in 52 Fed 859, although affirmed on other grounds. The case went up to the United States Supreme Court, see 163 U. S. 445, and that court held that no dower right exists in an unpatented mining claim.

[2] Last Chance Co. vs. Bunker Hill Co., 131 Fed. 579; Clark-Montana Co. vs. Butte & S. Co., 233 Fed. 555, aff'd. 248 Fed. 609, aff'd. 249 U. S. 12; Stock vs. Plunkett, 181 Cal. 193, 183 Pac. 657.

[3] 1 Lindl. Mines (3d ed.), p. 83, § 46.

[4] Butte City Co. vs. Baker, *supra* [1], followed in Clason vs. Matko, 223 U. S. 646, aff'g. 10 Ariz. 175, 85 Pac. 721; Preston vs. Hunter, 67 Fed., 996; Northmore vs. Simmons, *supra* [1]; Mares vs. Dillon, 30 Mont. 117, 75 Pac. 963. "The Montana statute (Montana Codes Ann., Sec. 3612) among other supplementary regulations provided that the declaratory statement filed in the office of the clerk of the county in which the lode or claim is situate must contain 'the dimensions and location of the discovery shaft or its equivalent sunk upon lode or placer claims' and 'the location and description of each corner with the markings thereon.' A failure to comply with these regulations was the ground upon which the Supreme Court of Montana held the location invalid. It is contended that these provisions are too stringent and conflict with the liberal purpose manifested by congress in its legislation respecting mining claims. We do not think they are open to this objection. They certainly do not conflict with the letter of any congressional statute. On the contrary, are rather suggested by section 2324. It may well be that the state legislature in its desire to guard against false testimony in respect to a location deemed it important that full particulars in respect to the discovery shaft and the corner posts should be at the very beginning placed of record." Butte City Co. vs. Baker, *supra*.

§ 307. State Mining Laws.

With the exception of Texas[5] all of the mining states and the territory of Alaska[6] have passed laws auxiliary to the federal mining act.[7] Such statutes provide for the acts effectuating the location of a mining claim, the time within which the same shall be performed, the contents and place of posting of the notice upon the claim, the time for recording the location, and, in some instances, a penalty for nonperformance of required acts. These statutes also provide for the recording of an affidavit of annual expenditure,[8] the legal effect to be given thereto[9] and, in some instances, a means of establishing record evidence of a demand for contribution for assessment work, from a delinquent co-owner.[10]

While congress has not yet seen proper to put any limitation on the minimum size or the number of mining claims that one person or a corporation may locate or acquire,[11] excepting in Alaska,[12] the states are not inhibited from doing so. Hence a state law, or local rule, regulation or custom, limiting the area of a mining location is not in conflict with the federal mining law; is a reasonable one and entirely in harmony with the spirit of that law. So, a local law or rule may diminish the surface width of a location from three hundred feet on each side of the middle of the vein to twenty-five feet;[13] or limit a placer claim

[5] 15 Vernon's Tex. St., Art. 5388 *et seq.* For Texas oil and gas act see Id. Art. 5338 *et seq.*

[6] Sess. Laws, 1915, p. 11 *et seq.*; Sess. Laws, 1927, p. 135 *et seq.*

[7] Costigan Min. Law, p. 21, §§ 4 and 21. The right of the state to pass acts supplementing the mining act of congress in respect to the location of mining claims is recognized in the following language of § 2324 Rev. Stat. of the United States, to wit: "The miners of each mining district may make regulations not in conflict with the laws of the United States or with the laws of the state or territory where the district is situated, governing the location, manner of recording, * * * of a mining claim" subject to the requirements imposed by congress. This right also was recognized in Erhart vs. Boaro, 113 U. S. 527; see, also, Shoshone Co. vs. Rutter, 177 U. S. 505; Butte City Co. vs. Baker, *supra* (1); Clason vs. Matko, *supra* (4); Mares vs. Dillon, *supra* (4); Copper Globe Co. vs. Allman, 23 Utah 410, 64 Pac. 1019.

[8] Book vs. Justice Co., 58 Fed. 106; McCullough vs. Murphy, 125 Fed. 150; McGinnis vs. Egbert, 8 Colo. 41, 5 Pac. 652; Coleman vs. Curtis, 12 Mont. 301, 30 Pac. 266; Davidson vs. Bordeaux, 15 Mont. 245, 38 Pac. 1075.

A law requiring the notice of location of a mining claim to be "on oath" held a proper exercise of the power of the state legislature. McCowan vs. McClay, 16 Mont. 234, 40 Pac. 602.

[9] Book vs. Justice Co., *supra* (8). Big Three Co. vs. Hamilton, 157 Cal. 130, 107 Pac. 301; Coleman vs. Curtis, *supra* (8). "A location and its record are different things. The federal and most state statutes distinguish between them, the former even in authorizing local rules 'governing the location' and 'manner of recording * * *.' The statutory object is to protect and reward discoverers of mines. Discovery with intent to claim is the principal thing and vests an estate an immediate fixed right of present and exclusive enjoyment in the discoverer. The *record is incidental machinery* to secure to the discoverer his reward and to give notice to others.

"The spirit of all recordation acts is notice to protect others against secret equities. If the record is not necessary to create the estate (as it is in the matter of homestead exemptions and mechanics' liens), the statute providing for recording is but a *direction* to do certain acts and does not create conditions subsequent; *and if the statute provides no forfeiture* for *failure to record by statute the estate is not divested.* Recordation of mining locations can not be a condition precedent, for the estate arises before recordation is to be performed." Clark-Montana Co. vs. Butte & S. Co., *supra* (2).

[10] Arizona Rev. St. 1913, p. 1354, § 4042; California C. C., § 1426*o*; Nevada Rev. Laws 1912, p. 736, § 2432; Oregon Laws 1903, p. 326.

[11] North Noonday Co. vs. Orient Co., 1 Fed. 527; Jupiter Co. vs. Bodie Con. Co., 11 Fed. 666. The mining right is an integral one. It is secured by a single location. The fact that one individual company or corporation locates or acquires many such claims is wholly unimportant. Congress has never yet seen proper to put a limit on the number of such claims that one individual company or corporation may locate or acquire. St. Louis Co. vs. Kemp, 104 U. S. 636; Carson City Co. vs. North Star Co., 73 Fed. 597; O'Connell vs. Pinnacle Co.., 131 Fed. 106; Last Chance Co. vs. Bunker Hill Co., *supra* (2); U. S. vs. Brookshire Oil Co., 242 Fed. 721; Con. Mutual Oil Co., 245 Fed. 523; U. S. vs. California Midway Oil Co., 259 Fed. 351; U. S. vs. Dominion Oil Co., 264 Fed. 955.

[12] 5 U. S. Comp. St., p. 6026, § 5058.

[13] Northmore vs. Simmons, *supra* (1); see Parley's Park Co. vs. Kerr, 130 U. S. 261, aff'g. 3 Utah 235; Lakin vs. Dolly, 53 Fed. 337; Silver Bow Co. vs. Clark, 5 Mont. 409, 5 Pac. 574.

to eighty rods in length[14] or limit an association placer claim to forty acres[15] or limit the number of locations which may be made by the same person within a given time[16] or limit the locator to one lode location, except it be the first location; in which event an additional location may perhaps be made by him.[17]

§ 308. Conformity.

As a general rule the location of a valid mining claim under the federal statute must be made in conformity with any valid state legislation that may exist in the particular state within which the mineral land is situated, as well as with any valid existing rules and regulations of the mining district.[18]

§ 309. Effect of Nonconformity.

Noncompliance with the requirements of a local mining law should not work a forfeiture of title in the absence of a penalty for such omission, for where no penalty is affixed.[19] such provisions are directory merely and designed as a rule of evidence to determine the rights of an adverse claimant of the premises in a subsequent location.[20]

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[14] Rosenthal vs. Ives, *supra* (11); see St. Louis Co. vs. Kemp, 104 U. S. 651; Erhardt vs. Boaro, *supra* (7); North Noonday Co. vs. Orient Co., *supra* (11). In Alaska association placer claims can not exceed forty acres in extent and the annual assessment work of one hundred dollars must be done upon each twenty acres or fractional part thereof. Sess. Laws 1927, p. 135.

[15] Sess. Laws 1927, p. 135 (Alaska).

[16] 5 U. S. Comp. St., p. 6026, § 5058 (Alaska).

[17] B. & C. Codes, § 3974 (Oregon).

[18] Kendall vs. San Juan Co., 144 U. S. 664; Nevada Sierra Oil Co. vs. Home Oil Co., 98 Fed. 678; Ferris vs. McNally, *supra* (1); see Erhardt vs. Boaro, *supra* (7); Creede Co. vs. Uinta Co., 196 U. S. 337, aff'g. 119 Fed. 164; McCullough vs. Murphy, *supra* (8); Zerres vs. Vanina, 134 Fed. 6177; Saxton vs. Perry, 47 Colo. 263; 107 Pac. 281; Sisson vs. Sommers, 24 Nev. 379, 55 Pac. 829; Copper Globe Co. vs. Allman, *supra* (7); Knutson vs. Fredlund, 56 Wash. 634, 106 Pac. 201. The federal mining law provides that in the location of mining claims there must be not only compliance with the laws of the United States, but with "state, terriorial and local regulations." The rule as supported by decisions of courts is that the requirements of state statutes are inoperative only when they conflict with the United States statutes; and the failure to comply with a state or territorial statute renders a mining location destitute of legal sufficiency and leaves a valid location subsequent in time prior and superior to an older location when the locator thereof failed to comply with the state or territorial statute. Butte & S. Co. vs. Clark-Montana Co., *supra* (2); Butte City Co. vs. Baker, *supra* (1). Many territories and states, Colorado among the number, have made provisions in respect to the location other than the mere making of the boundaries of the claim. So before a location in those states is perfect, all the provisions of the state statute as well as of the federal must be complied with, for location there does not consist of a single act. Creede Co. vs. Uinta Co., *supra*.

[19] Stock vs. Plunkett, *supra* (2); Dripps vs. Allison's Co., 45 Cal. A. 95, 187 Pac. 452. In County of Kern vs. Lee, 129 Cal. 369, 61 Pac. 1124, the court adhered to the doctrine of McGarrity vs. Byington, 12 Cal. 426, cited in Jupiter Co. vs. Bodie Con. Co., *supra* (11); Bell vs. Bed Rock Co., 36 Cal. 219, that in the absence of a state or district requirement the failure to record the notice of location does not affect the validity of the location; and in the case of Daggett vs. Yreka Co., 149 Cal. 360, 86 Pac. 968, it was again held that, in the absence of a statute or local miners' law requiring the recording of a notice, the recording does not constitute in itself a location of any part of a legal location of the claim. In Last Chance Co. vs. Bunker Hill Co., *supra* (2), the court held that the failure of the locator of the Bunker Hill claim to record his notice of location within the time prescribed by the Idaho statute did not work a forfeiture of the claim, there being no such penalty affixed by the statute. To the same effect see Zerres vs. Vanina, *supra* (18); Ford vs. Campbell, 29 Nev. 578, 92 Pac. 206; Gibson vs. Hjul, 32 Nev. 360, 108 Pac. 759; Indiana Co. vs. Gold Hills Co., 35 Nev. 158, 126 Pac. 967. Of similar import are Johnson vs. McLaughlin, 1 Ariz. 493, 4 Pac. 130, and Rush vs. French, 1 Ariz. 99, 25 Pac. 816. In Yosemite Co. vs. Emerson, 208 U. S. 30, aff'g. 149 Cal. 50, 85 Pac. 122, upholding the rule stated, the court declined to pass upon the question. See Butte & S. Co. vs. Clark-Montana Co., *supra* (2); Smart vs. Staunton, 29 Ariz. 1, 239 Pac. 514, *but see* Ringling vs. Mahurin, 59 Mont. 38, 197 Pac. 829, and see Hedrich vs. Lee, 39 Ida. 42, 227 Pac. 27.

[20] Last Chance Co. vs. Bunker Hill Co., *supra* (2); Zerres vs. Vanina, *supra* (18); Sturtevant vs. Vogel, 167 Fed. 449; Sharkey vs. Candiani, 48 Or. 112, 85 Pac. 222; see Erhardt vs. Boaro, *supra* (18); Butte City Co. vs. Baker, *supra* (1); Wailes vs. Davies, 158 Fed. 667; Rosenthal vs. Ives, *supra* (11); Ford vs. Campbell, *supra*. (19)

Where a penalty is attached for nonobservance of such a provision it is mandatory, and a failure to substantially comply therewith fatal to the valid initiation or maintenance of title to the location;[21] yet without such penalty being provided for in the mining law a failure to comply with its provisions has been held mandatory.[22]

§ 310. Perfecting the Location.

The local statutes universally provide a period of time for the performance of the acts necessary to complete a location.[23] The purpose of this provision is to protect the locator in the possession of the claim until sufficient excavation and development can be made so as to disclose whether or not a vein or lode or other deposit of mineral of sufficient richness exists as to justify the location.[24]

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[21] Marshall vs. Harney Peak Co., 1 S. Dak. 350, 47 N. W. 290; Cunningham vs. Pirrung, 9 Ariz 288, 80 Pac. 229; Clason vs. Matko, *supra* (4); U. S. vs. Sherman, *supra* (1); Winters vs. Burkland, 123 Or. 137, 260 Pac. 231.

[22] Kendall vs. San Juan Co., 144 U. S. 658; Baker vs. Butte City Co., *supra* (1); Buckeye Co. vs. Powers, 43 Ida. 532, 257 Pac. 835; Sharkey vs. Candiani, *supra* (20); Purdum vs. Laddin, 23 Mont. 387, 59 Pac. 154; Hahn vs. James, 29 Mont. 1, 73 Pac. 965; Dolan vs. Passmore, 34 Mont. 277, 85 Pac. 1035; Sisson vs. Sommers, 24 Nev. 379, 55 Pac. 829; see Ford vs.. Campbell, *supra* (19); Ringling vs. Mahurin, *supra* (16); Upton vs. Santa Rita Co., 14 N. M. 96, 59 Pac. 153; Lockhart vs. Willis, 9 N. M. 344, 54 Pac. 336; Lockhart vs. Johnson, s. c. sub. nom., 181 U. S. 576; Deeney vs. Mineral Creek Co., 11 N. M. 279, 67 Pac. 724; Wright vs. Lyons, 45 Or. 167, 77 Pac. 81. See, generally, *supra*, note 21. Judge Hawley in Zerres vs. Vanina, *supra* (15) says: "Is the state statute which requires the certificate of location to be recorded within 90 days after posting notice of location mandatory? Does the failure so to record make the location void? *The statute does not in terms so provide.* The language of the statute is that any 'record of the location of a lode mining claim, which shall not contain all the requirements made in this section shall be void.' These requirements are specifically numbered one to six, inclusive, and the failure of the record to show that these requirements have been substantially complied with makes the record void. While the statutes of this state prescribe the *time* within which the record must be made, and are *mandatory* on the question *of a record in the first instance*, they are *directory* merely in so far as they relate to the time for making the record, provided no adverse rights have intervened in the meantime * * * and even when adverse rights have intervened unless they are founded upon a valid location, and compliance with the law, they will be of no avail * * *. *In the absence of any provision in the statute prescribing a forfeiture for failure to record* a claim within a specified time a locator who is in the actual possession and working his claim will be protected in the same, although he failed to record his location within the time required by the statute of the state or the rules of the mining district."

[23] Erhardt vs. Boaro, *supra* (7); Butte & S. Co. vs. Clark-Montana Co., *supra* (2); Northmore vs. Simmons, *supra* (1); Tonopah Co. vs. Tonopah Co., 125 Fed. 389; Last Chance Co. vs. Bunker Hill Co., *supra* (2); Porter vs. Tonopah Co., 133 Fed. 756, aff'd. 146 Fed. 385, *certorari* denied 207 U. S. 586, Zerres vs. Vanina, *supra* (15); Dripps vs. Allison's Co., *supra* (19); Omar vs. Soper, 11 Colo. 380, 18 Pac. 443; Ingemarson vs. Coffey, 41 Colo. 407, 92 Pac. 908; Sanders vs. Noble, 22 Mont. 110, 55 Pac. 1037; Gleeson vs. Martin White Co., 13 Nev. 444; Patterson vs. Tarbell, 26 Or. 29, 37 Pac. 76; Winters vs. Buckland, *supra* (21); Copper Globe Co. vs. Allman, *supra* (7).

[24] Erhardt vs. Boaro, *supra* ( ); Tonopah Co. vs. Tonopah Co., *supra* (23); Porter Co. vs. Tonopah Co., *supra* (23); Omar vs. Soper, *supra* (23); Ingemarson vs. Coffey, *supra* (23); Burke vs. McDonald, 3 Ida. 296, 29 Pac. 98; Thompson vs. Barton Gulch Co., 63 Mont. 190, 207 Pac. 113; Sanders vs. Noble, *supra* (23); Marshall vs. Harney Peak Co., 1 S. Dak. 350, 47 N. W. 290; *but see* Deeney vs. Mineral Creek Co., *supra* (22).

CHAPTER XIV.

FEDERAL MINING STATUTES.

§ 311. Federal Statutes Affecting Mineral Lands.

The initial mining statute was passed on July 26, 1866,[1] and was followed by the amendatory and supplemental act of July 9, 1870.[2] The act of 1866 remained in force for six years[3] and the act of 1870 for less than two years, both being superseded by the act of May 10, 1872,[4] and is the statute in force at the present time. An act modify-

[1] 14 Stats. 251; Del Monte Co. vs. Last Chance Co., 171 U. S. 55; Cosmos Co. vs. Gray Eagle Co., 104 Fed. 47; aff'd. 112 Fed. 4; aff'd. 190 U. S. 301. The policy of the government has been to recognize the rights of discoverers of valuable mineral deposits to appropriate for mining purposes the ground embracing their discoveries, and to extract therefrom ores and precious metals without rendering any account to the government. A great deal of mining ground was appropriated and exhausted without interference by the government, before congress enacted any law granting mining privileges or providing for the acquisition of titles to mining ground. The failure of the government to prohibit mining operations upon the public domain was understood as an implied license; and the miners were not treated as trespassers. Forbes vs. Gracey, 94 U. S. 762; N. P. R. Co. vs. Sanders, 499 Fed. 129; O'Connell vs. Pinnacle Co., 131 Fed. 109; U. S. vs. Rizzinelli, 182 Fed. 682. See, also, McKinley vs. Wheeler, 130 U. S. 632; Creede Co. vs. Uinta Co., 196 U. S. 342.

[2] 16 Stats. 217; 5 U. S. Comp. St., p. 5654, § 4628. This act is known as the placer law. It provided that "claims usually called 'placers' include all forms of deposit except veins of quartz or other rock in place." See Deffeback vs. Hawke, 115 U. S. 392; N. P. R. Co. vs. Soderberg, 188 U. S. 532; aff'g. 104 Fed. 425; Cranes Gulch Co. vs. Scherrer, 134 Cal. 350, 66 Pac. 487.

[3] Del Monte Co. vs. Last Chance Co., *supra* [1].

[4] 5 U. S. Comp. St., p. 5409, § 4613. This act is the foundation of the existing system of acquiring rights in public mineral lands and its provisions are found in § 2318 and the following sections of the Revised Statutes of the United States. Reynolds vs. Iron Co., 116 U. S. 687; Pacific Coast Marble Co. vs. N. P. R. Co., 25 L. D. 235; see Blackburn vs. Portland Co., 175 U. S. 571. For history of legislation see Del Monte Co. vs. Last Chance Co. *supra* [1]; Kansas City Co. vs. Clay, 3 Ariz. 330, 29 Pac. 9; Richards vs. Dower, 81 Cal. 51, 22 Pac. 304; aff'd. 151 U. S. 658; Callahan vs. James, 141 Cal. 291, 74 Pac. 853. This statute repealed certain sections of the act of 1866. Deffebach vs. Hawke, *supra* [2]; Cosmos Co. vs. Gray Eagle Co., *supra* [1]; Central Eureka Co. vs. East Central Eureka Co., 146 Cal. 153, 79 Pac. 834; aff'd. 204 U. S. 266.

§ 2318 provides that "in all cases lands valuable for mineral shall be reserved from sale, except as otherwise provided by law." This section is a clear declaration of the policy of the government to reserve only such mineral lands as are valuable as such. Callahan vs. James, *supra*; see Deffebach vs. Hawke, *supra* [2]; Black vs. Elkhorn Co., 163 U. S. 447; Diamond Coal Co. vs. U. S., 233 U. S. 249; U. S. vs. S. P. Co., 251 U. S. 1; Van Ness vs. Rooney, 160 Cal. 131, 116 Pac. 392. § 2319 reads: "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such, under rules and regulations prescribed by law and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." See Watervale Co. vs. Leach, 4 Ariz. 59, 33 Pac. 418; Silver Bow Co. vs. Clark, 5 Mont. 412, 5 Pac. 570. See, also, Collins vs. Bubb, 73 Fed. 739.

The above sections of the mining law recognize and sanction the custom long prevalent among the miners of the Pacific Coast of organizing mining districts and adopting local laws or rules governing the location, recording, and working of mining claims; and miners are authorized to make rules and regulations in addition to but not in conflict with those prescribed by congress. Golden Fleece Co. vs. Cable Con. Co., 12 Nev. 322; see Northmore vs. Simmons, 97 Fed. 386; *compare* Original Co. vs. Winthrop Co., 60 Cal. 631. But this did not give them authority to determine how the title to the land itself might be acquired. Benson Co. vs. Alta Co., 145 U. S. 431. The courts have always sustained rights that grew up under the district rules and customs, and the California laws declare that "in actions respecting mining claims, proof must be admitted of the customs, usages or regulations established and *in force* at the bar or diggings embracing such claims; and such customs, usages or regulations when not in conflict with the laws of this state, must govern in the decision of the action." C. C. P. § 748; Boggs vs. Merced Co., 14 Cal. 378; St. John vs. Kidd, 26 Cal. 272; see Johnson vs. McLaughlin, 1 Ariz. 493, 4 Pac. 130; Morton vs. Solambo Co., 26 Cal. 383.

See Supplemental State Legislation.

ing and amending the mining laws in their application to the Territory of Alaska and for other purposes was approved on August 1, 1912,[5] and amended by the act of March 3, 1927.[6] An act regulating the manner of acquiring and holding mining claims within the Philippine Islands was enacted on July 1, 1902,[7] and materially amended by act of February 6, 1905.[8]

§ 312. Amendments and Supplemental Legislation.

There have been some supplemental legislation and various amendments to the act of 1872, the most important of which is the act of February 11, 1875, providing that work done on a tunnel may be applied as assessment work on a mining location;[9] the act of March 3, 1881,[10] relating to judgments in adverse proceedings; the act of April 26, 1882, providing for the verification of adverse claims and proof of citizenship;[11] the act of August 24, 1921,[12] changing the period of doing annual assessment work on unpatented mining claims from the calendar year to twelve o'clock meridian of July 1st of each year.

§ 313. Placer Mining Laws.

The placer mining laws were extended by act of August 4, 1892, permitting lands chiefly valuable for building stone to be located under the provisions of the law in relation to placer mining claims,[13] the act of March 1, 1893, regulating hydraulic mining in the State of California;[14] the act of February 11, 1897, authorizing the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws;[15] the act of January 31, 1901, extending the

[5] 37 Stats. 242.
[6] 43 Stats. 1118.
[7] 32 Stats. 697.
[8] 33 Stats. 691; see Reavis vs. Fianza, 215 U. S. 16.
[9] 6 Fed. St. Ann. (2d ed.), p. 598. See Chambers vs. Harrington, 111 U S 350; Book vs. Justice Co., 58 Fed. 106; Hain vs. Mattes, 34 Colo. 345, 83 Pac. 127. See Royston vs. Miller, 76 Fed. 50; Justice Co. vs. Barclay, 82 Fed. 560.
[10] 5 U. S. Comp. St., p. 5650, § 4625. This act provided that in adverse suits if "title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs will not be allowed to either party and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title." See Perego vs. Dodge, 163 U. S. 160. The land office holds in a final judgment that neither party is entitled to the right of possession, and should take nothing by the action, is a conclusive determination that the patent proceedings out of which the controversy arose were without effect from the beginning, and the rendition of such judgment causes the patent application to fail. Brien vs. Moffitt, 35 L. D. 32; see Jackson vs. Roby, 109 U. S. 444; Cole vs. Ralph, 252 U. S. 297; rev'g. 249 Fed. 81.
[11] 5 Fed. St. Ann. (2d ed.), pp. 5466, 5650.
[12] For suspension of annual assessment work for the year 1893, see 28 Stats. 6; for the year 1894, see 28 Stats. 114 (excepting South Dakota); for act relieving volunteers in war with Spain from performing such work, see 30 Stats. 651. For joint resolution relieving officers and enlisted men from performing annual labor, see 40 Stats. 243; for joint resolution suspending the requirements of annual assessment work during the years 1917, 1918, see 40 Stats. 343 (this resolution does not apply to oil placer locations or claims); for the year 1919, see 41 Stats. 279–354. For Alaskan provisions, see 40 Stats. 1213; 41 Stats. 354, 1084. For act defining what shall constitute annual labor upon petroleum oil locations, see 32 Stats. 825.
[13] 5 U. S. Comp. St., p. 5678, § 4633.
[14] 6 Fed. St. Ann. (2d ed.), p. 621. See North Bloomfield Co. vs. U. S., 88 Fed. 644. aff'g. 81 Fed. 243; Sutter County vs. Nichols, 152 Cal. 688, 93 Pac. 872. As to the circumstances and conditions leading to the enactment and on the interpretation of this statute, see Woodruff vs. North Bloomfield Co., 16 Fed. 25; People vs. Gold Run Co., 66 Cal. 138, 4 Pac. 1152; Hobbs vs. Amador Co., 66 Cal. 161, 4 Pac. 1147; Salstrom vs. Orleans Bar Co., 153 Cal. 551, 96 Pac. 292; Good vs. West Co., 154 Mo. A. 591, 136 S. W. 241; Nelson vs. O'Neal, 1 Mont. 284; Fitzpatrick vs. Montgomery, 20 Mont. 181, 51 Pac. 416; Carson vs. Hayes, 39 Or. 97, 65 Pac. 814; York vs. Davidson, 39 Or. 81, 65 Pac. 819.
[15] Id., § 4635.

placer mining laws[16] to saline lands; the act of February 12, 1903, defining what shall constitute, and providing for annual assessment work on petroleum oil claims;[17] the act of June 25, 1910, validating presidential withdrawals amended by the act of August 24, 1912, so as to include all nonmetalliferous minerals.[18] This act is known as the "Pickett Act." The act of March 2, 1911, affecting petroleum oil lands transferred prior to discovery.[19] The act of July 17, 1914, known as the "Surface Act," permitted agricultural entry of the surface rights in withdrawn oil, gas, and other specified mineral lands.[20] The act of January 11, 1915, validated locations of deposits of phosphate rock theretofore made in good faith under the placer mining law;[21] the act of December 29, 1916, known as the "Stock-Raising Homestead Act," permitting the miner, under certain restrictions to prospect and mine the land included within a stock-raising homestead;[22] the act of October 2, 1917, providing for the prospecting and leasing of chlorides, sulphates, carbonates, silicates or nitrates of potassium;[23] the act of February 25, 1920, withdrawing deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits from mining location;[24] the act of June 4, 1920, giving the Secretary of the Interior control of the naval petroleum naval reserves;[25] the act of April 17, 1926, providing for the prospecting and leasing of deposits of

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[16] 5 U. S. Comp. St., p. 5684, § 4641.

[17] 5 U. S. Comp. St., p. 5680, § 4636.

[18] 5 U. S. Comp. St., p. 5321, § 4524. This act was passed expressly enabling the President to make withdrawal of lands containing oil, gas, phosphates and coal. It provides that "the rights of any person who at the date of any order of withdrawal heretofore or hereafter made, is a *bona fide* occupant of oil or gas-bearing lands, and who, at such date, is in diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant shall continue in diligent prosecution of said work." For cases arising under this statute see U. S. vs. Midway Oil Co., 216 Fed. 802; U. S. vs. Midway Oil Co., 232 Fed. 619; U. S. vs. McCutchen, 234 Fed. 702, 238 Fed. 575; U. S. vs. Grass Creek Oil Co., 236 Fed. 481; U. S. vs. Stockton Midway Oil Co., 240 Fed. 1006; U. S. vs. Ohio Oil Co., 240 Fed. 996; U. S. vs. Dominion Oil Co., 241 Fed. 425; U. S. vs. North American Oil Co., 242 Fed. 723, aff'd. 264 Fed. 336; U. S. vs. Thirty-Two Oil Co., 242 Fed. 730; U. S. vs. Honolulu Oil Co., 249 Fed. 167; U. S. vs. Rock Oil Co., 257 Fed. 331; U. S. vs. Standard Oil Co., 265 Fed. 751; U. S. vs. Chanslor-Canfield Co., 266 Fed. 142, 145; remanded 254 U. S. 664; Mason vs. U. S., 273 Fed. 135; mod'fid. and affi'd. 260 U. S. 545; Pacific Midway Oil Co., 44 L. D. 420; Wheeler, 48 L. D. 94; Honolulu Oil Co., 48 L. D. 303; Johnson vs. Hinkel, 29 Cal. A. 78, 154 Pac. 487; Son vs. Adamson, 188 Cal. 99, 204 Pac. 392; Midland Oil Co. vs. Rudneck, 188 Cal. 265, 204 Pac. 1074. See, also, Wyoming vs. U. S., 255 U. S. 489; U. S. vs. Ridgely, 262 Fed. 675. See, also, Lowell, 40 L. D. 303; Circular, 41 L. D. 345; Instructions, 42 L. D. 118.

[19] 5 U. S. Comp. St., p. 5681, § 4637.

[20] 5 U. S. Comp. St., p. 5683, § 4640*a*.

[21] 2 Mason's U. S. Code, p. 2249, § 131.

[22] 39 Stats. 862; amended by act of October 25, 1918; 40 Stats. 1016; act of September 29, 1919, 41 Stats. 287; act of March 4, 1923, 42 Stats. 1445; act of June 6, 1924, 43 Stats. 469. For statutes, regulations and forms, see 51 L. D. 1.

[23] 40 Stats. 297; see Smoot, 52 L. D. 44. In this case it was held that permits may be issued to prospect for different minerals specified in this and the kindred act of February 25, 1920, concurrently upon the same area.

[24] 2 Mason's U. S. Code, p. 2253, § 181.

[25] 41 Stats. 812; see U. S. vs. Pan American Co., 6 Fed. (2d) 42, aff'd. and rev'd., 9 Fed. (2d) 761, aff'd. 273 U. S. 456. See Id. 24 Fed. (2d) 206, where the *nisi prius* court entered decree in accordance with mandate of the Supreme Court, and found the United States entitled to interest on value of oil and other property converted by defendants as wilful trespassers; but also held that where the government after obtaining appointment of receivers of the property involved in the suit to cancel the leases, failed to take steps to prevent further taking of royalty oil, and in fact permitted one of the defendants to take such oil from reserve thereafter it waived its right to interest on any additional obligation of such defendant subsequently created. Hodgson vs. Midwest Oil Co., 297 Fed. 273, aff'd. 17 Fed. (2d) 71; see 269 U. S. 534; Richardson vs. Western Oil Co., 3 Fed. (2d) 403; Sullivan vs. Mammoth Oil Co., 22 Fed. (2d) 663. For Tea Pot Dome Case, see 5 Fed (2d) 330, revs'd. 14 Fed (2d) 705; aff'd. on *certiorari* 275 U. S. 13; Hodgson vs. Federal Oil Co., 274 U. S. 15, aff'g. 5 Fed. (2d) 442; U. S. vs. Belridge Oil Co., 13 Fed. (2d) 562; Devlin vs. Central Wyoming Oil Co., 20 Fed. (2d) 530. See Instructions, 51 L. D. 475.

sulphur,[26] the act of June 8, 1926, providing for the leasing of certain lands containing gold, silver, and quicksilver deposits;[27] the act of February 7, 1927, to promote the mining of potash on the public domain.[28]

§ 314. Ditches and Canals.

For many years prior to the enactment of the law of 1866[29] the mineral land of California and Nevada had been occupied without objection on the part of the government, and canals and ditches dug over the public lands and waters of the streams thus diverted for mining and other purposes, and the possessory rights to public lands, mining claims and water were regulated by state statutes and by rules adopted at miners' meetings which governed the location, recording, and working of mining claims. These were all recognized by the courts and enforced in trials of mining rights.[30] That statute recognized the rights and equities, even as against the United States itself, as well as other miners, of those who had acquired water rights for mining and other purposes.[31] The manner of appropriating water upon the public domain is delegated to the states.[32]

§ 315. Reserved and Withdrawn Lands.

There is no doubt that lands containing mineral deposits may be reserved or withdrawn from the operation of the mining laws when situate within national monuments,[33] national parks,[34] subsisting mili-

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[26] 2 Mason's U. S. Code, p. 2268, §§ 280, 284. For provisions as to sulphur belonging to the United States within the state of Louisiana, see Id.

[27] 44 Stats. 710. See, generally, Gallagher vs. Boquillas Co., 28 Ariz. 560, 238 Pac. 395. For statute, regulations and forms, see 52 L. D. 20.

[28] 44 Stats. 1057. For statute, regulations and forms, see 52 L. D. 84 and 96.

[29] 14 Stats. 251. The purpose of the statute was to secure the right of way of owners of ditches and canals across existing mining claims if the title of the United States was conveyed to the holders of such mining claims, notwithstanding the fact that this right was recognized by the local customs, laws and decisions. Jennison vs. Kirk, 98 U. S. 460; see N. P. R. Co. vs. Sanders, 166 U. S. 634; De Wolfskill vs. Smith, 5 Cal. A. 182, 89 Pac. 1001. See McGuire vs. Brown, 106 Cal. 668, 39 Pac. 1060.

[30] Union Mill & Mining Co. vs. Ferris, Fed. Cas. 14371; Utah Co. vs. U. S., 230 Fed. 328; see U. S. vs. Utah Co., 209 Fed. 560, rev'g. 208 Fed. 821.

[31] Barnes vs. Sabron, 10 Nev. 231; Sullivan vs. Northern Spy Co., 11 Utah 442, 40 Pac. 709. Water rights vesting and accruing after the passage of this statute are protected by §§ 2339 and 2340 of the Revised Statutes. Jacob vs. Lorenz, 98 Cal. 335, 33 Pac. 119; see Vansickle vs. Haines, 7 Nev. 249.

"The act of July 26, 1866, c. 262, 14 Stats. 251 (Comp. St., Sec. 4647), provided in its 9th section, 'Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.' 'The act of July 9, 1870, c. 235, 16 Stats. 217, declared in its 17th section that "all patents granted or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, recognized by the provisions of 1866. And the act of March 3, 1877, c. 107, 19 Stats. 377 (Comp. St., Sec. 4674), after providing for the sale of desert lands in small tracts to persons effecting the reclamation thereof by an actual appropriation and use of water, declared that: 'all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply, upon the public lands, and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.' This court has said of these enactments that: 'The obvious purpose of congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention of the common law rule which permitted the appropriation of the waters for legitimate industries.'" Snake Creek Co. vs. Midway Co., 260 U. S. 596; aff'g. 271 Fed. 157; See Short vs. Praisewater, 35 Ida. 691, 208 Pac. 846. Peterson vs. Wood, 71 Utah, 77, 262 Pac. 832.

[32] McKenzie vs. Moore, 20 Ariz. 1, 176 Pac. 569. Gutierres vs. Albuquerque Co., 188 U. S. 545, aff'g. 10 N. M. 177, 61 Pac. 357; Snyder vs. Colorado Co., 181 Fed. 62.

[33] Cameron vs. U. S., 252 U. S. 450, aff'g. 250 Fed. 943; see Grand Canyon Co. vs. Cameron, 36 L. D. 66. A national monument may be created within the limits of a forest reserve, but in so far as they both embrace the same land, the monument reserve becomes the dominant reserve. Cameron vs. U. S., *supra*.

[34] See U. S. Rev. St., §§ 2474, 2475; 30 Stats. 993.

tary[35] of Indian reservations,[36] naval reserves,[37] or when within areas set apart as reservoir reservations,[38] or for water power[39] reclamation projects[40] or desert lands,[41] or when included within an executive order of withdrawal.[42]

§ 316. Miner's Rights.

Valid mining locations made prior to the reservation or withdrawal or the passage of the Leasing Act[43] are not defeated thereby, and, in the absence of an intervening relocation, the mineral claimant's rights, as conferred by the federal mining law, are fully preserved.[44] In other words, a prior mining location based upon actual discovery of a valuable mineral deposit within the limits of the location and maintained in accordance with the mining laws, rules and regulations applicable thereto carves such land from the operation of such excluding laws.[45] There is, of course, no necessity for annual expenditures upon lands covered by a lease from the government. Mineral lands within the national forest,[46] grants to the states[47] and to the transcontinental

[35] 23 Stats. 103; Fort Maginnis, 1 L. D. 552; Kinney, 44 L. D. 580; Interstate Oil Corp., 50 L. D. 262; see, also, Grisar vs. McDowell, 6 Wall. 383. Mineral lands within an abandoned military reservation are subject to mineral location. See Randolph, 23 L. D. 517; Walsh vs. Ford, 1 Alaska 146; and see Behrends vs. Goldstein, 1 Alaska 518.

[36] Spalding vs. Chandler, 160 U. S. 394; McFadden vs. Mt. View Co., 97 Fed. 670; Bay vs. Oklahoma Co., 13 Okla. 425, 73 Pac. 936. After an Indian reservation has been withdrawn mining locations may be made within its former boundaries. See Collins vs. Bubb, 73 Fed. 735; see, also, Kendall vs. San Juan Co., 9 Colo. 349, 12 Pac. 198, aff'd. 144 U. S. 658. A location made prior to the extinguishment of the reservation may be perfected subsequent thereto. Caledonian Co. vs. Noonan, 3 Dak. 189, 14 N. W. 426, aff'd. 121 U. S. 393. See U. S. vs. Four Bottles, 90 Fed. 720.

[37] 2 Supp. U. S. Comp. St., p. 1103, § 4640*a*.

[38] See Windsor Reservoir Co. vs. Miller, 51 L. D. 27.

[39] See Federal Water Power Act, *supra*, § 87.

[40] See Reclamation Projects, *supra*, § 88.

[41] Under the acts of March 3, 1877, 19 Stats. 377, and amended by act of March 3, 1891, 26 Stats. 1095, mineral land was expressly excluded; *but see* act of July 17, 1914, 38 Stats. 509, and act of February 25, 1920, 41 Stats. 437, as to reserved mineral deposits. See Stewart, 51 L. D. 603. See Desert Lands, *supra*, § 77.

[42] In U. S. vs. Midwest Oil Co., 236 U. S. 459, rev'g. 206 Fed. 141, the authority of the President to withdraw oil lands from location and patent was upheld. See, also, U. S. vs. Chanslor-Canfield Co., *supra* [18], mod'f'd. and aff'd. 266 Fed. 145, remanded 254 U. S. 664; Mason vs. U. S. 260 U. S. 545; U. S. vs. Midway Northern Oil Co., 232 Fed. 627. For an instance of wrongful entry upon lands embraced within a withdrawal order, see El Dora Oil Co. vs. U. S. 229 Fed. 949; see, also, U. S. vs. Dominion Oil Co., 241 Fed. 426. For cases involving the issuing of an injunction and the appointment of a receiver to prevent the extraction and waste of oil on withdrawn lands, see U. S. vs. McCutchen, *supra* [18]; U. S. vs. Honolulu Oil Co., 249 Fed. 168. A petroleum withdrawal impresses the land with a *prima facie* mineral character. Baxter, 48 L. D. 126. See Withdrawals, § 112.

[43] It has been held upon many occasions that the right of withdrawal relates only to unappropriated public lands; and that if there were, at the time of the withdrawal, a valid claim, said claim is unaffected by the withdrawal so long as it is maintained in accordance with the law under which it was initiated. Interstate Oil Corp., *supra* [35]. See, also,Wilbur vs. Krushnic, 280 U. S. 306, aff'g. and mod'g. 30 Fed. (2d) 742.

[44] U. S. vs. West, 30 Fed. (2d) 742, *but see* Hodgson vs. Midwest Oil Co., 17 Fed. (2d) 71; Krushnic, on rehearing, 52 L. D. 295.

[45] See U. S. vs. McCutchen, 234 Fed. 702.

[46] See National Forests. In U. S. vs. Deasy, 24 Fed. (2d) 108, it was said that the general mining laws of the United States apply to mining claims located within national forests as the act creating the national forests declares (§ 1, 16 U. S. C. A. § 482), that any mineral lands therein which have been or may be shown to be such, and subject to location; that any mining locators who have located such claims and in good faith are maintaining them, their rights will be protected, not only to extract ores from the same, but also to the use of timber growing thereon in development thereof, against any act or attempt on the part of the United States to deprive them of the use of such timber: "If the Secretary of Agriculture can deprive these locators of two-thirds of the timber upon the contention that they do not need but one-third thereof, he would be granted the power of deciding what amount of timber is necessary to be used in the development of mines, and those engaged in locating and developing mining property would have to secure permission from the Secretary as to the amount of timber they could use upon their claims. The law does not contemplate such a course to be taken."

[47] See State Lands, § 94.

railroads[48] are subject to the operation of the mining laws until the title in fee passes from the federal government to its respeetive grantees.[49]

§ 317. Severance of Mineral and Agricultural Rights.

The severance of surface from subsurface rights in land, which an individual proprietor, in its disposal may make as he will, has been authorized by several acts of congress, relative to the disposal by the United States of its public domain. Among such legislation are the "Surface[50] Act," the "Stock-Raising Act,"[51] the "Leasing Act,"[52] and the act of June 8, 1926,[53] providing for the leasing of all gold, silver, or quicksilver deposits or mines or minerals of the same on land confirmed by decree of the Court of Private Land Claims which do not convey the mineral rights to the grantee by the terms of the grant. The act of February 7, 1927, to promote the mining of potash on the public domain.[54]

§ 318. Restricted Patents.

Any person who has, in good faith, located, selected, entered, or purchased, or any person who shall hereafter locate, select, enter or purchase, under the nonmineral laws of the United States, any lands which are subsequently withdrawn, classified or reported as being valuable for oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits

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[48] See Railroad Lands, § 102.

[49] Ivanhoe Co. vs. Keystone Co., 102 U. S. 167; Davis vs. Weibbold, 139 U. S. 507; Hermocilla vs. Hubbell, 89 Cal. 5, 26 Pac. 611.

[50] 5 U. S. Comp. St., p. 5683, § 4640*a*, 4640*b*. This act permits agricultural entry of lands withdrawn, classified or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals. It did not suspend or work a repeal of the mining laws where such laws could otherwise operate. Pollock, 48 L. D. 5. Entries may be made of timber and stone lands under the provisions of the "Surface Act," provided the applicant files his consent to have the entry stand subject to the provisions and limitations of said act. Son vs. Adamson, 188 Cal. 99, 204 Pac. 392; Midland Oil Co. vs. Rudneck, 188 Cal. 265, 204 Pac. 1074. See Regulations, 49 L. D. 288. See, generally, Timber and Stone Lands, *supra*.

[51] 39 Stats. 862, amended 40 Stats. 1016, amended 41 Stats. 287. This act modifies the placer mining laws so as to authorize the issuance of surface patents for lands of the character contemplated by this act and duly entered thereunder, and authorized the patenting of the reserved deposits to mineral applications under the placer mining laws. Dean vs. Lusk Co., 50 L. D. 193.

[52] 2 Supp. U. S. Comp. St., p. 1403, § 4640*a*. The specific repeal of the mining law, as to coal, phosphate, sodium, oil, oil shale or gas and lands containing such deposits owned by the United States was accomplished by this act. The passage of the Leasing Act plan of general application by which an entire new system respecting the disposition of lands and the deposits of minerals beneath the surface owned by the United States and valuable for certain specified minerals was adopted. The purpose of this act was to encourage the development of the mineral resources of the country under the principle of permits for exploration and the leasing of the lands owned by the United States. It will be noted that under the terms of said act, all lands owned by the United States were included within its provisions except as to certain lands therein specifically enumerated. A discussion of this act may be found in Cleveland vs. Johnson (on rehearing), 48 L. D. 18, 49 L. D. 139.

[53] Stats. 710. This lease may be granted for the term of twenty years with a preferential right of renewal for successive periods of ten years. A rate of royalty will be fixed of not less than five per cent nor more than twelve and one-half per cent of the net value of the output. The form of lease will be furnished by the department and a bond of two thousand dollars will be required as a guarantee of due performance by the lessee. For Regulations and form of lease, see 52 L. D. 20.

[54] 44 Stats. 1057; see Regulations, 52 L. D. 84.

on account of which the lands are withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine and remove the same.[55]

§ 319. Jurisdiction of Courts.

The courts, not the land department, have direct jurisdiction to determine questions pertaining to actual physical possession of lands in cases arising from conflicts between claimants under the acts of July 17, 1914, and February 25, 1920, respectively.[56]

§ 320. Jurisdiction of Land Department.

The determination of the character of the public lands is committed exclusively to the land department,[56a] and in exercising that jurisdiction it may select its own instrumentalities and methods. A recommendation of the Geological Survey that specified public lands be withdrawn from entry (nonmineral or other) and placed in a petroleum reserve, if approved by the department head and acted upon favorably by the executive, is one mode of classification of those lands as mineral in character; provisional, it is true, and subject to revocation upon further investigation or upon showing by a nonmineral claimant, but until then, presumptively fixing their mineral character. In Washburn vs. Lane[57] it was held that inclusion in a petroleum reserve was a *prima facie* mineral classification, prevailing against a lieu selection of the land as nonmineral, previously initiated but not completed.[58]

§ 321. Protection of Surface.

Under the rules of the common law[59] the lessee of the mineral rights in lands belonging to the United States is under obligations to protect

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[55] 5 U. S. Comp. St., p. 5684, § 4640*c*; Stockley vs. U. S., 271 Fed. 632, aff'd. 260 U. S. 532. Consent to accept a restricted patent in accordance with the act of July 17, 1914, for oil and gas lands, may be filed by a mortgagee, if the homestead entryman, after proper notification, fails to do so. Otherwise the relief to which the former is entitled would be wholly defeated. Gordon vs. Overly, 50 L. D. 240.

[56] Marathon Oil Co. vs. West, 48 L. D. 150; Berg vs. Saylor, 51 L. D. 45.

[56a] Standard Co. vs. Habishaw, 132 Cal. 120, 64 Pac. 113. For exception to rule stated in text see Duffield vs. San Francisco Co., 205 Fed. 482, rev'g. 198 Fed. 942. See, also, San Francisco Co. vs. Duffield, 201 Fed. 833; Mason vs. Washington-Butte Co., 214 Fed. 35.

[57] 258 Fed. 524.

[58] Mabry (on rehearing), 48 L. D. 280; see Kelly, 49 L. D. 650; Marcus vs. Gray, 50 L. D. 288; also, Lane vs. Cameron, 45 App. Cas. (D. C.) 409; see, generally, Burke vs. S. P. Co., 234 U. S. 670; Cameron vs. U. S., *supra* [33]; aff'g. Peoples Dev. Co. vs. S. P. R. Co. 277 Fed. 796; Vore vs. Ephraim, 173 Cal. 245, 159 Pac. 719. The rules of law as administered by courts are binding upon the Land Department only in so far as they are not adverse to but assist its function as an administrative branch of the executive department of the government which, as the proprietor of the public domain, as a party to all proceedings looking to the disposal of any part of that domain, and in its executive administration is entitled to rely upon and adhere to the classification of its lands, once arrived at, even though between others than the parties to a new application to enter. This principle of the paramount nature of the administrative side of the land department's work, rather than its function of adjudicating the rights of private claimants, entitles it, in so adjudicating, to respect and follow its own former adjudications as to particular lands, even though not binding in strictness upon a new claimant. Its executive liberty of action in this respect is quite analagous to the executive power, existing through implication of withdrawal of lands from entry notwithstanding congressional legislation had previously made them free and open to occupation and purchase, which is fully discussed in U. S. vs. Midway Oil Co., *supra* [19]; Day, 50 L. D. 23. The practice of withdrawing lands contemplates their segregation for purposes of investigation and the land department holds that it is clearly its duty to seek such withdrawals whenever from evidence before it an inference or belief is warranted that lands in fact are mineral. Utah vs. Lichliter, 50 L. D. 231.

[59] 18 R. C. L., p. 1245, § 141.

the overlying surface.[60] That is to say, the mineral estate owes a servitude of sufficient support to the superincumbent estate. This is called "surface support." It may be vertical or lateral,[61] natural or artificial.[62]

§ 322. Lateral Support.

American and English courts generally have held that the right of an owner of land to the support of the land adjoining is *jure naturae*. This right is absolute and the owner whose right is invaded may maintain an action against him who has injured this right of lateral support without proof of negligence.[63]

§ 323. Waiver.

Where the owner of the entirety grants the surface and reserves the minerals, then the presumption is that the subjacent support unquestionably would be given, because he may not derogate from his own

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[60] See Gesner vs. Cairns, 1 N. Brunsw. 595; Lord vs. Carbon Co., 42 N. J. Eq. 157, 6 Atl. 812; Marvin vs. Brewster Co., 55 N. Y. 538; Dand vs. Kingscote, 7 M. & W. 174. It is well settled that the grant of the surface, with the reservation of the minerals and the right to extract the same, does not permit the destruction of he surface, unless the right to do so has been expressed in terms so plain as to admit of no doubt. Catron vs. South Butte Co., 181 Fed. 943; Marquette Co. vs. Oglesby Co., 253 Fed. 104; Whiles vs. Grand Junction Co., 86 Colo. 418, 282 Pac. 260; Norum vs. Queen City Oil Co., 81 Mont. 527, 264 Pac. 122; Moss vs. Jourdain, 129 Miss. 598, 92 So. 689. In Davis vs. Treharne, 6 Law Rep. 460, Lord Watson said: "When a proprietor of the surface and the subjacent strata grants a lease to the whole or part of his minerals to a tenant, I think it is an implied term of that contract that support shall be given in the course of working to the surface of the land. It is not intended that the right should be reserved; the parties must make it very clear upon the face of the contract." Evidence of the removal of any of the subjacent support in mining operations, without other proof, is *prima facie* evidence that subsidence of surface was caused thereby, and it is for the mine owner, who has control of underground workings and is in possession of facts, to show the contrary by proof of underground conditions. Standard Oil Co. vs. Watts, 17 Fed. (2d) 981.

[61] Jones vs. Wagner 66 Pa. St. 429; Youghiogheny Co. vs. Allegheny Bank, 211 Pa. St. 324, 60 Atl. 924. "This is an absolute right arising out of the ownership of the surface. Good or bad mining in no way affects the responsibility; what the surface owner has a right to demand is, sufficient support, even, if to that end, it is necessary to leave every pound of coal untouched under his land." Noonan vs. Pardee, 200 Pa. St. 482, 50 Atl. 256. To the same effect see Evans Fuel Co. vs. Leyda, 77 Colo. 356, 236 Pac. 1025; Harris vs. Ryding, 5 M. & W. 59. The owner of the entire estate may grant the surface of the land and reserve the mineral estate with the right to mine and remove it without liability for injury or damage done to the surface, and in such case the grantor or those claiming under him may mine and remove all the mineral without being compelled to support the surface. The owner of the servient estate is then liable only for improper or negligent mining. In such case removal of all the mineral does not constitute negligent working of the mine, and if such removal causes a subsidence of the surface the owner of the mineral estate will not in the absence of positive negligence, be liable to the owner of the surface for resulting injuries. Kellert vs. Rochester Co., 226 Pa. St. 27, 74 Atl. 789; Graff Co. vs. Scranton Co., 244 Pa. St. 592, 91 Atl. 508. In Barker vs. Mintz, 73 Colo. 262, 215 Pac. 534, where the ownership of the surface was separate from that of the minerals, the owners of latter threatening to remove all the soil in order to extract the minerals, an injunction was refused, since, said the court, it would destroy the property rights of the owner of the minerals, the land being used mainly for pasturage and injury could be compensated in damages.

[62] R. C. L., § 141, p. 1244.

[63] Foley vs. Wyeth, 2 Allen, 131; Gilmore vs. Driscoll, 122 Mass. 201; both cited and followed in Matulys vs. Coal Co., 201 Pa. St. 70, 50 Atl. 823. But his right of property, absolute though it be, is only in the land in its natural condition, and, in an action, damages are limited to injury to the land itself, and do not include any injury to the buildings and improvements. Matulys vs. Coal Co., *supra*; Burt vs. Rocky Mt. Co., 71 Colo. 205, 205 Pac. 741. In Cole vs. Signal Knob Co., 95 W. Va. 703, 122 S. E. 268, the court said: "The rule requiring surface support is an application of the doctrine *sic utero tuo ut alienum non laedas*, the true legal meaning of which is defined in Broom's Legal Maxims, page 289, as: 'So use your own property as not to injure the rights of another.' In lateral support cases this rule has been construed not to authorize the erection of buildings by the surface owner, for the reason that such added weight would increase the downward and lateral pressure and thus abridge the rights of the adjoining land owners. 3 Minor's Inst. (2d Ed.) 26. But Mr. Minor and the English authorities say that such right may be acquired by prescription, and no doubt it may be acquired by grant." See, also, 35 A. L. R. 1137, note.

grant.[64] The English courts have gone so far as to hold that the right to support was not taken away by an agreement that the minerals would be removed in a manner so as to occasion as little damage as possible to the surface.[65] And the waiver of surface rights, it has been held by many courts in the reservation of grant, must be express and not left to implication; in other words, the protection of the surface right being clear, an instrument should not be construed in favor of the owner of the mining right unless the language is clear, express and unambiguous.[66]

§ 324. Support of Strata.

Where different strata within the same land are controlled by different interests the operator of the upper or higher stratum is entitled to the same right as the actual surface owner.[67]

§ 325. When Cause of Action Accrues.

It has been determined that the cause of action does not arise until there has been an actual break in the surface.[68] But it has been held that the statute of limitations begins to run from the time of the removal of the mineral without sufficient support or when the surface owner has knowledge.[69]

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[64] 17 E. R. Cases, 647.

[65] Proud vs. Bates, 34 L. S. Ch. N. S. 406, 6 New Reports, 92.

[66] West Pratt Co. vs. Dorman, 161 Ala. 389, 49 So. 849; Collins vs. Gleason Co., 140 Iowa 114, 115 N. W. 497; Walsh vs. Kansas Fuel Co., 91 Kan. 310, 137, Pac. 94; Walsh vs. Kansas Fuel Co., 102 Kan. 29, 169 Pac. 219; Ohio Co. vs. Cocke, 107 Ohio St. 238, 140 N. E. 356; Dignan vs. Altoona Co., 222 Pa. St. 390, 71 Atl. 845. For cases involving waiver by contract of right to surface support, see Madden vs. Lehigh Co., 212 Pa. St. 63, 61 Atl. 559; Commonwealth vs. Clearview Co., 256 Pa. St. 328, 100 Atl. 820; Smith vs. Darby, L. R. 7 Q. B. 716, 42 L. J. Q. B. 140, 26 L. T. Rep. N. S. 762.

[67] Marquette Co. vs. Oglesby Co., *supra* [60]; Yandes vs. Wright, 66 Ind. 319. See Battersley Co. vs. New Hucknall Co., A. C. 99, L. T. R. 818, 1 Law Rep. Ch. Div. 37; Jones vs. Con. Anthracite Coll., 1 Law Rep., King's Bench Div. 123.

[68] West Pratt Co. vs. Dorman, *supra* [66].

[69] Noonan vs. Pardee, *supra* [61]. See Lightner Co. vs. Lane, 161 Cal. 689, 120 Pac. 771. An underground survey of the premises involved may be ordered by the court. Heath vs. Walton, 9 Pa. Dist. 206.

See Severance.

CHAPTER XV.

FEDERAL STATUTES OF LIMITATIONS.

§ 326. Provisions of Mining Law.

The mining act provides that where claims have been "held and worked for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claims,"[1] filed in the course of patent proceedings;[2] *provided, however,* that discovery,[3] and the statutory expenditure have been made,[4] all taxes have been paid,[5] and the citizenship of the claimant is shown.[6]

§ 327. Object of Statute.

The purpose of the foregoing provision in the mining law is to obviate the neeessity of proving the location and transfers of title.[7]

§ 328. How Construed.

This statute is not a separate and independent provision, but it is to be construed with the other sections of the mining law so that, if

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[1] 5 U. S. Comp. St., p. 5665, § 4631. This provision of the mining law furnishes an additional mode of acquiring a mining claim, but it does not enlarge the class which may do so. Anthony vs. Jillson, 83 Cal. 302, 23 Pac. 419; Altoona Co. vs. Integral Co., 114 Cal. 100, 45 Pac. 1047; Lavagnino vs. Uhlig, 26 Utah 1, 71 Pac. 1051. It does not apply to a trespasser. Chanslor-Canfield Co. vs. U. S., 266 Fed. 145; remanded to District Court, 254 U. S. 651. As the statute of limitations does not run against the United States it can not run against a claimant or occupant of the public lands until the issue of patent. Redfield vs. Parks, 132 U. S. 239; Pacific Co. vs. Slaght, 205 U. S. 133; Tyee Con. Co. vs. Langstedt, 136 Fed. 127; Tyee Co. vs. Jennings, 137 Fed. 864; Pioneer Co. vs. Pacific Co., 4 Alaska 476; Irvine vs. Tarbat, 105 Cal. 237, 38 Pac. 896; Hempill vs. Moy, 31 Ida. 70, 169 Pac. 289; Utah Co. vs. Eckman, 47 Utah 169, 152 Pac. 179; see, also, Baker vs. Berg, 138 Minn. 113, 164 N. W. 590; N. P. R. Co. vs. Smith, 62 Mont. 118, 203 Pac. 505. See dissenting opinion in South End Co. vs. Tinney, 22 Nev. 66, 35 Pac. 106. "One claiming title to land by adverse possession (for the statutory period) as against all persons but recognizing the superior title of the United States government and seeking in good faith to acquire that title, may assert such adverse possession as against any person claiming to be the owner under a prior grant." Boe vs. Arnold, 54 Or. 52, 102 Pac. 29. The "possession" of unpatented mining claims referred to in the reported cases is an actual possession—occupancy or working the claim—not constructive possession. Actual possession, therefore, means something more than mere compliance with the requirement to do the annual assessment work as a basis of title under the claim of adverse possession. The possession must be actual, open and exclusive and the boundaries must be maintained in place and position upon the ground so as to afford actual notice of their extent and the possession claimed in order to establish the adverse possession." Law vs. Fowler, 45 Ida. 1, 261 Pac. 670.

The provisions of this statute are applicable in injunction proceedings. Springer vs. S. P. Co., 67 Utah 590, 248 Pac. 819.

[2] McCowan vs. McClay, 16 Mont. 240, 40 Pac. 602.

[3] Donnelly vs. U. S., 228 U. S. 266; Cole vs. Ralph, 252 U. S. 286, rev'g. 249 Federal, 81; distg'd. in Springer vs. S. P. Co., *supra* [1]; Star Co. vs. Federal Co., 265 Fed. 899; Humphreys vs. Idaho Co., 21 Ida. 126, 120 Pac. 823; Law vs. Fowler, *supra* [1]; see, also, Pacific Coal Co. vs. Pioneer Co., 205 Fed. 577; U. S. vs. McCutchen, 238 Fed. 575; *compare,* Belk vs. Meagher, 104 U. S. 279; Springer vs. S. P. Co., *supra*; and see Glacier Co. vs. Willis, 127 U. S. 471.

[4] Donnelly vs. U. S., *supra* [3]; Barklage vs. Russell, 29 L. D. 404, overruling Stewart vs. Rees, 21 L. D. 446; Humphreys vs Idaho Co., *supra* [3]; Law vs. Fowler, *supra* [1]; McCowan vs. McClay, *supra* [2]; see Capital No. 5 Claim, 34 L. D. 462; Cleary vs. Skiffich, 28 Colo. 362, 65 Pac. 59.

[5] Glacier Co. vs. Willis, *supra* [3].

[6] Donnelly vs. U. S., *supra* [3].

[7] Barklage vs. Russell, *supra* [4]; Humphreys vs. Idaho Co., *supra* [3]; Law vs. Fowler, *supra* [1]; McCowan vs. McClay, *supra* [2]; see, also, Hickey vs. Anaconda Co., 33 Mont. 65, 81 Pac. 812; Springer vs. S. P. Co., *supra* [1].

possible, all may stand together, forming an harmonious body of mining law.[8] It does not contemplate that a right to a mining claim could be founded upon nothing more than holding and prospecting, for that would subject nonmineral land to acquisition as a mining claim. Discovery is essential, and in its absence the claim could not be "equivalent to a valid location."[9]

§ 329. Availability of the Statute.

The courts are not united as to whether or not the provisions of the statute are available both in the land department and in the courts. But the great weight of authority holds that it is of equal force and effect in either forum.[10]

§ 330. Procedure.

The claimant of a patent must prove his right under regulations of the land department[11] without the necessity of proving the posting and recording of a notice of location or furnishing an abstract of title.[12]

§ 331. Adverse Possession Under State Statutes.

Adverse possession of nonmineral land under a claim of a mining title will not ripen into a title in fee by prescription under a state statute of limitations, as appropriate use must be shown.[13]

§ 332. Transferees Protected.

The law does not require that the adverse possession shall be continuous in any one person. It is sufficient if the claimant or his grantor

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[8] Barklage vs. Russell, *supra* (4); Humphreys vs. Idaho Co., *supra* (3). But the statute just referred to is a part of the statutory chapters on mining and mining resources, having to do with the evidence which will be regarded as sufficient to establish the right of one in possession and who has worked a mining claim to obtain a patent. The statute is based upon the premise that the lands had been open to entry and could be patented under the mining laws of the United States. It is not enacted as a statute of limitations, and has no application in the case of a trespasser on land, title to which can not be acquired under the laws of the United States. Chanslor-Canfield Co. vs. U. S., *supra* (1).

[9] See *supra*, note 3; Pacific Coal Co. vs. Pioneer Co., *supra* (3); *but see* Springer vs. S. P. Co., *supra* (1), wherein no proper location was made as provided by the mining laws, the court saying: "As to whether respondent may avail itself of the provisions of section 2332, *supra* (Rev. St. U. S.), however, where, as here, the attempted lode location failed because no discovery of valuable mineral was made by discovering rock in place, as that term has always been construed and applied by the courts, is, perhaps, not without some difficulty. The record in this case leaves no room for doubt that every other legal requirement except the discovery of valuable mineral in rock in place has been met by the respondent. Neither is there any doubt that an honest attempt was made by respondent to make a lode location, and that in view that no proper discovery was made no valid or legal lode location was made. Notwithstanding that fact, however, respondent has fulfilled every other legal requirement. It expended more than a half million dollars in working and making improvements on the mining claims that it had attempted to locate as lode claims, but which unfortunately constituted placer ground instead, and should have been located as placer claims. Moreover, for more than twenty years before appellants made any attempt to locate the ground as placer ground, respondent had maintained actual and exclusive possession of its claims and made permanent and valuable improvements thereon. Then, again, respondent was in actual, open, and visible possession of the claims and was developing and constantly using the only minerals contained therein when the appellants made their attempt to locate the ground as placer claims, of which respondent was in actual possession and was extracting mineral therefrom, all of which appellants knew, and for a long time prior to their attempted location had known." See, also, Newport Co. vs. Bead Lake Co., 110 Wash. 120, 188 Pac. 27.

[10] Reavis vs. Fianza, 215 U. S. 16; Cole vs. Ralph, *supra* (3); see Springer vs. S. P. Co., *supra* (1); Law vs. Fowler, *supra* (1); *but see* McCowan vs. McClay, *supra* (2).

[11] Min. Regs., par. 43; Humphreys vs. Idaho Co., *supra* (3); Law vs. Fowler, *supra* (1); see, also, Shoshone Co. vs. Rutter, 177 U. S. 508.

[12] Humphreys vs. Idaho Co., *supra* (3); Law vs. Fowler, *supra* (1); see McCowan vs. McClay, *supra* (2).

[13] Adams vs. Smith, 273 Fed. 656; see *supra*, note 1.

has held and worked the claim for a period equal to the time prescribed by the state or territorial statute of limitations.[14] The federal mining law clearly contemplates the buying and selling of mining claims, and it would be absurd to permit sales for the benefit of a vendee, and then declare such sales proof of abandonment.[15] On the contrary, the law approves the derivative right by purchase or assignment and authorizes a patent to issue to such purchaser or assignee.[16]

§ 333. Adverse Claims.

A peaceable adverse entry, coupled with the right to hold the possession thereby acquired, operates as an ouster and breaks the continuity of the holding of the prior locator and deprives him of the title he might have acquired if he had kept possession for the requisite time.[17]

§ 334. Effect on Possessory Title.

The law does not mean that the person holding the title as provided may obtain patent therefor in the absence of an adverse claim filed within the period of the statute of limitations; but he is entitled to patent if no adverse claim is filed, as provided for in § 2325 of the Revised Statutes of the United States.[18] The words "in the absence of an adverse claim" mean that patent shall be issued to a claimant who has held and worked his claim for a period equal to the time prescribed by the statute of limitations, if no other person filed what is known in the land office as an adverse claim during the period within which an adverse claimant may file his claim under the provisions of the federal mining law.[19] Therefore, notwithstanding the provisions of the mining law as to the holding of a mining claim for a period equal to the state or territorial statute of limitations, yet, if an adverse claimant appears in an application for patent, the contest must be referred to a court of competent jurisdiction for determination, as in other cases.[20]

§ 335. Liens.

Liens which have attached in any way to a mining claim prior to the issuance of patent are not affected thereby.[21]

§ 336. Vacation and Annulment of Patents.

Under the provisions of the act of March 3, 1891,[22] suits by the United States to vacate and annul any patent thereafter issued shall

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[14] Warnekros, 41 L. D. 654, see *supra*, note 1.

[15] Butte Co. vs. Frank, 25 Mont. 349, 65 Pac. 1.

[16] St. Louis Co. vs. Kemp, 104 U. S. 651; Ketchum Co. vs. Pleasant Valley Co., 257 Fed. 275, *certiorari* denied, 250 U. S. 668, dis. 254 U. S. 615.

[17] Belk vs. Meagher, *supra* (3); see, generally, Cole vs. Ralph, *supra* (3); Star Co. vs. Federal Co., 265 Fed. 881, *certiorari* denied 254 U. S. 651.
See Adverse Claims.

[18] McCowan vs. McClay, *supra* (2); Upton vs. Santa Rita Co., 14 N. M. 96, 89 Pac. 283. See Law vs. Fowler, *supra* (1).

[19] Id.

[20] Id. See Possession.

[21] 5 U. S. Comp. St., p. 5665, § 4631. A judgment creditor having a lien upon a mining claim is not bound, before sale and deed, to file an adverse claim in order to preserve his lien, as such liens are expressly protected by this section; but after execution is levied, a sale had, and a deed executed, the purchaser must adverse, as in that case the lien is gone. Butte Co. vs. Frank, *supra* (15).

[22] This statute reads: "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance (1901) of such patents." 5

only be brought within six years after the date of the issuance of such patents, except in cases of concealed fraud[23] where the government has not been guilty of laches in discovering the fraud.[24]

U. S. Comp. St., p. 6065, § 5114; see, also, Id., p. 5893, § 4900, which, however, deals only with patents erroneously issued under railroad or wagon road grants. The object of the statute is to extinguish any right the government may have in the land and vest a perfect title in the adverse holder, after six years from date of the patent regardless of any mistake or error in the land department or fraud or imposition of the patentee. U. S. vs. Winona Co., 165 U. S. 463; U. S. vs. Chandler-Dunbar Co., 209 U. S. 447; aff'g. 152 Fed. 25; Burke vs. S. P. Co., 234 U. S. 690; U. S. vs. Coronado Co., 255 U. S. 488; U. S vs. American Co., 85 Fed. 832; U. S. vs. Smith, 181 Fed. 545; Capron vs. VanHorn, 201 Cal. 494, 258 Pac. 77; see, also, Louisiana vs. Garfield, 211 U. S. 70; Peabody Co. vs. Gold Hill Co., 106 Fed. 241; U. S. vs. Exploration Co., 203 Fed. 387, 235 Fed. 110, aff'd. 247 U. S. 443; U. S. vs. Jones, 218 Fed.973; U. S. vs. Pitan, 224 Fed. 604, aff'd. 241 Fed. 364. In U. S. vs. Chandler-Dunbar Co., *supra*, it was claimed that the instrument was void and hence was no patent. The court said: "But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. Leffingwell vs. Warren, 2 Black 599. In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which can not escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See U. S. vs. Winona Co., 165 U. S. 463, 476." The foregoing case is distinguished in U. S. vs. Whited & Wheless, 246 U. S. 563, rev'g. 232 Fed. 139. In the latter case the court said: "That in U. S. vs. Chandler-Dunbar Co., 209 U. S. 447, the words therein that 'by the statute the patent is to have the same effect against the United States that it would have had if it had been valid in the first place,' is merely an emphatic way of saying that the title is made good. It does not import that the collateral effects of fraud in obtaining the patent are purged. The element of bad faith or fraud was expressly excluded." See, also, Lee Wilson & Co. vs. U. S., 245 U. S. 32; U. S. vs. St. Paul Co., 247 U. S. 314; Huntington vs. Donovan, 183 Cal. 750, 192 Pac. 546. See, also, Redfield vs. Parks, 132 U. S. 239, wherein it was held that a tax deed void upon its face would not set the statute running; *contra* if apparently good it would give color of title. The patent under consideration in the Chandler-Dunbar case, *supra*, did not betray upon its face its invalidity. See, also, Norwood vs. Mayo, 153 Ark. 623, 241 S. W. 7; Horsky vs. McKennan, 53 Mont. 65, 162 Pac. 381. U. S. vs. Coronado Co., 255 U. S. 488, holds that a patent for a Mexican grant is conclusive against collateral attack and if attack is considered direct, the suit is barred by limitations under the provisions of the act of 1891. It is a well established rule that statutes of limitation do not run against the sovereign, in the absence of some express statutory provision to the contrary, and if the statute is made applicable to a class of suits only it will not be extended to other cases by implication. U. S. vs. Nashville Co., 118 U. S. 120; U. S. vs. Insley, 130 U. S. 263; Davis vs. Corona Co., 265 U. S. 219; U. S. vs. Dewey County, 14 Fed. (2d) 791; U. S. vs. Kern River Oil Co., 264 Fed. 416, mod. and aff'd. 257 U. S. 147; see The Falcon, 19 Fed. (2d) 1011

The decisions of the United States Supreme Court are uniform to the effect that the statute merely fixes the time within which the United States may institute proceedings to vacate and annul a patent issued by mistake or as a result of fraud, and that the period of limitation therein precribed may not be availed of by the patentee in defense of other actions bringing into issue the validity of a patent. That this statutory bar may be relied upon by a patentee only in defense of actions commenced by the United States and having for their purpose the annulment of a patent. See U. S. vs. Winona Co., *supra*; U. S. vs. Chandler-Dunbar Co., *supra*; U. S. vs. Whited & Wheless, *supra*.

The foregoing authorities establish that the running of the period prescribed in said act has no other effect than to make the title of the patentee good as against the grantor—the United States. That the expiration of said statutory period within which the federal government might proceed to annul a patent does not preclude a person other than the patentee from asserting and enforcing an interest adverse to that of the patentee was decided in U. S. vs. New Orleans Co., 248 U. S. 507. See Brandon vs. Ard, 211 U. S. 11; Huntington vs. Donovan, *supra*.

The ruling in U. S. vs. Chandler-Dunbar Co., *supra*, ever since has stood as the law applicable to the cited statute, making it the general statute of limitations applicable to all cases strictly involving the public lands which the government had the power to convey, and the validity of such lands. Fernandez vs. Ojeda, 166 U. S. 146.

[23] U. S. vs. Wooley, 262 Fed. 518; U. S. vs. Bellingham Bay Co., 281 Fed. 522. See same case 299 Fed. 869, aff'd. 6 Fed. (2d) 102, wherein it is said: "In U. S. vs. Oregon Lumber Co., *supra* (260 U. S. 290), the court said that the United States was entitled to disaffirm and recover patented lands, or affirm the patent and recover damages for the fraud, but that it could not do both and that any decisive action by a party 'with knowledge of his rights and the facts determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based upon one or the other of these inconsistent conclusions,'" aff'd. in Linn & Lane Co. vs. U. S., 196 Fed. 593, dist'd. in 203 Fed. 394; aff'd. 236 U. S. 574; see Shaw vs. Work, 9 Fed. (2d) 1014.; U. S. vs. Booth-Kelly Co., 246 Fed. 970. While it is true that "committing a fraud in a

§ 337. Concealed Fraud.

It now is well settled that in actions to annul patents for lands issued by the federal government, as to which the statute of limitations applies, the equitable rule that a cause of action does not accrue until the discovery of a fraud, where there are acts of concealment, is given full force, and in such a case the limiting period will commence to run at the date of discovery rather than the date of the patent.[25]

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manner that conceals itself" precludes the defense of limitations, Exploration Co. vs. U. S., *supra* [22], yet it also is the rule that there must be reasonable diligence and that the means of knowledge has the same effect as knowledge itself. Wood vs. Carpenter, 101 U. S. 143, cited in Kinder vs. Scharff, 231 U. S. 517; Strout vs. United Shoe Co., 206 Fed. 651, 224 Fed. 1016. The cases of Peck vs. Bank, 16 R. I. 710, 19 Atl. 369, and Reynolds vs. Hennessy, 17 R. I. 307, 20 Atl. 307, 23 Atl. 639, do not seem to be inconsistent with these decisions. Curtis vs. Metcalf, 259 Fed. 963, aff'd. 264 Fed. 650. See § 337.

[24] U. S. vs. Diamond Coal Co., 255 U. S. 323, rev'g. 254 Fed. 266; see, also, U. S. vs. Puget Sound Co., 215 Fed. 436; U. S. vs. Bellingham Bay Co., *supra* [23]. In an action brought by the government more than six years after the issuance of a patent to cancel and annul it on the ground of fraud the complainant must set forth specifically what were the impediments to an earlier prosecution of the claim, how it came to be so long ignorant of its rights and the means used by the patentee to fraudulently keep it in ignorance and how and when it first came to a knowledge of the matters alleged in the complaint. It is not sufficient for the government to aver that it was ignorant of its claim for thirteen years. U. S. vs. Diamond Coal Co., 254 Fed. 269; see, also, N. P. R. Co. vs. Smith, *supra* [1]. In 4 Fed. Stats. Anno. (2d ed.), p. 861, note, it is said: "In suits by the United States it must offer the same evidence as an individual, both in quantity and quality; and if it offers none, or if the evidence be insufficient, it fails precisely as the individual fails in similar circumstances. Chesapeake Co. vs. U. S., 223 Fed. 926, wherein the court said: 'The property of a citizen can only be taken according to the rules and forms of law, and, even if it be the sovereign who is striving to take it by an action in court, we think the sovereign also should be required to prove his right, and to prove it with the same strictness and according to the same rules as prevail in other cases'." The mere fact that the government permitted the patent to become valid by the statute of limitations in place of its express ratification would not affect the question of its right to maintain an action to recover the value of the lands which it is alleged were fraudulently obtained. Union Coal Co. vs. U. S., 247 Fed. 106; see, also, Bistline vs. U. S., 229 Fed. 546.

[25] Exploration Co. vs. U. S., *supra* [22]; U. S. vs. Diamond Coal Co., *supra* [24]; U. S. vs. Bellingham Bay Co., *supra* [23]; U. S. vs. S. P. R. Co., 11 Fed. (2d) 546. Where the party injured by the fraud remains in ignorance of it, without any fault or want of diligence or care on his part, the bar of the statute of limitations does not begin to run until the fraud is discovered, and this, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party. U. S. vs. Bellingham Bay Co., *supra;* U. S. vs. Bighorn Co., 9 Fed (2d), was an action to cancel stone and timber patents as fraudulently procured. It was held that the United States was subject in equity to the same rules of evidence, proof and presumptions of law as a private litigant. The court said: "The Supreme Court has laid down the rule covering a situation of this kind in the case of Wood vs. Carpenter, 101 U. S. 135, at page 140, where the following language is used: 'In this class of cases the plaintiff is held to stringent rules of pleading and evidence and especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered and what the discovery is, so that the court may clearly see whether by ordinary diligence the discovery might have been made.' Stearns vs. Page, 7 How. 819, 822. This is necessary to enable the defendant to meet the fraud and the time of its discovery. Moore vs. Greene et al., 19 How. 69, 72. The same rules were again laid down in Beaubien vs. Beaubien, 23 How. 190, and in Badger vs. Badger, 2 Wall. 95. A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery it should be stated when it was made, what it was, how it was made, and why it was not made sooner. Carr vs. Hilton, 1 Curt. C. C. 220 (Fed. Cas. 2436). The fraud intended by the section which shall arrest the running of the statute must be one that is secret and concealed and not one that is patent or known. Martin, Assignee, etc., vs. Smith, 1 Dill. 85 (Fed. Cas. 9164), and the authorities cited."

On the annulment of the patent the patentee is liable for all values derived from his improper use of the land embraced in the patent. U. S. vs. S. P. R. Co., *supra.* In reversing U. S. vs. Whited & Wheless, 232 Fed. 139, the Supreme Court said that the act was designed for the security of patent titles and does not apply to an action at law to recover the value of the patented land as damages for deceit in procuring the patent, *supra* [22]; see, also, Payne vs. U. S., 255 U. S. 444; Lane vs. Hoglund, 244 U. S. 552. Nor does the statute apply where the purpose of the annulment is not to establish the right of the United States to the land, but to remove a cloud upon the possessory right of its (Indian) wards. Cramer vs. U. S., 261 U. S. 236; see U. S. vs. Minnesota, 270 U. S. 181.

Where the government sued to annul certain timber and stone patents upon the ground of fraud, and persisted in suit after defendant had pleaded in bar the statute of limitations applicable to such cases (act of March 3, 1891, 26 Stats. 1095, 1099) and the plea was sustained and the case dismissed, it was held that the government had elected its remedy and could not afterwards maintain an action at law to

§ 338. Burden of Proof.

The burden of proof as to fraud is upon the government.[26] The charges of fraud must be specific and show that the fraud must, necessarily, have affected the action of the land department in issuing the patent.[27]

§ 339. Application to Sue.

Where a party is not entitled to control the legal title yet seeks to annul the patent or limit its operations he must make application to the government to take the proper steps to that end, as such a suit can be maintained only by and in the name of the United States.[28]

§ 340. Bona Fide Purchaser.

A sale to a *bona fide* purchaser, for value, without notice, will bar an action against a patentee or his transferee.[29] But where an applicant

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recover damages for fraud. U. S. vs. Oregon Lumber Co., 260 U. S. 301. See Equitable Co. vs. Connecticut Co., 10 Fed. (2d) 915.

[26] Maxwell Land Grant, 121 U. S. 325; Colorado Coal Co. vs. U. S., 123 U. S., 307; U. S. vs. Iron Co., 128 U. S. 673; U. S. vs. Keitel, 211 U. S. 370; U. S. vs. Diamond Coal Co., *supra* [24]; U. S. vs. Big Horn Co., *supra* [25]; U. S. vs. Bucher, 15 Fed. (2d) 785. "Fraud is not to be presumed. To establish it the evidence must be clear, unequivocal and convincing, which means there must be sufficient competent evidence as distinguished from mere suspicion to satisfy the court trying the question. That is the real test in cases where fraud is an issue. The burden is on the party alleging fraud to show the same." U. S. vs. Mammoth Oil Co., 14 Fed. (2d) 705, rev'g. 5 Fed. (2d) 330; aff'd. 275 U. S. 13, in which latter case the court said:

"The legal effect of evidence is always a question of law. The rule in the federal courts has long been well settled that fraud is not to be presumed. That it is not to be presumed from any number of lawful acts; that where an act and circumstance are as consistent with an honest motive as with a dishonest one, the former must be preferred; that fraud can not be proved by a bare preponderance of the evidence, but only by evidence that is clear, unequivocal and convincing." U. S. vs. Porter Fuel Co., 247 Fed. 769; Filcher vs. U. S., 7 Fed. (2d) 522, aff'g. 1 Fed. (2d) 53. See U. S. vs. Barber Co., 194 U. S. 31; aff'g. 172 Fed. 948; U. S. vs. Beaman, 242 Fed. 879; U. S. vs. Peterson, 34 Fed. (2d) 245; U. S. vs. Hays, 35 Fed. (2d) 949. In the Colorado Coal case, *supra*, the court was dealing with a statute excepting from entry lands within which there were "mines" at the time, a matter particularly noticed in the opinion, while in the Diamond Coal case, *supra* [23], the exception was of "mineral lands" and "lands valuable for mineral."

[27] Vance vs. Burbank, 101 U. S. 514; James vs. Germania Co., 107 Fed. 597; U. S. vs. Mills, 190 Fed. 513; U. S. vs. Barber Co., 194 Fed. 24; Connor vs. U. S. 214 Fed. 522. False testimony or forged documents will not defeat the patent if the disputed matter actually has been presented to and considered by the appropriate tribunal. Greenameyer vs. Coate, 212 U. S. 434; U. S. vs. Reed, 28 Fed. 482; Peabody Co. vs. Gold Hill Co., *supra* [22]. "The acts for which a court of equity will on account of fraud set aside or annul a judgment or decree between the same parties rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court and not to a fraud in the matter on which the decree was rendered. That the mischief of retrying in every case in which the judgment or decree rendered on false testimony given by perjured witnesses, or in contracts or documents whose genuineness or validity was in issue and which are afterwards ascertained to be forged or fraudulent would be greater by reason of the endless nature of the strife than any compensation arising from doing justice in individual cases." U. S. vs. Throckmorton, 98 U. S. 68, aff'g. 4 Sawy. 51; Christie vs. Great Northern Co., 284 Fed. 702; U. S. vs. Atkins, 260 U. S. 224, aff'g. 268 Fed. 923, where this principle was applied to an enrollment as a citizen of the Five Tribes and an allotment of land to an Indian by the Dawes Commission. To be considered the perjury must be extrinsic or collateral to the matter determined. U. S. vs. White, 17 Fed. 561; U. S. vs. Minor, 26 Fed. 672; for instances of extrinsic or collateral fraud see Cragie vs. Roberts, 6 Cal. A. 309, 92 Pac. 97.

In Chicago Co. vs. Callicotte, 267 Fed. 799, is a collection of cases on this question of fraud. See, also, Nelson vs. Meehan, 155 Fed. 1. Marshall vs. Holmes, 141 U. S. 189, is explained in Nelson vs. Meehan, *supra*.

[28] Lee vs. Johnson, 116 U. S. 48; Burke vs. S. P. Co., 234 U. S. 669; Carter vs. Thompson, 65 Fed. 329; Peabody Co. vs. Gold Hill Co., *supra* [22]; Southern Dev. Co. vs. Endersen, 200 Fed. 284, and cases therein cited; U. S. vs. Wesley, 189 Fed. 276; Bateman vs. Southern Oregon Co., 217 Fed. 933; S. P. Co. vs. Jackson Oil Co., 164 Cal. 392, 129 Pac. 276. See S. P. R. Co. vs. McKittrick, 49 Cal. A. 634, 194 Pac. 82; see, also, Fisher vs. Rule, 248 U. S. 317, aff'g 232 Fed. 861.

[29] As to what constitutes a *bona fide* purchaser see U. S. vs. Winona Co., 67 Fed. 948, aff'd 165 U. S. 463; Scott vs. Logan, 233 U. S. 613. See, also, Bernhard vs. Wall, 184 Cal. 612, 194 Pac. 1040. In a suit in equity by the United States to cancel a patent, the rule as to what constitutes a *bona fide* purchaser is no different from what it would be if the complainant were an individual. U. S. vs. Chicago Co., 172 Fed. 271. For establishment of rights of *bona fide* purchasers of lands erroneously patented or certified prior to the institution of a suit to cancel a patent

obtaining title to public land by fraud has sold it to a *bona fide* purchaser the government may recover from the applicant the price he sold it for to the *bona fide* purchaser.[30]

§ 341. Constructive Trust.

Where a state to which lands were certified by the Secretary of the Interior afterwards fraudulently executed contracts of sale to certain corporations to portions of the land for mineral purposes, the government brought suit to quiet its title thereto as against the assignees of the purchasers on the ground of fraud in the procurement of the sales of the lands. A decree quieting its title was entered in its favor. Subsequently the state issued its patent to said lands to one of said assignees. The government about nine or ten years later brought suit, setting up these and other facts, against the assignees and asked that they be enjoined from removing coal from lands and that it be adjudged that defendants held the lands in trust for the plaintiff. The court on appeal from the judgment dismissing the bill on the ground that the suit was barred by the provisions of the act of March 3, 1891, reversed the judgment and held the statute not applicable as the suit was in aid of the former decree and to obtain the benefits of that decree. The court, quoting from Moore vs. Crawford,[31] said: "Whenever the legal title to the property is obtained through means or under circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have

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or certification, see 5 U. S. Comp. St., p. 5896. § 4902. This section is broad enough to include all patents erroneously or fraudulently issued under any act of congress. U. S. vs. St. Paul Co., 247 U. S. 310. U. S. vs. Pitan, *supra* (22); see U. S. vs. Norris, 222 Fed. 14. In U. S. vs. Barber Co., *supra* (25), it was held that a person or a corporation may enter into an agreement with another to buy public lands, loaning him the money to acquire title, and may inspect and select the lands and yet not be bound to inquire into the methods by which the other party to the contract acquires the title, nor chargeable with knowledge of any fraud upon the land laws that he may resort to, and that "in taking titles based upon the issuance of final receiver's receipts to the entrymen, without knowledge of such fraud or facts sufficient to put one upon inquiry, such person or corporation is an innocent purchaser of the lands." To same effect U. S. vs. Bighorn Co., *supra* (26). A patent for a mining claim secured by fraudulent practices, although not void nor subject to collateral attack, nevertheless is voidable and may be annulled in a suit by the government against the patentee or a purchaser with notice of the fraud. U. S. vs. Diamond Coal Co., *supra* (24).

Construing section 8 of the act of March 3, 1891, 5 U. S. Comp. St., p. 6065, § 5114, in U. S. vs. Koleno, *supra* (24), it was said: "The present concern is not whether this would operate as a limitation upon an action by the government for damages for deceit, but whether the government had an action before this statute was passed, but which should be denied it since its passage, even within the period fixed for bringing suit to annul the patent. This statute was strictly one of limitation and did not create the right to maintain an action to set aside the patent. In U. S. vs. Stinson, 197 U. S. 200, it was held that no action would lie by the United States against *bona fide* purchasers from a patentee for value without notice of fraud. U. S. vs. California Land Co., 148 U. S. 31, 41; United States vs. Winona, etc., R. R. Co., 165 U. S. 479, and it especially is pointed out in the last named case that the defense of a *bona fide* purchaser existed entirely independent of any statutory provision in his behalf."

[30] U. S. vs. Frick, 244 Fed. 574.

[31] 130 U. S. 128; U. S. vs. Carbon Co. Land Co., 9 Fed. (2d) 517, aff'd. 274 U. S. 640. In its affirmative decision the Supreme Court said: "The statute of limitations relied upon provides that suits by the United States to 'vacate and annul any patent * * * shall only be brought within six years after the date of the issuance of such patents.' A point much argued here was whether a certification of public lands is a patent within the meaning of the statute. But that is a question which we need not here decide. Statutes of limitation against the United States are to be narrowly construed. United States vs. Whited and Wheless, 246 U. S. 552, 561 * * *. And we think it plain that the present suit founded on equitable grounds to compel a conveyance of title derived from a certification by the government is not a suit to cancel the certification.

any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust."

CHAPTER XVI.

STATE STATUTES OF LIMITATIONS.

§ 342. Basis of Claimants' Right.

Under the provisions of the mining act of congress in regard to local statutes of limitation,[1] the latter statute becomes the foundation upon which actively to assert a right, and is not limited as in other cases, to be used as a defense against an adversary's attack. In other words, the statute of limitations thus becomes a controlling factor as the basis of a claimant's right to a mining claim in constradistinction from its ordinary uses as a shield for defense against an adverse attack.

§ 343. Possession for Period of Limitation.

The working of a mining claim for the local statutory period is equivalent to a valid location under the mining act,[2] creates a valid claim against everyone except the United States,[3] and will entitle the

[1] 6 Fed. St. Ann. [2d. ed.], p. 580, § 2332; see Glacier Co. vs. Willis, 127, U. S. 471; Shoshone Co. vs. Rutter, 177 U. S. 505; Butte City Co. vs. Baker, 196 U. S. 123; aff'g. 28 Mont. 222, 72 Pac. 617; Lavagnino vs. Uhlig, 198 U. S. 449.

In Butte & S. Co. vs. Clark-Montana Co., 249 U. S. 12, aff'g. 248 Fed. 609, aff'g. 233 Fed. 547, where, in order to meet a defect in the location notice under the state law, the complaint, in a suit brought to determine extralateral rights, averred actual, open, exclusive and uninterrupted possession and working of plaintiff's mining claim for the period of limitation provided by § 2332 of the Rev. Stats. of the United States, it was held that these latter allegations were a part of plaintiff's case and involved a construction and application of said section, and, hence, for that reason, the decree of the Circuit Court of Appeals was reviewable.

[2] Donnelly vs. U. S., 228 U. S. 243; Cole vs. Ralph, 252 U. S. 286, rev'g. 249 Fed. 81; Humphreys vs. Idaho Co., 21 Ida. 138, 120 Pac. 823; Upton vs. Santa Rita Co., 14 N. M. 96, 89 Pac. 275. See Pacific Co. vs. Pioneer Co., 205 Fed. 577; Chancellor-Canfield Co. vs. U. S., 266 Fed. 151.

In Cole vs. Ralph, *supra*, the court said: "The views entertained by the courts in the mining regions are shown in Harris vs. Equator Co., where the court ruled that holding and working a claim for a long period were equivalent of necessary acts of location, but added that 'this, of course, was subject to proof of a lode in the Ocean Wave ground, of which there was evidence.' In Humphreys vs. Idaho Co., *supra*, where the section (§ 2332 Rev. St.) was held to obviate the necessity of providing, etc., of a location notice, but not to dispense with proof of discovery; in Upton vs. Santa Rita Co., *supra*, where the court held that the section should be construed in connection with the provisions of the mineral land laws, and that it did not relieve a claimant coming within its terms from continuing to do the assessment work required by another section; and in Anthony vs. Jillson, 83 Cal. 296, 23 Pac. 419, where the section was held not to change the class who may acquire mineral lands or to dispense with proof of citizenship.

"As respects discovery, the section itself indicates that no change was intended. Its words 'Have held and worked their claims' pre-supposes a discovery; for to 'work a mining claim' is to do something toward making it productive, such as developing or extracting an orebody after it has been discovered. Certainly it was not intended that a right to a patent could be founded upon nothing more than holding and prospecting, for that would subject nonmineral land to acquisition as a mining claim. Here as the verdicts show, there was no discovery, so the working relied upon could not have been of the character contemplated by congress.

"The defendant places some reliance upon the decisions of this court in Belk vs. Meagher, 104 U. S. 279, and Reavis vs. Fianza, 215 U. S. 54, but neither contains any statement or suggestion that the section dispenses with a mineral discovery or cures its absence. The opinion in the first shows affirmatively that there was a discovery, and that in the other shows that the controversy, although of recent origin, related to 'gold mines' which had been worked for many years."

In other words, the statute does not give one a right to the claim merely because he has worked it for the statutory time without any adverse claim being made, McCowan vs. McClay, 16 Mont. 230, 40 Pac. 604.

[3] Glacier Co. vs. Willis, *supra* [1]; Francoeuer vs. Newhouse, 43 Fed. 236; Buffalo Zinc Co. vs. Crump, 70 Ark. 538, 69 S. W. 572.

person so holding to a patent [4]; provided, there is citizenship,[5] discovery,[6] performance of the necessary work,[7] and the payment of taxes.[8]

§ 344. Periods of Limitations.

The period of limitation differs in the various states; for instance, in California the time limit is five years [9]; in Colorado [10] and Utah [11] seven years; in Nevada [12] two years and in Oregon [13] ten years.

§ 345. When Statute Operative.

The statute does not begin to run against the mineral claimant from the date of his location, but only after the patent has been issued, and the government has finally disposed of the soil, and the miner has become the absolute owner thereof any local legislation to the contrary notwithstanding.[14] It does not run from the date of the final receipt [15] nor as between claimants of the possessory title to the same ground.[16]

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[4] Belk vs. Meagher, *supra* (2); Blackburn vs. Portland Co., 175 U. S. 587; Horst vs. Shea, 23 Mont. 397, 59 Pac. 364, 178 U. S. See Min. Regs., pars. 74 to 77.

[5] See *supra*, note 2.

[6] Cole vs. Ralph, *supra* (2); Star Co. vs. Federal Co., 265 Fed. 899; Humphreys vs. Idaho Co., *supra* (2).

[7] See *supra*, note 2; Capital No. 5 Claim, 35 L. D. 462.

[8] Glacier Co. vs. Willis, *supra* (1); Unger vs. Mooney, 63 Cal. 586; Mann vs. Mann, 152 Cal. 29, 91 Pac. 994; Wasson, 54 Cal. A. 274, 201 Pac. 608; Sheehan vs. All Persons, 195 Cal. 546, 252 Pac. 337; Weyse vs. Biedebach, Cal. A. —, 261 Pac. 1092. See Standard Co. vs. Habishaw, 132 Cal. 115, 64 Pac. 113. Eberville vs. Leadville Co., 28 Colo. 241, 64 Pac. 200; Utah Co. vs. Chandler, 45 Utah 85, 142 Pac. 1119.

[9] Cain vs. Addenda Co., 24 L. D. 21; Melton vs. Lambard, 51 Cal. 258.

[10] Eberville vs. Leadville Co. *supra* (8); see, also, Knight vs. Lawrence, 19 Colo. 425, 36 Pac. 242.

[11] Utah Co. vs. Chandler, *supra* (8).

[12] South End Co. vs. Tinney, 22 Nev. 19, 35 Pac. 89; 38 Pac. 401; Wren vs. Dixon, 40 Nev. 170, 161 Pac. 736.

[13] Eastern Oregon Co. vs. Brosnan, 173 Fed. 67.

[14] Weibbold vs. Davis, 7 Mont. 107, 14 Pac. 865.

There is diversity of opinion as to the precise time when the title passes from the government to an entryman upon the public domain. In the majority of cases it is held that no title passes until patent issues. For a collection of cases to that effect as well of those to the contrary, see Tyee Con. Co. vs. Langstedt, 136 Fed. 127.

[15] Redfield vs. Parks, 132 U. S. 239; *but see* Hamilton vs. Southern Nevada Co., 33 Fed. 562; and see Merced Co. vs. Fremont, 7 Cal. 317; Mathews vs. Ferrea, 45 Cal 51. For a collection of cases upon this subject see Tyee Co. vs. Langstedt, 136 Fed. 126. See Cal. Civil Code § 1925.

[16] The general rule is well settled that adverse possession of land, though held in admitted subordination to the title of the government, may nevertheless be adverse to every one else. Missouri Co. vs. Wiese, 204 U. S. 234; Iowa Co. vs. Blumer, 206 U. S. 482; Boe vs. Arnold, 54 Or. 52, 102 Pac. 290; Steele vs. Boley, 7 Utah 64, 24 Pac. 755. See, also, Bennett vs. Harkness, 158 U. S. 446; Lange vs. Robinson, 148 Fed. 804; Charlton vs. Kelley, 156 Fed. 437; Cameron vs. Bass, 19 Ariz. 246, 168 Pac. 646; Ring vs. U. S. Gypsum Co., 62 Cal. A. 87, 216 Pac. 409; Rohn vs. Iron Chief Co., 186 Cal. 703, 200 Pac. 644; Wren vs. Dixon, *supra* (12).

In Conway vs. Hart, 129 Cal. 480, 62 Pac. 44, the court said: "This is an ordinary mining suit, where the rights of the parties against each other are alone to be considered. It does not arise under § 2326 of the United States Revised Statutes, out of an application in the United States land office by one of the parties to obtain a patent and an adverse claim there filed by the other party in which questions touching the right of a party as against the United States government may arise and where the judgment should sometimes be against both parties to the contest. See Jackson vs. Roby, 109 U. S. 440."

CHAPTER XVII.

ADVERSE SUITS.

§ 346. Character of Adverse Suit.

An "adverse suit" may be one in the form of an action in ejectment or a suit to quiet title[1] brought in a court of competent jurisdiction[2] in opposition to an application for a patent for a mining claim.[3] It has been classed as a "special proceeding" of an equitable nature[4] and also as a "special action."[5] Or, differently stated, the proceedings authorized by the mining act are purely statutory; are for special relief of an equitable nature and are regarded as a continuation of the proceedings

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[1] Perego vs. Dodge, 163 U. S. 165, aff'g. 9 Utah 3, 33 Pac. 221; Keppler vs. Becker, 9 Ariz. 234, 80 Pac. 334; Deeney vs. Mineral Creek Co., 11 N. M. 279, 67 Pac. 742.

[2] Butte City Co. vs. Baker, 196 U. S. 124; Shoshone Co. vs. Rutter, 177 U. S. 505, dismissing 87 Fed. 801 for want of jurisdiction.

[3] Providence Co. vs. Burke, 6 Ariz. 393, 57 Pac. 641; Nesbitt vs. De Lamar's Co., 24 Nev. 273, 53 Pac. 178. See 177 U. S. 523. An action brought in support of an adverse claim must be based on the right asserted in such claim; and it must be assumed that no adverse claim exists except such as has been filed. Marshall Co. vs. Kirtley, 12 Colo. 415, 21 Pac. 492; Lancaster vs. Coale, 27 Colo. A. 495, 150 Pac. 821; Healey vs. Rupp, 37 Colo. 25, 86 Pac. 1015; Lily Co. vs. Kellogg, 27 Utah 114, 74 Pac. 518. In the case of Wolenberg, 29 L. D. 302, the secretary said: "The assumption declared in section 2325 of the Revised Statutes that no adverse claim exists in those instances where no adverse claim is filed in the local land office during the period of publication relates to the time of the expiration of the period of publication and to adverse claims which might have been made known at the local office before that time. It has nothing to do with adverse claims which initiated subsequent to that time, and which could not therefore have been made known at the local office during the period of publication." As to such existing claims an adverse must be filed in the land office or the claim is waived. Chichagoff Co. vs. Alaska Handy Co., 45 Fed. (2d) 553; Poore vs. Kaufman, 44 Mont. 248, 119 Pac. 785; Hamilton vs. Southern Nevada Co., 33 Fed. 562. The form of the action is not provided for by statute. Perego vs. Dodge, *supra* [1]; Gillis vs. Downey, 85 Fed. 487; Durgan vs. Redding, 103 Fed. 917. But it may be either an action in ejectment or a suit to quiet title, as may be appropriate under the particular circumstances. Perego vs. Dodge, *supra;* Young vs. Goldsteen, 97 Fed. 308; see Conway vs. Hart, 129 Cal. 488, 62 Pac. 44; Mares vs. Dillon, 30 Mont. 139, 75 Pac. 963; Kirby vs. Higgins, 33 Mont. 518, 85 Pac. 275; Upton vs. Santa Rita Co., 14 N. M. 112, 89 Pac. 275.

An adverse suit is possessory, and the right to patent to the successful party rests solely with the land department. Robbins vs. Elk Basin Co., 285 Fed. 179. In Quigley vs. Gillett, 101 Cal. 462, 35 Pac. 1040, it is said: "The action was brought 'to determine the right of possession' of the mining claim, and that was the only question involved. The court had nothing to do with the proceedings in the land office, and no power to determine as to their regularity or irregularity, sufficiency or insufficiency." Gruwell vs. Rocca, 141 Cal. 417, 74 Pac. 1029. To the same effect see 420 Co. vs. Bullion Co., 9 Nev. 240, 3 Sawy. 634. It was there held that the act of congress required the contestant to bring such action as was authorized by the laws of the state to determine the right of possession, and that such action, when brought, would be governed and determined by the practice and rules of pleading there prevailing, irrespective of the act of congress requiring the suit to be brought. And, in Altoona Co. vs. Integral Co., 114 Cal. 100, 45 Pac. 1047, it is said: "The rights of the parties will be entirely determined by the laws of the United States granting the right to enter upon the mineral lands, and to extract metals therefrom and to acquire title thereto, but the suit must be tried in every respect as though no contest was pending in the land office of the United States in regard to the right to purchase the same. The court would be at liberty to order a special verdict if that was desired by the parties, because it would be more serviceable in the contest, for that may be done in any case, and such contingency is provided for in our practice." Warnekros vs. Cowan, 13 Ariz. 42, 108 Pac. 239.

[4] Providence Co. vs. Burke, *supra* [3]; see Keppler vs. Becker, *supra* [1]. Any proceeding in a court which under the common law and equity practice was neither an action at law nor a suit in equity is a special proceeding. County of Yuba vs. North American Co., 12 Cal. A. 223, 107 Pac. 139. The term "suit" applies to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. Kohl vs. U. S., 91 U. S. 367.

[5] Lee Doon vs. Tesh, 68 Cal. 43, 6 Pac. 97, 8 Pac. 621. The adverse suit stays all proceedings in the land office except the publication of notice and the making and filing of proof thereof, and also, proof of posting upon the claim during the period of newspaper publication. Richmond Co. vs. Rose, 114 U. S. 585; aff'g. 17 Nev. 25, 27 Pac. 1105; Gwillim vs. Donnellan, 115 U. S. 49. In South End Co. vs. Tinney, 22 Nev. 50, 35 Pac. 89, it is held that the proceedings which by law are required to be suspended pending suit on an adverse claim are those relating to the patenting of the claim, and the land office is not barred by the filing of an adverse claim from investigating the collateral fact as to whether or not the application for patent embraces land not subject to the same. See, also, Great Eastern Co. vs. Esmeralda Co., 2 L. D. 705.

before the land department to have the determination of the question as to which of the contesting parties is entitled to possession.[6]

§ 347. Distinctive Features.

The proceeding has its inception in the local land office and not within the court in which it is brought,[7] and the time within which the adverse suit must be commenced is fixed by the mining act.[8] It arises only from claims to independent and conflicting locations.[9] Each party thereto practically is a plaintiff and must show title.[10] The adverse suit involves the present right of possession,[11] but not the right to the patent.[12] Its pendency, until final judgment, or other disposition of the case, stays proceedings in the land department.[13] The adverse suit may involve the whole, or a part, or different parts, of the same claim.[14] There may be as many different judgments as there are successful parties to the litigation[15] or the judgment may be against all

[6] In Cole vs. Ralph, 252 U. S. 297, rev'g. 249 Fed. 81, it is said: "When adverse claim is filed in response to notice required by the statute . . . further proceedings upon the application must be suspended to await determination by a court of competent jurisdiction of the question whether either party, and if so, which, has the exclusive right to the possession arising from a valid and subsisting location." See Wolverton vs. Nichols, 119 U. S. 489; Perego vs. Dodge, *supra* (1); Doe vs. Waterloo Co., 43 Fed. 219; McFadden vs. Mt. View Co., 97 Fed. 670; Tonopah Co. vs. Douglass, 123 Fed. 936; Providence vs. Burke, *supra* (3); Kirby vs. Higgins, *supra* (3); Creede Co. vs. Uinta Co., 196 U. S. 357; Tonopah Co. vs. Tonopah Co., 125 Fed. 408, 419, dis. 129 Fed. 1007.

See *infra*, notes 11, 12, 17, and 82.

[7] Wolverton vs. Nichols, *supra* (6); Doe vs. Waterloo Co., *supra* (6); Tonopah Co. vs. Douglass, *supra* (6); Mason vs. Washington-Butte Co., 214 Fed. 36.

[8] 5 U. S. Comp. St., p. 5622, § 4623; Harris vs. Helena Co., 29 Nev. 506, 92 Pac. 1. A suit on an adverse claim under § 2326 of the Revised Statutes must be brought within thirty days from the filing of the adverse claim, 6 Fed. St. Ann [2d ed.], p. 563. In Hagenauer vs. Detroit Co., 14 Ariz. 74, 124 Pac. 808, it is said: "§ 2326 is not an ordinary statute of limitations, acting upon a claim in the ordinary manner; but the law permits of thirty days after the adverse is filed in the land office, the maintenance of a special proceeding in the proper court in aid of the adverse, but when that period has elapsed the right itself is gone, and no cause of action whatsoever remains."; *but see* Altoona Co. vs. Integral Co., *supra* (3); *compare* Little vs. Morris, 48 Ida. 740, 284 Pac. 1029.

[9] Turner vs. Sawyer, 150 U. S. 578; Creede Co. vs. Uinta Co., *supra* (8); Stevens vs. Grand Central Co., 133 Fed. 28; Thomas vs. Elling, 25 L. D. 495; s. c. 26 L. D. 220; Bunker Hill Co. vs. Shoshone Co., 33 L. D. 147; Grand Canyon Co. vs. Cameron, 35 L. D. 495; Krushnic, 52 L. D. 303; Providence Co. vs. Burke, *supra* (3); Doherty vs. Morris, 11 Colo. 12, 16 Pac. 911; aff'd. 28 Pac. 85; Davidson vs. Fraser, 36 Colo. 1, 84 Pac. 695.

[10] Brown vs. Gurney, 201 U. S. 184, aff'g. 32 Colo. 472; 77 Pac. 357; see Jackson vs. Roby, 109 U. S. 440; Perego vs. Dodge, *supra* (1); Bay State Co. vs. Brown, 21 Fed. 167; Tonopah Co. vs. Douglass, *supra* (6); Willitt vs. Baker, 133 Fed. 948. If there is any exception to the rule that in an action to recover possession of land the plaintiff must recover on the strength of his own title, and that the defendant in possession can lawfully say, until you have shown *some* title, you have no right to disturb me—it has not been pointed out to us. Reynolds vs. Iron Co., 116 U. S. 687. Though in an action of ejectment to recover possession of a mining claim, if the defendant relies on forfeiture by the plaintiff, he must plead it specially, this is not the rule in adverse suits where the better title must prevail, and if neither has it, neither will have judgment. Hammer vs. Garfield Co., 130 U. S. 291; Morenhaut vs. Wilson, 52 Cal. 288; Quigley vs. Gillett, *supra* (3); Steel vs. Gold Lead Co., 18 Nev. 80, 1 Pac. 448; Merchants Bank vs. McKeown, 60 Or. 325, 119 Pac. 335; see Shoshone Co. vs. Rutter, 87 Fed. 803; *but see* Renshaw vs. Switzer, 6 Mont. 464, 13 Pac. 127.

[11] Perego vs. Dodge, *supra* (1); Duffield vs. San Francisco Co., 198 Fed. 942; Butte Co. vs. Merriam, 32 Mont. 402, 80 Pac. 675; Steel vs. Gold Lead Co., *supra* (10).

[12] Id.

[13] Cole vs. Ralph, *supra* (6); Gwillim vs. Donnellan, *supra* (5); Last Chance Co. vs. Tyler Co., 61 Fed. 557; Deeney vs. Mineral Creek Co., 11 N. M. 294, 67 Pac. 726. See Cuenin vs. Chloride Co., 57 Colo. 320, 141 Pac. 464; Iba vs. Central Ass'n., 5 Wyo. 355, 42 Pac. 20, 40 Pac. 527.

[14] 5 U. S. Comp. St., p. 5622, § 4623; Smith vs. Imperial Co., 11 Ariz. 197, 89 Pac. 510; Slothower vs. Hunter, 15 Wyo. 198, 88 Pac. 36; see Jackson vs. Roby, *supra* (10). The jurisdiction of the court is limited to the area in conflict. Mares vs. Dillon, *supra* (3); and the burden is upon the plaintiff to show the conflict of the surface area. Porter vs. Tonopah Co., 133 Fed. 756, aff'd. 146 Fed. 385; see Hoban vs. Boyer, 37 Colo. 185, 85 Pac. 837; Swanson vs. Kettler, 17 Ida. 321, 105 Pac. 1065; aff'd. 224 U. S. 180.

[15] 5 U. S. Comp. St., p. 5622, § 4623; Del Monte Co. vs. Last Chance Co., 171 U. S. 77.

the parties to the suit.[16] The judgment is conclusive only between the parties thereto as to the right of possession, and not as between them, or any one of them, and the government in the matter of the issuance of the fee simple title.[17] The court must find on the question of citizenship.[18] The judgment of the court as to discovery is not conclusive upon the land department.[19] A judgment of nonsuit does not relieve the defendant from affirmatively showing his own title.[20] That only those who have filed adverse claims can be made parties or intervene is disputable.[21] The suit must be prosecuted with reasonable diligence to final judgment under penalty of waiver.[22] The suit is equivalent to "inquest of office found" because the government is interested in the outcome of the suit; and either party thereto may question the citizenship of the other.[23]

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[16] Perego vs. Dodge, *supra* (1); Brown vs. Gurney, *supra* (10); Providence Co. vs. Burke, *supra* (3); Mares vs. Dillon, *supra* (3); Tonopah Ralston Co. vs. Mt. Oddie Co., 49 Nev. 420, 248 Pac. 834.

[17] Perego vs. Dodge, *supra* (1); Clipper Co. vs. Eli Co., 194 U. S. 232; Lane vs. Cameron, 45 App. Cas. D. C. 410; Aurora Lode vs. Bulger Hill Placer, 23 L. D. 95; Upton vs. Santa Rita Co., *supra* (3); San Francisco Co. vs. Duffield, 201 Fed. 833, *certiorari* denied, 229 U. S. 609.

[18] Rosenthal vs. Ives, 2 Ida. 270, 12 Pac. 904; Burke vs. McDonald, 2 Ida. 679, 33 Pac. 49; see North Noonday Co. vs. Orient Co., 1 Fed. 522; Iba vs. Central Ass'n., *supra* (13). An admission by the defendant that the plaintiff is a citizen is *prima facie* evidence of the fact. Stolp vs. Treasury Co., 38 Wash. 619, 80 Pac. 817. In an adverse suit the government, though not a party, requires that certain facts must be found whether alleged in the pleadings or not, and one of these is that the applicant for a patent must prove himself to be a citizen or has declared his intention to become a citizen, as citizenship is an absolute qualification to the patenting of mineral lands. Tonopah Co. vs. Douglass, *supra* (6); Burke vs. McDonald, *supra;* see Ginaca vs. Peterson, 262 Fed. 904; Iba vs. Central Ass'n., *supra.* Tonopah Ralston Co. vs. Mt. Oddie Co., *supra* (16).

[19] San Francisco Co. vs. Duffield, *supra* (17).

[20] Kirk vs. Meldrum, 28 Colo. 453, 65 Pac. 633; see Willitt vs. Baker, 133 Fed. 937; Moffatt vs. Blue River Co., 33 Colo. 142, 80 Pac. 139; Lozar vs. Neill, 37 Mont. 287, 96 Pac. 343. "That a judgment of nonsuit does not relieve defendant from affirmatively showing his own title," see Butts vs. Sauve, 79 Colo. 317, 245 Pac. 713.

[21] The Californian cases upon this point are conflicting; Mont Blanc Co. vs. Debour, 61 Cal. 364; Byrd vs. Reichert, 74 Cal. 582, 10 Pac. 499; and Youle vs. Thomas, 146 Cal. 544, 91 Pac. 584, all hold that interveners are not entitled to litigate in adversary actions while Altoona vs. Integral Co., *supra* (3), Quigley vs. Gillett, *supra* (3) and Gruwell vs. Rocca, *supra* (3) all hold that such an action must be tried in all respects as though no contest was pending in the land office. To the same effect are Shoshone Co. vs. Rutter, *supra* (2), citing Rose vs. Richmond Co., 17 Nev. 25, 27 Pac. 1105, reaffirming 420 Co. vs. Bullion Co., 9 Nev. 248. This doctrine is affirmed in Noonan vs. Caledonian Co., 121 U. S. 393, the court holding that one who has not filed an adverse claim may be permitted to intervene. See Nome-Sinook Co. vs. Simpson, 1 Alaska 582; Gavigan vs. Crary, 2 Alaska 378; and see Chichagoff Co. vs. Alaska Handy Co., *supra* (3). In line with the three Californian cases first above cited are Hamilton vs. Southern Nev. Co., *supra* (3); Murray vs. Polglase, 23 Mont. 401; Nesbitt vs. DeLamar's Co., *supra* (3). See *supra,* note 3.

[22] The question as to whether or not an adverse claimant has exercised reasonable diligence in prosecuting a suit to final judgment is for determination by the court in which the suit is pending, and the question can not be determined by the land department. Richmond Co. vs. Rose, *supra* (5); Davis vs. McDonald, 33 L. D. 642; Rose vs. Richmond Co., 17 Nev. 61, 27 Pac. 1105; Deeney vs. Mineral Creek Co., *supra* (13); Upton vs. Santa Rita Co., *supra* (3). The state statute may be looked to as a safe and convenient guide in determining whether due diligence had been taken and used in prosecuting an adverse action. Mars vs. Oro Fino Co., 7 S. Dak. 616, 65 N. W. 19.

[23] Lee Doon vs. Tesh, *supra* (5); Sherlock vs. Leighton, 9 Wyo. 297, 63 Pac. 580, 934; see Holdt vs. Hazzard, 10 Cal. A. 440, 102 Pac. 540; *but see* Galbreath vs. Simas, 161 Cal. 303, 119 Pac. 86; see Duncan vs. Eagle Rock Co., 48 Colo. 569, 111 Pac. 588. The question of alienage can not be raised for the first time on appeal. O'Reilly vs. Campbell, 116 U. S. 418; Dean vs. Omaha-Wyoming Co., 21 Wyo. 133, 128 Pac. 881, nor in any other way than in an adverse suit. Manuel vs. Wulff, 152 U. S. 505, rev'g. 9 Mont. 279, 23 Pac. 723; Thornases vs. Melsing, 109 Fed. 710; Perley vs. Goar, 22 Ariz. 146, 195 Pac. 532; Holdt vs. Hazzard, *supra;* Buckley vs. Fox, 8 Ida. 246, 67 Pac. 659; see Galbreath vs. Simas, *supra;* and see Ginaca vs. Peterson, *supra* (18); also see Lohmann vs. Helmer, 104 Fed. 180.

§ 348. Ultimate Result of Suit.

Under the amendatory act of 1881,[24] the rule that a plaintiff must recover upon the strength of his own title does not prevail in actions based upon an adverse claim, because when such a suit is brought the title of both parties to the controversy has to be settled and the rights of the government against both parties are to be determined; and the judgment must be that the plaintiff has title, or that the defendant has the title, or that neither of them has title.[25] If neither party establishes his right to the property in controversy the court or jury must so find and the proceedings in the land office are stayed until the title is perfected; and a possessory title is all that is possible under the circumstances.[26] A certified copy of the judgment proves such right only in the subsequent patent proceedings in the land office.[27]

§ 349. Procedure.

The mining act does not prescribe nor create jurisdiction[28] in any particular court, state or federal,[29] but requires that the court in which the suit may be brought be of "competent jurisdiction."[30] If the usual conditions of federal jurisdiction such as diverse citizenship do not exist, and the necessary amount is not in controversy, then the

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[24] U. S. Comp. St., p. 5650, § 4625.

[25] Gwillim vs. Donnellan, *supra* (5); Ritter, 37 L. D. 715; Providence vs. Burke, *supra* (3); Kirk vs. Meldrum, *supra* (20); Steel vs. Gold Lead Co., 18 Nev. 80, 1 Pac. 448; Iba vs. Central Ass'n., *supra* (13); Slothower vs. Hunter, *supra* (14). An adverse claimant must establish a right in himself good not only against his adversary, but as against the United States. It must be valid against the one as well as against the other. Gwillim vs. Donnellan, *supra*; Tonopah Co. vs. Tonopah Co., *supra* (6); Kendall vs. San Juan Co., 9 Colo. 357, 12 Pac. 202; aff'd. 144 U. S. 658. Or, in other words, the burden of proof is on an adverse claimant to show that some part of the mining ground sought to be patented by the applicant for patent is within the boundaries of a mining claim previously located by him or his grantors. Porter vs. Tonopah Co., *supra* (14); see Gwillim vs. Donnellan, *supra*; Kendall vs. San Juan Co., *supra*. In a suit on an adverse claim the right of the plaintiff to recover can not be defeated by proof on the part of the defendant that a senior location inured to his benefit on the failure of such senior locator to perform the assessment work within the statutory period, where it is made to appear that the defendant made his location over a part of such senior location before the expiration of the year for the performance of such labor by the senior locator, although such senior locator failed to adverse. Lockhart vs. Farrell, 31 Utah 155, 86 Pac. 1077; rev'd., 210 U. S. 142, on ground that abandonment by senior locator was shown before defendant located. See Helena Co. vs. Baggaley, 34 Mont. 474, 87 Pac. 455; Street vs. Delta Co., 42 Mont. 381, 112 Pac. 701.

See §§ 362, 363, 364, 365.

[26] Manning vs. Strehlow, 11 Colo. 451, 18 Pac. 625; Kirk vs. Meldrum, *supra* (20); see, also, Perego vs. Dodge, *supra* (1); Brown vs. Gurney, *supra* (10); Doe vs. Waterloo Co., *supra* (6); Tonopah Co. vs. Douglass, *supra* (6).

[27] Clipper Co. vs. Eli Co., *supra* (17); *see* Perego vs. Dodge, *supra* (1).

[28] Blackburn vs. Portland Co., 175 U. S. 571; see Low vs. Katalla Co., 40 L. D. 534; Nome-Sinook Co. vs. Simpson, *supra* (21); Gavigan vs. Crary, *supra* (21). The mining act relegates to the courts the jurisdiction to determine the right of possession between adverse claimants. The determination of that question necessarily involves not only the question which of the adverse claimants was prior in time in making the location, and whether the location was made in compliance with the law, but also the question whether the land occupied and covered by the location was subject to location in the manner in which it was attempted to be acquired. Duffield vs. San Francisco Co., 205 Fed. 482, rev'g 198 Fed. 942; Mason vs. Washington Butte Co., *supra* (7); see, also, Campbell vs. McIntyre, 295 Fed. 45.

[29] Blackburn vs. Portland Co., *supra* (28); Giberson vs. Wilson, 79 Ark. 583, 96 S. W. 137.

[30] Id. Shoshone Co. vs. Rutter, *supra* (2).

proceedings must be in the state court.[31] When relief is afforded by the courts of a state, the rules of pleading and the methods of proceedure of the particular state must be followed, yet the matters involved should be settled under the provisions of the mining act, else the relief will be wholly inadequate and the determination would be of no advantage to either the litigants or to the government.[32] The judgment of a state court can not be reviewed by the United States Supreme Court simply because the parties were claiming under a federal statute.[33]

§ 350. Commencement of Suit.

The time within which an action founded upon an adverse claim is to be commenced is fixed by the mining act and can not be controlled by a state law; but the question as to what constitutes the commencement of an action may be determined by a state statute.[34] Unless the adverse claimant complies strictly with the provisions of the latter law an adverse suit will not be commenced within the meaning of the federal statute.[35]

§ 351. No Excuse.

The fact that an adverse claimant may be beyond the seas, or under legal disability, or may fail to act from inadvertence, or other cause, will not excuse the failure to file the adverse suit within the statutory period.[36]

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[31] Id. An adverse suit does not necessarily involve a federal question so as to give a federal court jurisdiction. McMillen vs. Ferrum Co., 197 U. S. 347; see, also, Bushnell vs. Crooke Co., 148 U. S. 682; see *supra*, note 30. In De Lamar's Co. vs. Nesbitt, 177 U. S. 523, the court said: "The mere fact that the mining company claimed title under a location made under the general mining laws of the United States (Rev. Stats., § 2325), was not in itself sufficient to raise a federal question, since no dispute arose as to the legality of such location, except so far as it covered ground previously located, or as to the construction of this section. We have repeatedly held that to sustain a writ of error from this court something more must appear than that the parties claim title under an act of congress."

[32] Iba vs. Central Ass'n., *supra* (13); Murray vs. Polglase, *supra* (21); Chilton vs. 85 Co., 23 N. M. 451, 168 Pac. 1067.

[33] See *supra*, notes 28 and 29.

[34] Harris vs. Helena Co., *supra* (8); see Richmond Co. vs. Rose, *supra* (5). What constitutes the commencement of an action in a state court is a matter of state law, and the decision of a state court upon that point is not a federal question and is not subject to review in a federal court. Richmond Co. vs. Rose, *supra;* see Gypsum Claims, 37 L. D. 488. It has been held that the proceedings in a court are properly begun where the complaint is filed within the thirty days, though the summons is not issued and service had upon the defendant within the thirty days. DeGarcia vs. Eaton, 22 L. D. 17.

[35] Richmond Co. vs. Rose, *supra* (5); Del Monte Co. vs. Last Chance Co., *supra* (15); Doe vs. Waterloo Co., *supra* (6); Providence Co. vs. Marks, 7 Ariz. 74, 60 Pac. 938; Penn Co. vs. Bales, 18 Colo. A. 108, 70 Pac. 44. A failure to commence proceedings in a proper court within thirty days after the filing of an adverse claim in the proper land office is a waiver of the claim This waiver becomes effective upon the expiration of the thirtieth day. Any proceedings thereafter upon the adverse claim are without authority of law, and can not affect the rights of the applicant for patent. Mason vs. Washington-Butte Co., *supra* (7) Chichagoff Co. vs. Alaska Handy Co., *supra* (3); Madison Placer Claim, 35 L. D. 552; International Co., 45 L. D. 158; Corning vs. Pell, 4 Colo, 507; see Steves vs. Carson, 42 Fed. 821. In Alaska, by statutory enactment, the time is extended to eight months after such filing. 26 Stats. 459; Ebner Co. vs. Hallum, 47 L. D. 32.

The time of commencing an adverse suit is not enlarged by the amendment of the adverse claim pursuant to leave granted by the register of the local land office in rejecting the original adverse claim. Failure to bring suit within thirty days of filing the original adverse as required by the mining act constitutes a waiver, irrespective of the attempted amendment. Little vs. Morris, *supra* (8).

[36] Steves vs. Carson, *supra* (35); see Ring vs. Montana Co., 33 L. D. 132; Little vs. Morris, *supra* (8).

§ 352. Pleadings.

Many questions may be litigated in an adverse suit, but they can only be litigated when set up in some appropriate pleading.[37] The action must be instituted according to the forms and practice within the jurisdiction wherein the suit is commenced.[38]

§ 353. Complaint.

The plaintiff must allege facts which will entitle him to the possession of the claim against the government as well as against his adversary.[39] The complaint also should contain a definite description of the area in conflict in order to support the judgment, which must designate the part, if any, of the area in conflict, that might belong to each of the adverse claimants.[40] It must be averred and

[37] Last Chance Co. vs. Tyler Co., 157 U. S. 691, rev'g. 61 Fed. 557. In adverse suits not merely questions of law arising under the statutes of the United States, but questions of fact and questions arising under local rules and customs and state statutes are open for consideration. Shoshone Co. vs. Rutter, *supra* (2). The extent of the allegations in the pleadings as well as the extent of the proof required varies in the different states. See Bennett vs. Harkrader, 158 U. S. 441; Brown vs. Gurney, *supra* (10); Tonopah Co. vs. Douglass, *supra* (6); Providence Co. vs. Marks, *supra* (35); Phillips vs. Smith, 11 Ariz. 309, 95 Pac. 91; Rough vs. Simmons, 65 Cal. 227, 3 Pac. 804; Holmes vs. Salamanca Co., 5 Cal. A. 659, 91 Pac. 160; Contreras vs. Merck, 131 Cal. 211, 63 Pac. 336; Jackson vs. McFall, 36 Colo. 119, 85 Pac. 638; Rawlings vs. Casey, 19 Colo. A. 152, 73 Pac. 1090; Cronin vs. Bear Creek Co., 3 Ida. 614; Hahn vs. James, 29 Mont. 1, 73 Pac. 965; Hopkins vs. Butte Co., 29 Mont. 390, 74 Pac. 1081; Thornton vs. Kaufman, 35 Mont. 181, 88 Pac. 796; s. c. 40 Mont. 282, 106 Pac. 361; Deeney vs. Mineral Creek Co., *supra* (22); Sherlock vs. Leighton, *supra* (23).

Generally forfeiture as a defense must be specially pleaded, but this rule does not necessarily obtain in an adverse suit, where the title of each party is in issue, and neither can recover without proof of title. See *supra*, note 25.

[38] Wolverton vs. Nichols, 5 Mont. 90, 2, Pac. 308; see 119 U. S. 485; Murray vs. Polglase, *supra* (21). In Tonopah Co. vs. Douglass, *supra* (6), Judge Hawley said: "The general consensus of opinion in the United States courts is to the effect that the proceedings brought under section 2326 (Rev. Stats.) to determine the question of the right of possession are of an equitable nature. Doe vs. Waterloo Co., 43 Fed. 219; Shoshone Co. vs. Rutter, *supra* (2). But it does not necessarily follow that the strict rule of equity pleading should be applied with an iron hand to all such cases, or that complainant be compelled to set forth with clock-work precision every step he had taken in acquiring his title or right of possession to the mining ground in controversy, and to point out with unerring certainty the defects existing in the claim of the applicant for a patent, although where it can certainly be done, such a course might safely be followed, and the objections and exceptions of the nature and character here might be avoided. The present suit is a proceeding of purely statutory origin, having its inception in the land office, and not in the court where the suit is commenced; and the question of proper pleading therein is one that ought to be controlled by the statutory provisions in regard thereto, keeping constantly in view the object, purpose, intention, and effect of the statute."

[39] Gwillim vs. Donnellan, *supra* (5); Brown vs. Gurney, *supra* (10); see Tonopah Co. vs. Tonopah Co., *supra* (25); *compare* Keppler vs. Becker, *supra* (1); see Cameron vs. Bass, 19 Ariz. 246, 168 Pac. 645. For an instance of pleading over, see Cole vs. Ralph, *supra* (13). It is not enough for the complaint to allege that the mining laws have been complied with. It is for the court to say, from the facts stated and proven, whether or not the law has been complied with to that extent which would entitle the adverse claimant to the patent. Ducie vs. Ford, 8 Mont. 233, 19 Pac. 417; see 138 U. S. 587. A mere allegation in general terms that plaintiff is the owner and entitled to possession has been held to be sufficient; Payne vs. Treadwell, 16 Cal. 221; Robinson vs. City, 182 Cal. 213, 187 Pac. 741; see, also, Keppler vs. Becker, *supra*. For safety, each party litigant should state in his pleadings all the facts upon which he relies as showing his right to become the purchaser from the government, and the steps he has taken to avail himself of, and secure his right to make the purchase. This applies to the answer as well as to the complaint. Anthony vs. Jillson, 83 Cal. 299, 23 Pac. 419; Dollenmayer vs. Pryor, 150 Cal. 4, 87 Pac. 616. As to pleading of an intervener see Moran vs. Bonynge, 157 Cal. 295, 107 Pac. 312. To entitle a party to a judgment in his favor, it must appear that he has not only the right of possession, but that he has made a valid location of the premises in controversy, and, by virtue of a compliance with all the requirements of the mining laws, is entitled to a patent from the government. To this effect are the cases of Gwillim vs. Donnellan, *supra*; Wolverton vs. Nichols, *supra* (6); Swanson vs. Sears, 224 U. S. 181, aff'g. 17 Ida. 238, 105 Pac. 1059; see also, Becker vs. Pugh, 9 Colo. 589, 13 Pac. 906. "Each are actors and both may fail." Duncan vs. Eagle Rock Co., *supra* (23).

[40] Smith vs. Imperial Co., *supra* (14).

proved that the plaintiff is a citizen of the United States, or has declared his intention to become such citizen, to entitle him to recover.[41] It depends upon the provisions of the local statute whether or not the complainant should allege the filing of the adverse claim in the land office and that the adverse suit has been commenced within thirty days after such filing.[42]

§ 354. Amended Complaint.

Where the original complaint does not state a cause of action an amendment can not be filed after the expiration of thirty days from the time of filing the adverse claim in the land office so as to relate back to the time of filing the original complaint.[43]

§ 355. Supplemental Complaint.

When, at the time of the application for patent, a suit is pending involving the title of the claim, or a part thereof, applied for therein, the adverse claimant, instead of bringing a separate and further action in support of the adverse claim may file a supplemental complaint within the thirty days after the adverse claim is filed; and thus show the relationship of the prior suit to the application for patent.[44] Otherwise no judgment rendered in such prior pending suit, whatever it might be, could in any way bind the land department, or control its action in the issuance of the patent.[45]

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[41] Cole vs. Ralph *supra* (13); Dean vs. Omaha-Wyoming Co., 21 Wyo. 133, 128 Pac. 881; Lee Doon vs. Tesh, *supra* (5); Anthony vs. Jillson, *supra* (39); Jackson vs. Dines, 13 Colo. 93, 21 Pac. 918. The absence of proof of citizenship in an adverse suit may prevent a recovery by one party, but it does not authorize for that reason alone a judgment in favor of the other party. In other words, proof of citizenship in such a suit is required only to enable a party to recover judgment in his own favor. The effect of a mere failure of proof of citizenship can not be greater or more far-reaching than affirmative showing of alienage. Sherlock vs. Leighton, *supra* (23).

[42] Rawlings vs. Casey, *supra* (37); Seatter vs. Heid, 196 Fed. 333; Smith vs. Wheeler, 5 Alaska 288; Smith vs. Imperial Co., *supra* (14); Hain vs. Mattes, 34 Colo. 345, 83 Pac. 127; Cronin vs. Bear Creek Co., *supra* (37); Upton vs. Santa Rita Co., *supra* (3); Thornton vs. Kaufman, *supra* (37). See, also, Yellow Aster Co. vs. Winchell, 95 Fed. 213. In Warnekros vs. Cowan, *supra* (3), and Lilly Co. vs. Kellogg, *supra* (3), it is held that allegations as to the filing of the adverse claim in the land office and the bringing of suit thereon in the complaint on the adverse claim are jurisdictional. To the *contrary* see Souter vs. Maguire, 78 Cal. 543, 21 Pac. 183; Quigley vs. Gillett, *supra* (8); Altoona Co. vs. Integral Co., *supra* (8); Penn Co. vs. Sales, 18 Colo. A. 108, 70 Pac. 444; Rawlings vs. Casey, *supra* (37); Deeney vs. Mineral Creek Co., *supra* (13); see Hopkins vs. Butte Co., 29 Mont. 390, 74 Pac. 1081; O'Hanlon vs. Ruby Gulch Co., 48 Mont. 65, 135 Pac. 913, 209 Pac. 1062. Marshall Co. vs. Kirtley, 12 Colo. 410, 21 Pac. 492. See *supra*, note 39.

[43] Keppler vs. Becker, *supra* (1); Bourdreaux vs. Tuscon Co., 13 Ariz., 361, 114 Pac. 547; see, generally, Sicard vs. Davis, 6 Pet. 124; Whalen vs. Gordon, 95 Fed. 309; M., K. T. Ry. Co. vs. Bagley, 65 Kan. 188, 69 Pac. 189; and see Woody vs. Hinds, 30 Mont. 189, 76 Pac. 1; Deeney vs. Mineral Creek Co., *supra* (13). Thompson vs. Automatic Co., 151 Fed. 945, was not an adverse, but the complaint failed to allege jurisdictional amount. Demurrer was filed; plaintiff admitted defect and made motion to amend. The court granted the motion on the general proposition that where, up to time of motion, jurisdiction is shown in particular court, but there is defect in his pleadings with relation to setting forth of the grounds of the *particular* jurisdiction, an amendment will be allowed.

[44] Jones vs. Pacific Co., 9 Ida. 186, 72 Pac. 956; see, also, Memphis Co., 8 L. D. 427; Northwestern Co., 8 L. D. 437; Nichols vs. Becker, 11 L. D. 14; Little Giant, 29 L. D. 194; Smith vs. Wheeler, 5 Alaska 288; Stark vs. Hoeft, 205 Cal. 102, 269 Pac. 1105; Marshall Co. vs. Kirtley, *supra* (12); Axiom Co. vs. Little, 9 S. Dak. 190, 61 N. W. 441; *but see* Ginaca vs. Peterson, *supra* (18), holding that a supplemental pleading is not necessary when an alien is an adverse claimant. As to bringing in new parties, see Marshall Co. vs. Kirtley, *supra*.

[45] See Bunker Hill Co. vs. Shoshone Co., 33 L. D. 142. In an action duly commenced following the filing of an adverse claim, a plea of former adjudication is unavailing where no issue was made as to the conflict in the boundaries of the mining claims involved and the former judgment simply quieting title thereto without delineation of boundaries, and, where it appears that the claims in controversy always overlapped. Morgan vs. Barrett, 17 Ariz. 376, 153 Pac. 449.

§ 356. Answer.

An answer, when coupled with an allegation of citizenship of the defendant, or of his intention to become such citizen, is sufficient when it states facts which seem to entitle the defendant to affirmative relief against the plaintiff,[46] and also shows his right against the government.[47]

§ 357. Proof.

In an adverse suit each party is required to establish by appropriate evidence his right or title to the land in controversy.[48] No presumption of title can arise.[49] But there are some matters of mere practice which, if admitted by the pleadings, need not be proved by the evidence.[50] When the defendant proves that his was the prior location, the plaintiff must fail, for the reason that his alleged discovery, when made, was upon land not open to exploration.[51] Where the rights of two mining claimants are apparently equal with respect to mining ground the element of priority is controlling and preference is given to the senior locator.[52] The right of the plaintiff can not be defeated by proof on the part of the defendant that a senior location inured to his benefit upon the failure of such senior locator to perform the assessment work within the statutory period, where it is made to appear that the defendant made his location over a part of such senior location before the expiration of the year for the performance of such labor by the senior

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[46] Perego vs. Dodge, 9 Utah 7, aff'd 163 U. S. 160; Betsch vs. Umphrey, 252 Fed. 573. It has been held that each party must prove that he has performed the assessment work upon the claim for each year as required by statute. Willitt vs. Baker, *supra* [20]; see Duncan vs. Eagle Rock Co., *supra* [23]; *but see infra*, note 48.

[47] Gwillim vs. Donnellan, *supra* [5]; Tonopah Co. vs. Tonopah Co., *supra* [25]; Kendall vs. San Juan Co., *supra* [22].

[48] Brown vs. Gurney, *supra* [10], Perego vs. Dodge, *supra* [1]; Phillips vs. Brill, 17 Wyo. 26, 95 Pac. 856. To entitle either party to a judgment he must show that his location is one which entitles him to possession against the United States as well as against the other party; it must be valid against both. Gwillim vs. Donnellan, *supra* [5]; Duffield vs. San Francisco Co., *supra* [28]; Mason vs. Washington-Butte Co. *supra* [7]; Lee Doon vs. Tesh, *supra* [5]. Each party must show every fact which would give him the right to a patent except those acts necessary to initiate and prosecute an application for patent in the local land office. Schultz vs. Allyn, 5 Ariz. 152, 48 Pac. 960; Deeney vs. Mineral Creek Co., *supra* [1]; Tonopah Co. vs. Douglass, *supra* [6]; Tonopah Co. vs. Tonopah Co., *supra* [25]; Manning vs. Strehlow, *supra* [26]; *but see* Robbins vs. Elk Basin Co., *supra* [3]. In an adverse suit where no question of forfeiture or abandonment is involved it is immaterial whether the applicant for patent had performed the annual assessment work or had made improvements to the value of five hundred dollars. Roberts vs. Oechsli, 54 Mont. 589, 172 Pac. 1038. "When defendants established that no work had been done upon the Golden Star claim for the year 1907, which was admitted by plaintiff, the burden shifted, and was upon plaintiff to establish the fact that work done outside of the claim was for its benefit." Merchants' Bank vs. McKeown, 60 Or. 325, 119 Pac. 335; Dyer vs. Brogan, 70 Cal. 136, 11 Pac. 589. The introduction in evidence of a certified copy of the record of the location of a mining claim is not proof of the necessary acts of location. Childers vs. Laham, 19 N. M., 301, 142 Pac. 924; see Cole vs. Ralph, *supra* [9]. The burden of proof is on the adverse claimant to show that some part of the ground sought to be patented by the applicant for patent is within the boundaries of a location previously located by him or his grantor. Porter vs. Tonopah Co., *supra* [14]. The plaintiff in an adverse suit can not recover if defendant proves possession of the location during the period prescribed by the state statute of limitations. 420 Co. vs. Bullion Co., Fed. Cas. 4989; 9 Nev. 240. See Cole vs. Ralph, *supra*.

The fact that a locator was a federal prisoner on parole when his location was made does not destroy his right to file an adverse suit to determine his right of possession, his parole having expired and pardon granted before the intervention of other valid rights; his grant relating back and becoming effective as of the late of location. Vedin vs. McConnell, 22 Fed. (2d.) 753.

[49] Bay State Co. vs. Brown, *supra* [10]; Robbins vs. Elk Basin Co., *supra* [3]; *but see* Swanson vs. Kettler, 17 Ida. 321, 105 Pac. 1059, aff'd. 224 U. S. 180.

[50] Iba vs. Central Ass'n., *supra* [15]; see Rosenthal vs. Ives, *supra* [18]; Burke vs. McDonald, *supra* [18].

[51] Gwillim vs. Donnellan, *supra* [5]; Hoban vs. Boyer, *supra* [14].

[52] St. Louis Co. vs. Montana Co., 104 Fed. 668; see Argentine Co. vs. Terrible Co., 122 U. S. 484.

locator, although such senior locator failed to adverse.[53] A senior locator possessed of a paramount interest in a location for which patent is sought may cause such right in effect to inure to the benefit of the applicant for patent by failure to adverse.[54] An admission against his interest by the plaintiff and fatal to his case is equivalent to proof to the same effect;[55] for instance, the admission that the part of his claim in which he sunk his discovery shaft had been patented to a third person prevents him from recovering.[56] A third locator is permitted to offer proof tending to establish the existence of a valid and subsisting location anterior to that which is being adversed.[57] Defendant may, to defeat plaintiff's claim, show that the location of the latter was upon land not subject to location, having been included within the exterior limits of a patent issued to a third person.[58]

§ 358. Title in Neither Party.

As we have already observed, if neither party establishes title to the disputed ground, judgment must be entered accordingly.[59] Neither party can recover his costs.[60] The claimant can not proceed in the land office until he perfects his title.[61]

§ 359. Jury Trial.

The parties are entitled to a jury whether the action be one at law[62] or a suit in equity.[63]

[53] Farrell vs. Lockhart, *supra* (25); see Helena Co. vs. Baggaley, *supra* (25); Street vs. Delta Co., *supra* (25); Walsh vs. Kleinschmidt, 55 Mont. 57, 173 Pac. 548.

[54] Swanson vs. Kettler, *supra* (49). See Snowy Peak vs. Tamarack Co., 17 Ida. 630, 107 Pac. 60.

[55] Gwillim vs. Donnellan, *supra* (5).

[56] Id. See Star Co., 47 L. D. 42.

[57] See *supra*, note 53.

[58] Girard vs. Carson, 22 Colo. 354, 44 Pac. 508. Where original discovery upon which a location is based, is included within surface boundaries of a junior location, which goes to patent without protest from owner of prior location, but before such patent a new discovery is made on the prior location without the boundaries of the patented junior location, and within the surface boundaries of the senior location as originally made, in an adverse action brought by this prior locator against a subsequent locator who has applied for patent to the ground, the prior locator may show these facts, notwithstanding loss of original discovery point. Silver City Co. vs. Lowry, 19 Utah 334, 57 Pac. 11, dis. 179 U. S. 196.

[59] 5 U. S. Comp. St., p. 5650, § 4623; Brown vs. Gurney, *supra* (10); Kirk vs. Meldrum, *supra* (20). Where neither party establishes title to the ground in controversy judgment can not be for either party, and the suit must be dismissed. Bay State vs. Brown, *supra* (7); Anthony vs. Jillson, *supra* (39); see Jackson vs. Roby, *supra* (10); Willitt vs. Baker, *supra* (20); Rankin, 7 L. D. 411. Neither party is entitled to recover where it appears that there has been no discovery of mineral within the location of either. Waterloo Co. vs. Doe, 56 Fed. 689. See, also, Perego vs. Dodge, *supra* (1); Brown vs. Gurney, *supra;* Seymour vs. Fisher, 16 Colo. 188, 27 Pac. 240.

See § 348.

[60] 5 U. S. Comp St., p. 5650, § 4623.

See Costs.

[61] Iba vs. Central Ass'n., *supra* (13); see Brien vs. Moffitt, 35 L. D. 32, overruling 7 L. D. 411; see, also, Brown vs. Gurney, *supra* (10); Mares vs. Dillon, *supra* (3). Where one asserts compliance with the mining laws and files an adverse claim he is in every sense a claimant of the tract in dispute as fully as the applicant for patent, and he may profit by the latter's patent proceedings in the event of a favorable judgment, and it can not be maintained that the applicant for patent, who, by virtue of the judgment unfavorable to both, stands in no better position than the adverse claimant, is alone privileged to prove a possessory title in himself, and that the adverse claimant is barred from further effort in that direction. Brien vs. Moffitt, *supra*.

[62] Golden Cycle Co. vs. Christmas Co., 204 Fed. 939; see Donahue vs. Meister, 88 Cal. 121, 25 Pac. 1096; Newman vs. Duane, 89 Cal. 597, 27 Pac. 66; Landregan vs. Peppin, 94 Cal. 465, 29 Pac. 771; Reiner vs. Schroder, 146 Cal. 411, 80 Pac. 517; see also, El Dora Oil Co., vs. U. S. 229 Fed. 946; Meinecke vs. Frasier, 69 Cal. A. 688, 232 Pac. 501, Mares vs. Dillon, *supra* (3).

[63] Id. Wolverton vs. Nichols, *supra* (6). See Providence Co. vs. Burke, *supra* (3); Angus vs. Craven, 132 Cal. 121, 64 Pac. 1091; Meinecke vs. Frasier, *supra* (62); Montana Co. vs. Boston Co., 27 Mont. 536, 71 Pac. 1005; Hickey vs. Anaconda Co., 33 Mont. 206, 81 Pac. 808; see, also, Fairview Co. vs. Lamberson, 25 Ida. 72, 136 Pac. 606; Pankey vs. Ortiz, 26 N. M. 575, 195 Pac. 906, and see Pacific Co. vs. Pioneer Co. 205 Fed. 581.

§ 360. Verdict.

As no title in fee can be established in an adverse suit a general verdict or findings by court is sufficient.[64] The parties, upon proper request, are entitled to special findings by the jury upon questions of fact relevant to the issue.[65] Either party may move for a directed verdict.[66]

§ 361. Nonsuit.

Where the plaintiff fails to make out a *prima facie* case, a judgment of nonsuit may be entered;[67] but the defendant can not have his own title determined without an affirmative showing of title to the ground in controversy.[68]

§ 362. Judgment.

A judgment determines the right of possession and a certified copy of the judgment proves such right only; the prevailing party still must make the proof required by law to entitle him to a patent; and the sufficiency of the proof is a matter for the determination of the land department.[69]

§ 363. Conclusiveness of Judgment.

The judgment is conclusive as to matters which were in fact decided, but not as to matters which might have been determined.[70] Where a

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[64] Colorado Central Co. vs. Turck, 50 Fed. 888; Willitt vs. Baker, *supra* (10); Bushnell vs. Crooke Co., 12 Colo. 247, 21 Pac. 932; Thomas vs. Chisholm, 13 Colo. 105, 21 Pac. 1020; Providence Co. vs. Burke, *supra* (4); Upton vs. Santa Rita Co., *supra* (3). In Bennett vs. Harkrader, 158 U. S. 441, a verdict that "We, the jury, find for the plaintiff was sufficient. See, also, Maloney vs. Adsit, 175 U. S. 289; *but see* McGinnis vs. Egbert, 8 Colo. 41, 5 Pac. 652.

[65] Cole vs. Ralph, *supra* (6); Gonzales vs. Leon, 31 Cal. 98; Upton vs. Santa Rita Co., *supra* (3); see, also, Manning vs. Strehlow, *supra* (26); Currency Co. vs. Bentley, 10 Colo. A. 271, 50 Pac. 920; Burke vs. McDonald, *supra* (18); and see McGinnis vs. Egbert, *supra* (64).

[66] Saxton vs. Perry, 47 Colo. 369, 107 Pac. 281, and cases therein cited; Butts vs. Sauve, *supra*.(20) It is a settled rule of law regarding trial by jury that in a proper case the court has full power to direct the jury to render a verdict. Estate of Sharon, 179 Cal. 459, 177 Pac. 283; Estate of Flemming, 199 Cal. 753, 251 Pac. 637. Wayland vs. Latham, 89 Cal. A. 57, 264 Pac. 766, and cases therein cited. To deprive the court of the right to exercise its power, if there was a conflict, it must have been a substantial one, Id.; see, also, Estate of Baldwin, 162 Cal. 471, 123 Pac. 267. The court may direct a verdict only when, disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, indulging every legitimate inference which may be drawn therefrom, no evidence of sufficient substantiality to support a verdict in favor of plaintiff, if given, may be found. Mairo vs. Yellow Co., 208 Cal. 351, 281 Pac. 66. A verdict against the instructions of the court is a verdict against law. Altoona Co. vs. Integral Co., *supra* (3).

[67] Kirk vs. Meldrum, *supra*(20); McWilliams vs. Winslow, 34 Colo. 341, 82 Pac. 538; Cuenin vs. Chloride Co., *supra* (13); Lozar vs. Neill, *supra* (20); see Butts vs. Sauve, *supra* (66). In Kirk vs. Meldrum, *supra*, it was held that a plaintiff in an adverse suit, who had failed to prove a title as against the United States, i.e., his right to a patent, could not object to a mere dismissal of the suit without judgment in favor of defendant's title. The action of the lower court was upon motion for a nonsuit.

[68] Brown vs. Gurney, *supra* (10); Perego vs. Dodge, *supra* (1); Murray Hill vs. Havenor, 24 Utah 73, 66 Pac. 762; Slothower vs. Hunter, *supra* (14); Currency Co. vs. Bentley, *supra* (65); Becker vs. Pugh, 9 Colo. 589, 13 Pac. 906; Cuenin vs. Chloride Co., *supra* (13).

[69] Clipper Co. vs. Eli Co., *supra* (17); Alice Placer, 4 L. D. 316; Apple Blossom vs. Cora Lee, 14 L. D. 641; reviewed in 21 L. D. 438; Upton vs. Santa Rita Co., *supra* (3); see Perego vs. Dodge, *supra* (1). It is not the province of an adverse suit to show more than the plaintiff's right against any but the defendant, as all other persons who fail to adverse under the provisions of the mining law lose all interest, and, accordingly a finding as between the plaintiff and the defendant exhausts the field of controversy. Upton vs. Santa Rita Co., *supra*; see Burke vs. McDonald, *supra* (18).

[70] Last Chance Co. vs. Tyler Co., *supra* (37); Jefferson Co. vs. Anchoria Leland Co., 32 Colo. 176, 75 Pac. 1070. The judgment will be conclusive between the parties, but the government is not bound by the adjudication; and the judgment is not conclusive of the right of the successful party to the property as against the government; nor is it sufficient to divest the government title; nor, is it alone sufficient to entitle the prevailing party to a patent. Mason vs. Washington-Butte Co., *supra* (7).

claimant bases his right on a priority of location, a judgment for the plaintiff upon such a complaint necessarily is an adjudication in favor of the alleged priority of location.[71] Where the judgment is that the adverse claimant has the right only to a portion of the vein or lode claimed by him, no entry can be made by the applicant for patent including any portion of the vein or lode claimed adversely until the judgment becomes final.[72] The judgment is not final if an appeal has been taken or a motion for a new trial is pending.[73]

§ 364. Judgment by Default.

Judgment by default is conclusive between the parties of all that is essential to support the judgment[74] when coupled with proof of title in the nondefaulting litigant.[75]

§ 365. Separate Judgments.

Where it appears, as the result of judicial proceedings, that several of the parties litigant are entitled to separate and different portions of the claim, judgment must be entered accordingly.[76]

§ 366. Judgment Between Lode and Placer Claimants.

A judgment in favor of a placer claimant in an adverse suit instituted by a lode claimant, that the lode location was not valid and subsisting does not determine that there were not, within the ground covered by the placer claim, veins or lodes known to exist at the time of the application for patent; nor does it settle the question of the validity of subsequent locations the rights whereof depend on whether, at the time of the application for the placer patent, there were known veins or lodes such as to be excluded from the placer patent.[77]

§ 367. Judgment Roll.

After the judgment shall have been rendered the party entitled to the possession of the claim, or any part thereof, or, if it appears from

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[71] Last Chance Co. vs. Tyler Co., *supra* (37).

[72] Branagan vs. Dulaney, 2 L. D. 750.

[73] Lee Doon vs. Tesh, *supra* (5). The rule of practice is that, when an appeal is taken, the action still is pending. The judgment does not become final until the appellate court has passed its order. Blue Goose Co. vs. Northern Light Co., 245 Fed. 730. Collins vs. Ramish, 182 Cal. 360, 188 Pac. 550.

[74] Last Chance Co. vs. Tyler Co., *supra* (37); American Radium Co. vs. Hipp Didisheim Co., 279 Fed. 604.

[75] See Iba vs. Central Ass'n., *supra* (13); Becker vs. Pugh, *supra* (67). "The pleadings required proof to be made of a compliance with the requirements of the statute. The policy of the law without regard to the pleadings requires such proof to be made." Bryan vs. McCaig, 10 Colo. 15, 15 Pac. 413; Duncan vs. Eagle Rock Co., 48 Colo. 569, 111 Pac. 594.

[76] Del Monte Co. vs. Last Chance Co., *supra* (15); Providence Co. vs. Burke, *supra* (3); Manning vs. Strehlow, *supra* (26); Kirk vs. Meldrum, *supra* (20); Mares vs. Dillon, *supra* (3); Iba vs. Central Ass'n., *supra* (13).

[77] Mason vs. Washington-Butte Co., *supra* (7). In a suit between a placer locator and a lode locator on an adverse claim the court necessarily has jurisdiction to determine whether the mineral land in controversy is of a character which entitles it to be located as a placer claim, or whether it can be entered only as a lode claim; and the court is not prohibited from determining whether the land is subject to location in the mode and manner claimed by one or both of the parties; but the court can not determine what may be the binding force and effect of its judgment in that respect upon the Land Department. San Francisco Co. vs. Duffield, 201 Fed. 834, overruling in effect 198 Fed. 942, app'd. in 205 Fed. 480. See, also, Cole vs. Ralph, *supra* (13); Webb vs. American Co., 157 Fed. 203. In a contest between a placer claimant and a lode claimant the mere want of evidence to prove the existence of a vein or lode of sufficient value to pay for the extracting of the ore will not warrant a recovery by the placer claimant any more than a second discovery of a vein or lode apparently valuable would entitle the second locator to recover possession from the owner of the placer claim. Bevis vs. Markland, 130 Fed. 226; see, also, Clipper Co. vs. Searl, 29 L. D. 139. See Clark-Montana Co. vs. Ferguson, 218 Fed. 959.

the judgment of the court that several parties are entitled to separate and different portions of the claim, each party may, without giving further notice, file a certified copy of the judgment roll, pay for his portion of the claim, together with the proper fees, and file the certificate and description by the cadastral engineer with the register of the land office and pay to him five dollars an acre and fractional acre if for a lode claim,[78] and two dollars and fifty cents an acre and fractional acre if for a placer claim.[79] Thereupon the whole proceedings are certified to the General Land Office, and a patent shall issue according to the decision of the court;[80] *provided*, that the land department is satisfied that patent should issue at all.[81] That is to say, the final passage of the title is not on the judgment of the court as certified; but it is on the judgment of the Commissioner of the General Land Office, pursuant to the judgment of the court, and on certain evidence supplemental to that furnished by the judgment roll, as the office of the judgment ends when it determines the right of possession; but the right of patent is not then established, as the successful litigant must prove by report of the office cadastral engineer that sufficient improvements have been made on the claim; and the commissioner may further investigate the character of the land.[82]

§ 368. Termination of Proceedings.

An adverse suit may not only be terminated by a judgment of the court,[83] but by a dismissal of the action for want of prosecution,[84] the withdrawal of the patent application,[85] the waiver of the adverse claim,[86] or by a settlement between the parties.[87]

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[78] Del Monte Co. vs. Last Chance Co., *supra* (15); see Silver City Co. vs. Lowry, *supra* (58); Tonopah Co. vs. Tonopah Co., *supra* (25).

[79] 5 U. S. Comp. St., p. 5668, § 4632; see Reynolds vs. Iron Co., 116 U. S. 687; U. S. vs. Iron Co., 128 U. S. 673; Creede Co. vs. Unita Co., *supra* (6); Doe vs. Waterloo Co., *supra* (6).

[80] Del Monte Co. vs. Last Chance Co., *supra* (15).

[81] Perego vs. Dodge, *supra* (1); Cole vs. Ralph, *supra* (13); Alice Placer Claim, *supra* (69).

[82] Clipper Co. vs. Eli Co., *supra* (17); Alice Placer Claim, *supra* (69); Apple Blossom vs. Cora Lee, *supra* (68), 21 L. D. 438, reviewing 14 L. D. 641; Lane vs. Cameron, 45 App. D. C. 404; Cameron vs. Bass, *supra* (39). In an adverse suit the matter determined is one purely of possession as between two claimants and the ultimate matter to be decided in awarding rights to government lands rests solely with the Interior Department. Robbins vs. Elk Basin Co., 285 Fed. 181; Cameron vs. U. S. 252 U. S. 450, aff'g. 250 Fed. 943, was not an adverse suit, but was an appeal in a suit in equity to enjoin occupation of part of forest reserve under an alleged mining claim, and upholds the right of the land department to pass upon the validity of the claim as being mineral land or not, upon an application for a patent.

[83] Richmond Co. vs. Rose, *supra* (5); Mackay vs. Fox, 121 Fed. 491; dist'g. Last Chance Co. vs. Tyler Co., *supra* (37); Nettie Lode vs. Texas Lode, 14 L. D. 180.

[84] Carnahan vs. Connolly, 17 Colo. A. 98, 68 Pac. 836; aff'd. 68 Pac. 1126; see, also, Richmond Co. vs. Rose, *supra* (5); Lee Doon vs. Tosh, *supra* (5). An adverse claimant permitting a suit instituted by him to be dismissed for want of prosecution, certainly stands in no more favorable position than if he had failed to file adverse proceedings. Kannaugh vs. Quartette Co., 16 Colo. 341, 27 Pac. 245; see Golden Reward Co. vs. Buxton, 79 Fed. 874. The dismissal of proceedings brought by an adverse party is a waiver of all adverse rights and interests. Whitman vs. Haltenhoff, 19 L. D. 245; see Poncia vs. Eagle, 28 Ida. 60, 152 Pac. 208. When a motion is made to dismiss because the suit has not been prosecuted with reasonable diligence to final judgment the court will consider the date of the filing of the adverse claim in the land office and the date of the filing of the complaint, but the court can not pass upon the sufficiency of the adverse claim. Waterhouse vs. Scott, 13 L. D. 718; Gypsum Placer, 37 L. D. 484; see Kannaugh vs. Quartette Co., *supra*.

[85] Lucky Four Co. vs. Bacon, 62 Colo. 342, 163 Pac. 863.

[86] International Co., 45 L. D. 162. "We can imagine several ways in which it can be shown that the adverse claim is waived, without invading the jurisdiction of the court while the case is still pending. One of these would be the production of an instrument signed by the contestant and duly authenticated, that he had sold his interest to the other party, or had abandoned his claim and his contest. Or, since the act says that all proceedings shall be stayed in the land office *from the filing of the adverse claim*, and not from the commencement of the action in the court within thirty days, such delay of thirty days is made by the statute conclusive of waiver.

§ 369. No Waiver.

Where an adverse claimant, during the pendency of his adverse suit, files an amended application and obtains patent for adjoining land, the securing of such patent does not operate as a waiver of the adverse claim.[88] An abandonment by the owner of a part of the disputed ground after the filing of an adverse claim is not a waiver of the adverse claim; that is, the claim made by the party opposing the application for patent, and the only party who can waive such claim is the one who makes it.[89] The failure of a tunnel owner before discovery of mineral to adverse an application for a surface patent does not estop him from asserting a right prior to the date of discovery named in the notice of location upon which the patent for the surface lode is based.[90]

§ 370. Transfer of Interest.

While an adverse suit should properly be instituted by the adverse claimant of record, still where a person becomes vested with the title between the time of filing the adverse claim and the bringing of the adverse suit he may maintain the action in his own name.[91] The legal heirs of the owner of a mining claim who have executed an agreement to convey at a future time to another are the proper persons to adverse the application of a junior locator.[92]

A filing in the records of the court by the plaintiff of a plea that he abandons his case or waives his claim might authorize the land office to proceed." Richmond Co. vs. Rose, *supra* (5); Kendall vs. San Juan Co., 144 U. S. 664, aff'g. 9 Colo. 349, 12 Pac. 198; Mackay vs. Fox, *supra* (83); Madison Placer, *supra* (35); Cuenin vs. Chloride Co., *supra* (15). A person whose rights are affected by an application for patent, or by a conflicting claim, who fails to file an adverse claim or to institute proceedings after filing the same, or to file a protest in the land office against the issuance of a patent, can not thereafter be heard to contest a question of fact upon which the patent is issued. Round Mt. Co. vs. Round Mt. Co., 36 Nev. 543, 138 Pac. 71, rehearing denied 141 Pac. 849. The failure of the plaintiff in an adverse suit to offer any evidence in his own behalf is a waiver of his claim, so that he can not object afterwards that the defendant has not shown a right to a verdict and judgment in his favor. Connolly vs. Hughes, 18 Colo. A. 372, 71 Pac. 681; see, also, Butts vs. Sauve, *supra* (20).

"It is not competent for the land department while a proceeding under Revised Statutes § 2326 is pending in a court of competent jurisdiction to assume from delay in placing cause on calendar for trial or taking proceedings therefor that the adverse claim has been waived and to issue a patent for the mineral lands in dispute as if no adverse claim had been made." Richmond Co. vs. Rose, *supra* (5).

[87] An amicable adjustment of conflicting claims between adverse claimants is not against public policy. Specific performance of such an agreement will be enforced by the courts. This means that where the owners of conflicting or overlapping claims have compromised and settled such conflicts and have agreed upon their several lines no adverse claim nor suit is necessary in a subsequent application for patent by one of the parties, who may bind himself to convey after patent is issued to him. St. Louis Co. vs. Montana Co., 171 U. S. 650, aff'g. 20 Mont. 394; Shea vs. Nilima, 133 Fed. 215; Thatcher vs. Darr, 27 Wyo., 476, 199 Pac. 938; see Ducie vs. Ford, 138 U. S. 587; aff'g. 8 Mont. 233, 19 Pac. 414; Poncia vs. Eagle, *supra* (84); Murray vs. White, 42 Mont. 433, 113 Pac. 754.

[88] Mackay vs. Fox, *supra* (83).

[89] Last Chance Co. vs. Tyler Co., *supra* (37).

[90] Creede Co. vs. Uinta Co., *supra* (6).

[91] Willitt vs. Baker, *supra* (20).

[92] Wolverton vs. Nichols, *supra* (6); see Mackay vs. Fox, *supra* (83); Baker Fraction, 23 L. D. 112; Mont Blanc Co. vs. Debour, *supra* (21). In Cole vs. Ralph, *supra* (8), it was held a party to an unrecorded contract executed by the locator of a placer claim which gave him the right to a specified share in the output or proceeds of such claim, and possibly a right to have it worked and thereby made productive, had no such interest as to make him an *essential* party to proceedings in the land office adverse to a conflicting lode location, but his interest was such as to make him an admissible party.

§ 371. Rights of Cotenants.

An excluded coowner is not required to adverse an application for patent.[93] If at any time before the issuance of patent the land department is given due notice that a suit is pending between the cotenants for the purpose of settling the question of joint ownership it will await the result of such suit before finally acting in the patent proceedings.[94] If one obtains patent title to the claim as against his cotenant, the latter may enforce a trust,[95] or maintain an action to quiet title to his individual interest in the location.[96] A coowner is not required to file an adverse suit where a party does not claim a prior location but asserts that he, as coowner, had acquired another person's interest by legal proceedings.[97] An action by one joint owner is for the benefit of all the tenants in common.[98]

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[93] Turner vs. Sawyer, *supra* [(9)]; Stevens vs. Grand Central Co., 133 Fed. 28; Nowell vs. McBride, 162 Fed. 441; dis., 178 Fed. 1004; Davidson vs. Fraser, 36 Colo. 1, 84 Pac. 695; Allen vs. Blanche Co., 46 Colo. 199, 102 Pac. 1072; Sussenbach vs. Bank, 5 Dak. 477, 41 N. W. 662; see, also Hunt vs. Patchin, 35 Fed. 820.

[94] Thomas vs. Elling, *supra* [(9)]; Wolenberg, *supra* [(3)].

[95] Turner vs. Sawyer, *supra* [(9)].

See, generally, §§ 376–377.

[96] Stevens vs. Grand Central Co., *supra* [(93)]; Nowell vs. McBride, *supra* [(93)]; Butte Co. vs. Cobban, 13 Mont. 351, 34 Pac. 24; Brundy vs. Mayfield, 15 Mont. 201, 38 Pac. 1067; see O'Hanlon vs. Ruby Gulch Co., *supra* [(42)]. While it is true that the excluded cotenant may bring his adverse suit and have his rights determined, so that the patent will convey directly to him whatever interest he shows himself entitled to (Turner vs. Sawyer, *supra* [(9)]; Badger vs. Stockton Co., 139 Fed. 838; Brundy vs. Mayfield, *supra*), yet he is not bound to do so. He may ordinarily, if he chooses, wait until the conclusion of the patent proceedings, and then assert his equities in the patent title, and have the patentee declared a trustee for his benefit to the extent of his interest. Turner vs. Sawyer, *supra* [(9)]; Brundy vs. Mayfield, *supra*. See Tabor vs. Sullivan, 12 Colo. 136, 20 Pac. 437.

[97] Turner vs. Sawyer, *supra* [(9)]; Brundy vs. Mayfield, *supra* [(96)].

[98] Nesbitt vs. DeLamar's Co., *supra* [(31)].

CHAPTER XVIII.

SUITS AFFECTING MINING PATENTS.

§ 372. Recourse to Court.

A suit may be brought against the Secretary of the Interior on the ground that the cancellation of the application for patent for a mining claim was not in accordance with law.[1]

After the issuance of patent the United States may have a patent annulled on the ground of fraud in its procurement [2] or that it was issued by inadvertence and mistake,[3] or was not authorized by law.[4]

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[1] Oregon Basin Co. vs. Work, 6 Fed. (2d) 676, aff'd. 273 U. S. 660. For original case see 50 L. D. 253, distinguishing Castle vs. Womble, 19 L. D. 455.

In Wilbur vs. Krushnic, 280 U. S. 306, aff'g. 30 Fed. (2d) 742, the court said: "In this case the Secretary interpreted and applied a statute in a way contrary to its explicit terms, and in so doing, departed from a plain official duty. A writ of mandamus should issue directing a disposal of the application for patent on its merits, unaffected by the temporary default in the performance of assessment labor for the assessment year 1920; and that further proceedings be in conformity with the views expressed in this opinion as to the proper interpretation and application of the excepting clause of the Leasing Act of February 25, 1920, and of § 2324 Revised Statutes of the United States. A writ in that form follows the precedent established by this court in respect of the writ of injunction in Payne vs. C. P. R. Co., 255 U. S. 228, 238, and Payne vs. New Mexico, 255 U. S. 367, 373, as being better suited to the occasion than that indicated by the District Court of Appeals." In an action for an injunction or in a proceeding for mandamus against him, the decision of the Secretary of the Interior in exercising his discretion upon the facts is conclusive unless such discretion is arbitrary or capricious or characterized by fraud. Riverside Oil Co. vs. Hitchcock, 190 U. S. 316; Ness vs. Fisher, 223 U. S. 683, aff'g. 33 App. D. C. 302.

In the case of Alaska Co. vs. Lake, 250 U. S. 549, where a writ of mandamus was asked requiring the Secretary of the Interior and the Commissioner of the General Land Office to approve and pass to patent an application for certain coal claims where one of the questions involved was a compliance with sections 2347 to 2352 Rev. Gt. (extended to Alaska) in that the applicant shall have opened or improved a coal mine or mines on any of the unsurveyed public lands of Alaska, and the decision of the land office was opposed to the contention of the claimant the Supreme Court said: "All of the officers decided that the acts of congress contemplated as a valid location, the opening and developing of a producing mine of coal and that work performed upon a claim for prospecting purposes does not fulfill the requirements and that such was the character of the work done upon the claims in question, was the deduction of the officers * * * manifestly judgment in all cases must be exercised—judgment not only of the law but what was done under the law and its sufficiency to avail of the grant of the law, * * * but where there is discretion, as we think there is in this case, even though its conclusion is disputable, it is impregnable to mandamus." Riverside Oil Co. vs. Hitchcock, *supra;* Ness vs. Fisher, *supra.* The case of Charleston Co. vs. U. S., 274 U. S. 220, aff'g. 3 Fed. (2d) 1019, was a suit in equity brought by the United States to have declared void the certification by the Secretary of the Interior and the Commissioner of the General Land Office to public lands in Florida, title to which had been transferred to the mining company on the ground that the certification was made on fraudulent representations that the character of the land was nonmineral.

See Mandamus and Injunction.

[2] Diamond Coal Co. vs. U. S. 233, U. S. 236, aff'g. 191 Fed. 786; U. S. vs. Southern Power Co., 11 Fed. (2d) 547; see Filcher vs. U. S., 7 Fed. (2d) 519, aff'g. 1 Fed. 53. See, also, McLaughlin vs. U. S., 107 U. S. 528; U. S. vs. Minor, 114 U. S. 244; Mullan vs. U. S., 118 U. S. 278; Maxwell Land Grant, 121 U. S. 325; U. S. vs. San Jacinto Co., 125 U. S. 285, aff'g. 10 Sawy, 639; U. S. vs. Iron Co., 128 U. S. 676; San Pedro Co. vs. U. S., 146 U. S. 120. It is indispensable to the avoidance of a patent that the evidence of fraud or mistake shall be "clear, unequivocal and convincing" * * * that it shall be that class of evidence which commands respect and that amount of it which produces conviction. Maxwell Land Grant Case, 121 U. S. 325, 381.

The acceptance by the land department of an application for a patent for a mining claim in proper form from a private individual, and the payment by the latter of the purchase money, is not a bar during the pendency of the matter in the Land Department to a suit by the government to cancel and annul the interest of the applicant and determine the right to the possession and to extract and market the mineral, on the ground that the application and proceedings are fraudulent. U. S. vs. Devil's Den Oil Co., 236 Fed. 973, 251 Fed. 548. If the land department is induced by fraud or false proofs to issue a patent for mineral lands under a nonmineral land law, or after such patent is issued by inadvertence, the government

§ 373. Collateral Attack.

A patent may be collaterally impeached in any action and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the land described, or that the public officers acted without authority,[5] as, for instance, where the land never was the property of the United States, or where its sale was not authorized by statute, or where it had been previously disposed of or reserved from

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may maintain a suit to annul the patent, or a mineral claimant who had acquired a vested right in the land, might maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable and is not void, and can not be attacked by strangers who had no interest in the land at the time the patent was issued. Burke vs. S. P. R. Co., 234 U. S. 669. Chino Co. vs. Hamaker, 178 Pac. 738, 39 Cal. A. 274. See Mesmer vs. Geith, 22 Fed. (2d) 690. "In actions to annul patents to land issued by the government, as to which the statute of limitations applies, the equitable rule that a cause of action does not accrue until the discovery of the fraud where there are acts of concealment is given full force, and in such a case the limiting period will commence to run at the date of discovery rather than the date of the patent." U. S. vs. Southern Co., 11 Fed. (2d) 547.

Where mineral lands were acquired by the defendant by procuring certification thereof to the state of Utah under the act of July 16, 1894, by fraudulent representations the government is entitled to a reconveyance of all such lands claimed by the defendant or others having notice of the rights of the government, such lands being held in trust for the government. U. S. vs. Carbon Co. Land Co., 9 Fed. (2d) 517, aff'd. 274 U. S. 640. See Milner Co. vs. U. S., 288 Fed. 431.

[3] Williams vs. U. S., 138 U. S. 514; Germania Co. vs. U. S., 165 U. S. 379; U. S. vs. Lavenson, 206 Fed. 755. A patent will not be set aside nor modified for mistake, except where the proof is plain beyond reasonable controversy. Thallman vs. Thomas, 111 Fed. 277.

[4] U. S. vs. Winona Co., 67 Fed. 959; Carson City Co. vs. North Star Co., 83 Fed. 665. The action of the land department can not override the express will of congress, nor convey away public land in disregard or defiance thereof. St. Louis Co. vs. Kemp, 104 U. S. 646; Knight vs. U. S. Land Ass'n., 142 U. S. 161, rev'g. 85 Cal. 448, 24 Pac. 818, but its decisions are unassailable by the courts, except by direct proceedings. Cragin vs. Powell, 128 U. S. 691; Rogers vs. DeCambra, 132 Cal 502, 64 Pac. 894, aff'd. 189 U. S. 119.
See § 381.

[5] St. Louis Co. vs. Kemp, *supra* [3]; Steel vs. St. Louis Co., 106 U. S. 452; Garrard vs. S. P. Mines, 82 Fed. 583, aff'd. 94 Fed. 983; Chilberg vs. Con. Co., 3 Alaska 241; Kansas City Co. vs. Clay, 3 Ariz. 328, 29 Pac. 9; Van Ness vs. Rooney, 160 Cal. 141, 116 Pac. 392; Heydenfeldt vs. Daney, 10 Nev. 308; see Richmond Co. vs. Rose, 114 U. S. 576; Lakin vs. Dolly, 53 Fed. 333.
It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the land department and that its judgment thereon is final. Whether, for instance, a certain tract is mineral or not, presents a question of fact not on record, dependent on oral testimony; and it can not be doubted that the decision of the land department one way or another in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be reexamined. Burfenning vs. Chicago Co., 163 U. S. 321, cited approvingly in U. S. vs. Bucher, 15 Fed. (2d) 786. If the patent be issued without authority it may be collaterally impeached in a court of law. This exception is subject to the qualification that where the authority depends upon the existence of particular facts or upon the performance of certain antecedent acts, and it is the duty of the land department to ascertain whether the facts exist or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack, as is its determination upon any other matter properly submitted to its decision. St. Louis Co. vs. Kemp, *supra*.

Where the land department had issued a patent for a homestead on lands withdrawn or classified as coal, without the reservation to the United States of the coal contained therein, as required by the act of June 22, 1910, the patent was held void, the court saying: "The question whether a patent from the U. S. for public lands is valid or invalid is not always one of easy solution. The Supreme Court has repeatedly held that patents for lands which have been previously granted, reserved or appropriated are absolutely void." Proctor vs. Painter, 15 Fed. (2d) 975, aff'g. 300 Fed. 476. In the Eureka-Richmond case, 4 Sawyer, 319, Judge Field uses this language: "A patent of the United States for land, whether agricultural or mineral, is something upon which the holder can rely for peace and security in his possession. In its potency it is iron clad against all mere speculative inferences. But it is equally as clear and as well settled that, if the statute has not been complied with, and a patent issued without authority of law, no substantial title is acquired. A patent issued without authority is void."

Where the United States no longer has jurisdiction over land patented to mining claimants, it having been a part of the Crow Reservation prior and subsequent thereto, mining claimants acquired no rights under the patent, as there was nothing to convey. West vs. Minnesota Co., 68 Mont. 253, 217 Pac. 342.

sale, or dedicated to special purposes, or that the instrument never was executed by the person whose signature was attached to it.[6]

§ 374. Not Subject to Collateral Attack.

A patent can not be collaterally attacked on account of any question which the land department can lawfully determine before issuing the patent.[7] The fact that a patented placer claim included part of a lode claim which had not been forfeited can not be considered in a

[6] Id. A patent issued by the land department of the United States, as a general rule, transfers the legal title to the land, and has attached to it all presumptions of conclusiveness. It may, however, be absolutely void on its face. And this may be shown when it is considered with reference to the statutes governing it, of which judicial notice is taken; as, for example, when the land described therein has been absolutely reserved from sale, or the government has not title to it, or the land officers attempt to convey an unauthorized amount of land. When so void, advantage may be taken of it collaterally, in any form of action, legal or otherwise, without extrinsic proof. Such nullity may also appear and be declared from a consideration of extrinsic proof in connection with the law governing it; as, for instance, where in a conflict between two patents for the same tract of land, each regular on its face, it is shown that the junior patent is based upon an entry and certificate of final proof and purchase prior in time to the senior patent. Of course, where it readily appears from extrinsic proof, in the light of the law, that the land department had no subject matter on which to act, as, for example, where the proof showed that the land embraced in the patent never belonged to the United States, or that it had been previously granted in a regular patent, issued by the officers of said department acting within the scope of their authority in the land department, that it can be shown collaterally, even in an action at law, is clear. Horsky vs. Moran, 21 Mont. 350, 53 Pac. 1065, dis. 178 U. S. 205, no federal question involved. For instances of the issuance of patents in excess of the jurisdiction of the land department, and therefore void, see Burfenning vs. Chicago Co., *supra* [5]; Sawyer vs. Gray, 205 Fed. 162; Proctor vs. Painter, *supra* [5]; Kansas City Co. vs. Clay, *supra* [5]; Donley vs. Van Horn, 49 Cal. A. 386, 193 Pac. 515; Horsky, vs. Moran, *supra*. Doolan vs. Carr, 125 U. S. 618, is sweeping in its announcement of the right to attack a patent collaterally and cites many decisions on the subject.

[7] Carson City Co. vs. North Star Co., *supra* [4]; see, generally, St. Louis Co. vs. Kemp, *supra* [4]; Steel vs. St. Louis Co., *supra* [5]; Davis vs. Weibbold, 139 U. S. 529; Enterprise Co. vs. Rico-Aspen Co., 167 U. S. 108; Creede Co. vs. Uinta Co., 196 U. S. 353; New Dunderberg Co. vs. Old, 79 Fed. 604; Peabody Co. vs. Gold Hill Co., 111 Fed. 820; Spong, 5 L. D. 193; Kansas City Co. vs. Clay, *supra* [5]; Justice Co. vs. Lee, 21 Colo. 262, 40 Pac. 44 rev'g. 2 Colo. A. 112, 29 Pac. 1020; and see N. P. R. Co. vs. Cannon, 54 Fed. 260; Durango Co. vs. Evans, 79 Fed. 425. A patent for a mining claim within the jurisdiction of the land department is the judgment of that tribunal upon the evidence before it that the patentee is entitled to the mining claim therein described and the conveyance of the legal title to him. The validity, the extent, and the boundaries of the claim are unavoidable issues which that tribunal must adjudge in sustaining any part or all of the claim, and in such case the adjudication of matters within the jurisdiction of that department are not subject to collateral attack but can be avoided only by direct suit for that purpose on the ground of fraud or errors of law. Conkling Co. vs. Silver King Co., 230 Fed. 558. In other words, where the land department under its duty has ascertained the existence of certain required facts, its determination is conclusive against any collateral attack. St. Louis Co. vs. Kemp, *supra* [4]; Aurora Hill Co. vs. Eighty-five Co., 34 Fed. 518; U. S. vs. Winona Co., *supra* [4]; Roberts vs. S. P. Ry. Co., 186 Fed. 935. If the land department has jurisdiction to dispose of the land and to issue a patent therefor, an erroneous determination of the facts upon which the right to a patent depends, or an entire failure to determine such facts will not void the patent. Burke vs. S. P. Ry. Co., 234 U. S. 669; Proctor vs. Painter, *supra* [5]. The fact as to whether or not at the time placer claimants made their application for a patent, there was within the boundaries of their claim an existing vein or lode is a matter of judicial cognizance and not a matter for the determination of the officers of the land department where both lode and placer claimants had a patent duly issued by the government. Iron Co. vs. Campbell, 135 U. S. 286; the fact of such knowledge is a question for judicial cognizance in an action to quiet title where the placer claimant has a patent and the lode claimant has none. South Butte Co. vs. Thomas, 260 Fed. 819. Where the state's patent (agricultural) was issued to plaintiff's predecessor in interest long prior to the location of defendant's mining claim, investigation as to the character of the land is concluded, as the state's patent is not subject to collateral attack, but can only be attacked on a direct proceeding to set aside the patent on the ground of fraud or other invalidity. Graham vs. Reed, 83 Cal. A. 516, 257 Pac. 131, citing approvingly Saunders vs. La Purisima Co., 125 Cal. 159, 57 Pac. 656; and Worcester vs. Kitts, 8 Cal. A. 181, 96 Pac. 335.

In an action in ejectment to recover possession of a tract of land claimed by the plaintiffs under a mineral patent from the United States to their grantors in 1881, the defendants relying upon a nonmineral patent issued to their predecessors by the United States in 1876, the court said: "We assume as settled principles of law that the locator of a mining claim acquires a vested right therein by virtue of his location; and when a valid location of a mining claim has been made which by subsequent proceedings is conveyed to the locator by patent from the United States, the title of the patentee by the doctrine of relation relates back to the time of the location

collateral attack upon such placer patent.[8] The validity of a patent for a mining claim can not be assailed collaterally because false and perjured testimony may have been used to secure it.[9]

§ 375. Strangers May Not Attack Patent.

A person who was not in privity with the United States and who has acquired no right to the land, or vein or lode, when a patent was issued therefor to another, will not be permitted to attack such a patent.[10]

§ 376. Patentee as Trustee.

Where a patent was issued to one person when in equity and good conscience and under the laws of congress it should have been issued to another person a court of equity will convert the holder of the

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* * *. The plaintiffs contend that their patent is conclusive evidence as against collateral attack that there has been a valid location prior to the issuance of the patent, but not for any particular time thereto. As against any claim to the patented premises arising after the issuance of the patent, the patent is conclusive proof of a previous valid location, but, as against a conflicting claim of title arising before the application for patent, the patent is not evidence of a valid location earlier than the conflicting claim. In such case the question of when the location was made is one of fact depending on the proof. Gibbons vs. Frazier, 68 Utah 182, 249 Pac. 472.

The case of Stepan vs. N. P. R. Co., 81 Mont. 361, 263 Pac. 425, was an action in trespass against a defendant for intruding upon and filling in the mining shaft of the plaintiff on its patented ground. The railroad defendant claimed the right to do this, as the mining claims were within the 100-foot grant of the railroad company on each side of its road. The mining patent was issued long subsequent to the railroad grant. In holding that judgment should be entered for defendant the court said: "The patent is not an adjudication concluding the paramount right of the company, but in so far as it included lands validly acquired theretofore, was in violation of law and inoperative to pass title. When, therefore, the plaintiffs entered upon the right of way in 1905, and sank their discovery shaft, the defendant company was in the exclusive possession of the land which was conclusively presumed to be necessary for railroad purposes and the plaintiffs acquired no rights by their action. Their subsequently acquired patent could not pass title to the land and therefore they acquired no rights to the surface of the ground."

[8] Montana Co. vs. Migeon, 68 Fed. 818; aff'd. 77 Fed. 249; see Peabody Co. vs. Gold Hill Co., *supra* (7).

[9] Steel vs. St. Louis Co., *supra* (5); see Justice Co. vs. Lee, *supra* (7); Casey vs. Thieviege, 19 Mont. 353, 48 Pac. 394; South End Co. vs. Tinney, 22 Nev. 55, 35 Pac. 89.

In a direct attack upon a patent the facts must show clearly, unequivocally, and convincingly that the officers who accepted the final proofs were induced to do so by perjury or false testimony. U. S. vs. Hays, 35 Fed. (2d) 949.

[10] St. Louis Co. vs. Kemp, *supra* (4); Iron Co. vs. Campbell, *supra* (7); Burke vs. S. P. R. Co., *supra* (2); Wight vs. Dubois, 21 Fed. 693; New Dundenberg Co. vs. Old, *supra* (7); Peabody Co. vs. Gold Hill Co., *supra* (7); Boggs vs. Merced Co., 14 Cal. 279; Horsky vs. Moran, *supra*,(6); South End Co. vs. Tinney, *supra* (9); Board vs. Mansfield, 17 S. Dak. 78, 95 N. W. 286. In a suit in equity for relief as against a patent for a mining claim the plaintiff must connect himself with the original source of title so as to be able to aver that his rights are injuriously affected by the existence of such patent and he must possess such equities as will control the legal title in the patentee. St. Louis Co. vs. Kemp, *supra;* Boggs vs. Merced Co., *supra*. If a party is not entitled to control the legal title yet seeks to annul the patent or limit its operation he must make application to the government to take the proper steps to that end, as such a suit can be maintained only by and in the name of the United States. Lee vs. Johnson, 116 U. S. 48; Carter vs. Thompson, 65 Fed. 329; Jameson vs. James, 155 Cal. 275, 100 Pac. 700; Poire vs. Wells, 6 Colo. 406; see Doolan vs. Carr, *supra* (6); South End Co. vs. Tinney, *supra* (9). When a person has obtained his patent he can only be required to answer persons who have some established claim and to contest with such person, not before the administrative departments, but in courts of justice only, and by legal proceedings, which determine finally the rights of the parties to the property. Iron Co. vs. Campbell, *supra;* Turner vs. Sawyer, 150 U. S. 587; Peoples Dev. Co. vs. S. P. R. Co., 277 Fed. 796; Vore vs. Ephraim, 173 Cal. 248, 159 Pac. 720; Lightner Co. vs. Superior Court, 14 Cal. A. 648, 112 Pac. 909; see, also, U. S. vs. New Orleans Co., 235 Fed. 845, rev'd. and aff'd. in part, 248 U. S. 507.

For a collection of authorities and for a distinction between mere intruders who attempt to attack a patent collaterally and persons having a direct interest in its impeachment, see Doolan vs. Carr, *supra* (6); Burke vs. S. P. R., *supra*. Granting that a stranger may 'protest' against the issue of a patent, he acquires thereby no right or equity in the land which can be made the basis of a suit in equity to annul the patent or to charge the patentee as a trustee of the legal title for the protestant. Neilsen vs. Champagne Co., 119 Fed. 123.

legal title into a trustee for the use and benefit of the owner[11] unless suit is barred by limitation or laches.[11a]

§ 377. Not Attack Upon Patent.

A proceeding to enforce a trust is not an annulment nor a setting aside of the patent wrongfully issued.[12] The proceeding is based upon the theory that the title evidenced by the patent inured to the benefit of the *cestui que trust*.[13]

§ 378. Placer and Townsite Patents.

Patents for placer claims as well as for townsites either exclude in their terms any conveyance of title to known mineral lands, or are issued under a law that provides that, while they convey title to all other lands within their limits, they do not convey title to such mines, mineral lands or mining claims. These patents are issued with these qualifications; it is proper, therefore, for the court, in a subsequent action, to determine just what any patent thus issued conveys, or what may as a matter of fact be excluded from the patent. This is simply a judicial determination as to the true intent and effect of such patent, and not an attack upon its conclusiveness or validity.[14]

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[11] Burke vs. S. P. R. Co., *supra* (2); Independent Co. vs. U. S., 274 U. S. 640, aff'g. 9 Fed. (2d) 517; Thomas vs. Horst, 84 Mont. 260, 169 Pac. 732. A person wrongfully or fraudulently obtaining a patent for land which properly belongs to another, or whether acting in good faith, will be treated in equity as trustee for the equitable owner and will be required to transfer the legal title to him. Silver vs. Ladd, 74 U. S. 219; Johnson vs. Towsley, 80 U. S. 72; Sanford vs. Sanford, 139 U. S. 642; Monroe Cattle Co. vs. Becker, 147 U. S. 47; Emblen Co. vs. Lincoln Co., 184 U. S. 660; Lakin vs. Sierra Buttes Co., 25 Fed. 337; Hunt vs. Patchin, 35 Fed. 816; James vs. Germania Co., 107 Fed. 597; Hoyt vs. Weyerhaeuser, 161 Fed. 324; Sussenbach vs. Bank, 5 Dak. 477, 41 N. W. 662; Rose vs. Richmond Co., 17 Nev. 25, 27 Pac. 1105; see Hartman vs. Warren, 76 Fed. 157; Delmoe vs. Long, 35 Mont. 139, 88 Pac. 778; South End Co. vs. Tinney, *supra* (9); Oregon Co. vs. Hertzberg, 26 Or. 216, 37 Pac. 1019; see, also, LeMarchel vs. Tegarden, 133 Fed. 826. A suit to declare a trust may be brought after entry and before patent issues. Malaby vs. Rice, 15 Colo. A. 346, 62 Pac. 228. A protest may not furnish basis for such a suit. Neilson vs. Champagne Co., 119 Fed. 123. The owner may bring suit to quiet title. Duluth Co. vs. Roy, 173 U. S. 587; see Peabody vs. Gold Hill Co., *supra* (7). Where it is sought to have the patentee declared the trustee for another, not named in the patent, the plaintiff, in such a suit, in the absence of any contract between the parties must allege and clearly prove that he occupies such a status as to enable him to control legal title. James vs. Germania Co., 107 Fed. 597; Plummer vs. Brown, 70 Cal. 544, 12 Pac. 464; Dreyfus vs. Badger, 108 Cal. 58, 41 Pac. 279; Capron vs. Van Horn, 201 Cal. 494, 258 Pac. 77; Pierce vs. Sparks, 4 Dak. 3, 22 N. W. 481, aff'd. 115 U. S. 408; see Lee vs. Johnson, 116 U. S. 48; Loney vs. Scott, 57 Or. 378, 112 Pac. 172.

An alien owning an unpatented mining claim may adverse an application for patent therefor, and if the patent issues to the applicant despite a judgment in favor of the alien the patentee will be held trustee for him. This notwithstanding the adverse claimant is not, *per se*, qualified to receive a patent from the United States. Ginaca vs. Peterson, 262 Fed. 910. See, also, Wills vs. Blain, 4 N. M. 378, 20 Pac. 798.

If charges of fraud are made they must be specific and show that the fraud must, necessarily, have affected the action of the land department in issuing the patent. Vance vs. Burbank, 101 U. S. 514. When fraud and misrepresentation are relied upon as ground of interference by the court, they should be stated with such fullness and particularity as to show that they must necessarily have affected the action of the officers of the department. Mere general allegations of fraud and misrepresentations will not suffice. U. S. vs. Caster, 271 Fed. 615.

The plaintiff must show a better right to the land than the patentee, such as in law should have been respected by the officers of the land department, and, being respected, would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. Fisher vs. Rule, 248 U. S. 314, aff'g. 232 Fed. 861, and cases therein cited.

[11a] Alsop vs. Riker, 155 U. S. 448; see Hanchett vs. Blair, 100 Fed. 817; Potts vs. Alexander, 118 Fed. 885.

[12] Silver vs. Ladd, *supra* (11); Burke vs. S. P. R. Co., *supra* (2); Mery vs. Brodt, 121 Cal. 332, 53 Pac. 818; see Van Ness vs. Rooney, 160 Cal. 131, 116 Pac. 392.

[13] See § 376.

[14] Old Dominion Co. vs. Haverly, 11 Ariz. 241, 90 Pac. 333. In order to except mines or mineral lands from the operation of a townsite patent, the lands must be

§ 379. Pleading.

While courts of equity will entertain proceedings to decree that persons who have received and hold patents to land hold the same in trust for the true owner, a plaintiff in such action must show by his complaint that he is entitled to the relief sought; that he occupies such a status as entitles him to control the legal title; that the officers who awarded the land to another, to whom the title was issued pursuant to the judgment, were imposed upon and deceived by the fraudulent practices of him in whose favor the judgment was given. Such facts must be distinctly alleged and proved.[15]

§ 380. Bona Fide Purchaser.

A suit by the United States to annul a patent will not lie against an innocent purchaser for value.[16]

§ 381. Limitation of Actions.

The act of March 3, 1891,[17] requires actions to vacate and annul patents to be brought within six years after the date of issuance. Con-

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known at the time of the issuance of the patent to be valuable for mining purposes. It is immaterial whether at some subsequent time they are discovered to be valuable for such purposes, and such discovery can not defeat the rights of persons claiming under the townsite patent as against mining locations thereon, where it does not appear that said lands were valuable for mining purposes at date of townsite patent. Dower vs. Richards, 151 U. S. 658; aff'g. 81 Cal. 44, 22 Pac. 304; Deffeback vs. Hawke, 115 U. S. 392; Davis vs. Weibbold, 139 U. S. 507. In Clark vs. Jones, 30 Ariz. 535, 249 Pac. 551, it was held that where the townsite patent was issued some seven years after the filing of the declaratory statement, the right of the patentee became fixed at the date of the entry, and mining locators acquired no rights superior to the patentee by reason of the fact that they had made discovery of minerals thereon before the issuance of the patent, and subsequent to the filing of the declaratory statement the court saying, "A townsite patent is 'inoperative as to all lands known at the time to be valuable for their minerals or discovered to be such before their occupation and improvement for residence or business purposes under the townsite patent.' Deffeback vs. Hawke, 115 U. S. 392 * * * . But when a townsite is entered and a patent therefor issued and it is not known at the time that there are valuable mineral lands within its boundaries, a subsequent discovery of mineral thereon does not exclude such mineral land from the operation of the townsite patent." Davis vs. Weibbold, *supra*. In Kinney Oil Co. vs. Kieffer, 1 Fed. (2d) 795 a tract was leased by the government under the Leasing Act of February 25, 1920, on withdrawn lands, and was thereafter 'spotted' for prospective wells, one well being in production, a homestead entryman who made entry prior to the lease and thereafter obtained a patent to the land, included within the lease, was enjoined from interfering with the operations of the lessee by the filing of a township plat on the lands in controversy and the carrying out of a plan for the establishment of a township thereon." This was a case of first instance as stated by the court.

[15] Kentfield vs. Hayes, 57 Cal. 409; Aurreochea vs. Sinclair, 60 Cal. 532; Bond vs. Walters, 38 Cal. A. 246, 175 Pac. 909.

[16] Colorado Coal Co. vs. U. S., 123 U. S. 307; U. S. vs. Winona Co., *supra* (9); U. S. vs. Clark, 138 Fed. 294, aff'd. 200 U. S. 601; U. S. vs. Barber Lumber Co., 194 Fed. 24, see Curtis Co. vs. U. S. 262 U. S. 215. To be entitled to protection as an innocent purchaser, a party must have bought in good faith and for value. The defense of a *bona fide* purchaser is an affirmative defense and it must not only be pleaded specifically, but proved by affirmative evidence. U. S. vs. Bennett, 296 Fed. 413, and cases therein cited. See, also, Independent Co. vs. U. S. *supra* (11).

See § 340.

[17] 26 Stats. 1099. See U. S. vs. Chandler-Dunbar Co., 209 U. S. 447. The object of this statute is to extinguish any right the government may have in the land which is the subject of the patent, not to foreclose claims of third parties. Cramer vs. U. S., 261 U. S. 233, rev'g. 276 Fed. 78. Capron vs. Van Horn, *supra* (11). But it does not apply to a suit by the United States to recover the value of the land erroneously patented. Union Oil Co. vs. U. S., 247 Fed. 106. In U. S. vs. Minnesota, 270 U. S. 196, the court said: "The provision in the act of 1891 has been construed and adjudged in prior decisions—which we see no reason to disturb—to be strictly a part of the public land laws, and without application to suits by the United States to annul patents as here, because issued in alleged violation of the rights of its Indian wards and of its obligations to them"; citing Cramer vs. U. S., *supra*; LaRoque vs. U. S., 239 U. S. 62; N. P. R. Co. vs. U. S., 227 U. S. 355. "Where the government seeks to cancel a patent to certain mining claims on the ground that it has been obtained through deception, perjury and fraud, the doctrine announced in Bailey vs Glover, 88 U. S. 342; Exploration Co. vs. U. S., 247 U. S. 435, aff'g. 203 Fed. 387. and U. S. vs. Diamond Coal Co., 255 U. S.

gress by this act has clearly manifested its intention to make a delay for six years after the date of a patent fatal to a suit to avoid the patent for fraud, unless relief can be granted on equitable principles.[18]

323, is that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute of limitations does not begin to run until the fraud is discovered, and this though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." U. S. vs. Bellingham Bay Co., 6 Fed. (2d) 102, aff'g. 299 Fed. 869. See U. S. vs. Bellingham Bay Co., 281 Fed. 522.

[18] U. S. vs. Diamond Coal Co., 225 U. S. 323, rev'g 254 Fed. 266. In an action brought by the government more than six years after the date of the issuance of a patent to cancel and annul it on the ground of fraud, the complaint must specifically set forth what the impediments were to an earlier prosecution of the claim, how the government came to be so long ignorant of its rights and the means used by the patentee to fraudulently keep it in ignorance, and how and when it first came to the knowledge of the matters alleged in the complaint. It is not sufficient for the government to aver it was ignorant of its claim in, say, 1903, and was aware of it in 1916. U. S. vs. Diamond Coal Co., *supra*. The respect due to a patent for a mining claim and the presumption that all the preceding steps required by law were duly observed, and the obvious necessity for stability in titles resting upon patents, require that in a suit to cancel or annul any such patent, the government shall bear the burden of proof and shall sustain it by that class of evidence which commands respect and that amount of it which produces conviction. Diamond Coal Co., *supra* [2]. In cases of concealed fraud the cause of action does not accrue until the discovery of the fraud or the receipt of such information as would excite the attention, or incite a person of ordinary prudence to an inquiry that would lead to a discovery of the fraud, and the bar of the statute does not begin to run until that time. U. S. vs. Exploration Co., 203 Fed. 387; aff'd. 247 U. S. 435; U. S. vs. Lee Wilson Co., 214 Fed. 630; U. S. vs. S. P. Co., 11 Fed. (2d) 547. In the case of Independent Coal Co. vs. U. S., *supra* [11], a suit to impress a trust upon public lands, it was held that the statute did not apply to such a suit founded upon equitable grounds to compel a conveyance of title derived from a certification by the government under the act of July 16, 1894 (28 Stats. 109, 110), as it was not a suit to cancel the certification, but one brought in aid of a former decree holding that the certification had been fraudulently obtained.

See § 336.

CHAPTER XIX.

POSSESSORY ACTIONS.

§ 382. Introductory.

The main difference between an "adverse suit" and a "possessory action" is that in an adverse suit the judgment therein affects the title to the ground in dispute as between the parties thereto and the government[1] and the judgment in a possessory action affects only the title to the ground as between the parties litigant.[2] As a general rule an action in ejectment,[3] or a suit to quiet title,[4] as circumstances may

[1] In Burke vs. McDonald, 2 Ida. 1022, 33 Pac. 51, the court, referring to the "act of March 3, 1881, providing that, if 'title to the ground in controversy shall not be established by either party the jury shall so find, said: "Since this act it has become necessary that the decision, whether by court or jury, must show, not only that the successful party is entitled to the possession as against his opponent, but also as against all others, including the government." See Jackson vs. Roby, 109 U. S. 440; Cole vs. Ralph, 252 U. S. 297, rev'g. 249 Fed. 81; Tonopah Co. vs. Douglass, 123 Fed. 941.

See § 347.

[2] Mr. Justice Fuller, in Manuel vs. Wulff, 152 U. S. 510, in summarizing the rights acquired by the locator under section 2322 of the Revised Statutes, said: "When such qualified persons have made discovery of mineral lands and complied with the law, they shall have the exclusive right to possession and enjoyment of the same. It has, therefore, been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged and inherited without infringing the title of the United States; and that when a location is perfected it has the effect of a grant by the United States of the right of present and exclusive possession." Forbes vs. Gracey, 94 U. S. 762; aff'g. 11 Nev. 223; Belk vs. Meagher, 104 U. S. 279; Gwillim vs. Donnellan, 115 U. S. 45; Noyes vs. Mantle, 127 U. S. 348; Clipper Co. vs. Eli Co., 194 U. S. 220; Bradford vs. Morrison, 212 U. S. 389, aff'g. 10 Ariz. 214, 86 Pac. 6; Sullivan vs. Iron Co., 143 U. S. 434; Union Oil Co. vs. Smith, 249 U. S. 349, aff'g. 166 Cal. 217, 135 Pac. 966; Gillis vs. Downey, 85 Fed. 487; Berquist vs. West Virginia Co., 18 Wyo. 234, 106 Pac. 682; see U. S. vs. Rizzinelli, 182 Fed 684. In Watterson vs. Cruse, 179 Cal. 382, 176 Pac. 870, the court said: "While the paramount fee remains in the government until it has issued its patent, yet as to every one else the estate acquired by a perfected mining location possesses all the attributes of a title in fee, and so long as the requirements of the law with reference to continued development are satisfied, the character of the tenure remains that of a fee. Merritt vs. Judd, 14 Cal. 59; Hughes vs. Devlin, 23 Cal. 501; Buchner vs. Malloy, 155 Cal. 253, 100 Pac. 687. The interest of the locator is treated as a vested estate. Hughes vs. Devlin, *supra;* Clipper Co. vs. Eli Co., *supra;* Trinity Co. vs. Beaudry, 223 Fed. 741, *certiorari* denied, 239 U. S. 638; O'Connell vs. Pinnacle Co., 131 Fed. 109; aff'd. 140 Fed. 854; Hodgson vs. Midwest Oil Co., 17 Fed. (2d) 71.

See *infra,* note 8.

[3] Iron Co. vs. Mike & Starr Co., 143 U. S. 394; Hodgson vs. Midwest Oil Co., *supra* [2]; Davidson vs. Calkins, 92 Fed. 232; Lavagnino vs. Uhlig, 26 Utah 1, 71 Pac. 1046; see Perego vs. Dodge, 163 U. S. 165, aff'g. 9 Utah, 3, 33 Pac. 221. "Ejectment is the action to try title to mining claims, except in those cases where the plaintiff is in possession. In the latter case a suit to quiet title is what results. Bill to quiet title will not lie in federal courts where defendant is in possession and complainant out even though maintainable in state where land lies. Childs vs. Missouri Ry. Co., 221 Fed. 219. By statute ejectment will lie for a mining claim, although the paramount title is in the United States. Rev. St. U. S., § 910, U. S. Comp. St. 1901, p. 679. See Davidson vs. Calkins, 92 Fed. 230, 232. The same is true of a suit to quiet title. Fulkerson vs. Chisna Co., 122 Fed. 782. See Naylor vs. Foreman Co., 230 Fed. 671.

[4] Ripinsky vs. Hinchman, 181 Fed. 793; Mason vs. Washington-Butte Co., 214 Fed. 32; Mt. Rosa Co. vs. Palmer, 26 Colo. 56, 56 Pac. 176; see Perego vs. Dodge, *supra* [3]; Buchner vs. Malloy, *supra* [2]. "The object of a suit to quiet title is to enable plaintiff to dispel whatever may be regarded, not only by defendant, but also by third persons, as a cloud on his title, depreciating its value; and, therefore, although a formal allegation or not of adverse claim may be necessary in the complant, it is immaterial whether the defendant actually asserted such adverse claim before the commencement of the action." 27 Cyc. 652*d*, citing Bulwer Co. vs. Standard Co., 83 Cal. 589, 23 Pac. 1101; see, also, Wolverton vs. Nichols, 119 U. S. 485; Parley's Park Co. vs. Kerr, 130 U. S. 256; California Oil Co., vs. Miller, 96 Fed. 12; Boston Acme Co. vs. Saline Co., 3 Fed. (2d) 733; Souter vs. Maguire, 78 Cal. 543, 21 Pac. 183.

In Davidson vs. Calkins, *supra* [3], it is held that under the California statute, allowing a bill to quiet title, where the defendant was in possession, did not confer jurisdiction in equity upon the federal court. The opinion reviews the decisions at much length. See Hirsch vs. Block, 267 Fed. 620; Twist vs. Prairie Oil Co., 6 Fed.

dictate, is as proper in the one class of cases as in the other, but in California it is not necessary that the cause of action be of any particular character.[4a] A possessory action may also be in trespass or for partition.[5] In a suit to recover possession of land, a separate cause of action may be added to restrain a threatened trespass and commission of waste.[6] The plaintiff may elect whether an action for trespass and appropriation of mineral shall be of a local or transitory nature.[7]

§ 383. Actions.

A possessory action for the recovery of any mining title or for damages to any such title is adjudged by the law of possession between the parties, although the paramount title to the land is in the United States.[8] This leaves the United States entirely out of consideration, and neither party can take advantage of the paramount title of the United States either to sustain his own title or to defeat that of his adversary.[9]

(2d) 349; Self vs. Prairie Oil Co., 19 Fed. (2d) 481. Where it is sought to enjoin the defendant from committing waste and destroying the property as a mining property jurisdiction in equity attached, even where the plaintiff is not in possession. Archer vs. Greenville Co., 233 U. S. 60; Big Six Co. vs. Mitchell, 138 Fed. 183; El Dora Oil Co. vs. U. S., 229 Fed. 949. See U. S. vs. Devil's Den Oil Co., 236 Fed. 977, aff'd. 251 Fed. 548; Lancaster vs. Kathleen Co., 241 U. S. 557. To sustain a suit in equity to quiet title in the federal courts, when the plaintiff is out of possession, the defendant must also be out of possession; in other words, the land must be unoccupied land. Holland vs. Challen, 110 U. S. 15. S. P. R. Co. vs. Goodrich, 57 Fed. 882. See, also, Whitehead vs. Shattuck, 138 U. S 146; Boston Co. vs. Montana Co., 188 U. S. 640; Lawson vs. U. S., 207 U. S. 1, aff'g. 134 Fed. 769; Stuart vs. Union Co., 178 Fed. 753; New Jersey Co. vs. Gardener Co., 190 Fed. 866.

[4a] Head vs. Fordyce, 17 Cal. 151, cited with approval in Hughes vs. Beekley, 85 Cal. A. 317, 259 Pac. 337. An action under § 738 of the Code of Civil Procedure of California may be maintained by the owner of property to determine any adverse claim whatsoever. Castro vs. Berry, 79 Cal. 443, 21 Pac. 946, cited with approval in Hyatt vs. Colkins, 174 Cal. 580, 163 Pac. 1007.

In Caperton vs. Schmidt, 30 Cal. 479, it is said: "Under our system of pleading, the plaintiff, in an action to recover possession of real estate, is not limited to any particular form of complaint, but the form may be adapted to the facts desired to be put in issue. Plaintiff may allege that he is seized of the premises, or of some estate therein, in fee, for life, or for years, he may aver a former possession and ouster; but whatever is put in issue and determined, is conclusive and final."

[5] Aspen Co. vs. Rucker, 28 Fed. 220; Dall vs. Confidence Co., 3 Nev. 531. The jurisdiction of federal courts of equity to entertain suits for partition where diversity of citizenship exists seems to be established. Willard vs. Willard, 145 U. S. 116; Hastings vs. Douglass, 249 Fed. 384.

[6] See Waskey vs. McNaught, 163 Fed. 927.

[7] Pioneer Co. vs. Mitchell, 190 Fed. 937. In Montana Co. vs. St. Louis Co., 183 Fed. 51, "it is contended that the action was the local action of trespass, and not the transitory action of conversion. * * * No claim was made for damages because of injury to the land, but judgment was demanded for the value of the ore which it was alleged had been converted by the Montana Co. The case was tried upon the theory that it was an action to recover the value of the ore converted. In the case of U. S. vs. Ute Co., 158 Fed. 20, Judge Sanborn, referring to a claim that the cause of action in that case was one for trespass upon land, and not a cause of action for the conversion of coal taken from the land, said: "The cause of action for trespass upon the land, and for the taking from it and conversion of coal, timber, or other personal property wherein the only damage alleged is the loss of the value of the personal property converted is the same in legal effect as a cause of action for the conversion of the personal property." This rule of action is fully supported by Stone vs. U. S., 167 U. S. 178; U. S. vs. Bitter Root Co., 200 U. S. 451, aff'g. 133 Fed. 274; Mexican Gulf Co. vs. Compania, 281 Fed. 161. See Taylor vs. Sommers Co., 35 Ida. 38, 204 Pac. 474; Arizona Co. vs. Iron Cap Co., 236 Mass. 193, 128 N. E. 7.

[8] Rev. St., § 910, U. S. Comp St. 1901, p. 679; O'Connell vs. Pinnacle Co., *supra* [(2)]; see Belk vs. Meagher, *supra* [(2)]; Del Monte Co. vs. Last Chance Co., 171 U. S. 61; Meydenbauer vs. Stevens, 78 Fed. 787; Gillis vs. Downey, *supra* [(2)]; Trinity Co. vs. Beaudry, *supra* [(2)]; Buchner vs. Malloy, *supra* [(2)]; Duggan vs. Davey, 4 Dak. 410, 26 N. W. 887. "Title to mining claims located on the public domain remains in the United States until patent. The locator's interest is only a possessory right, though it may be indefinitely continued by strict compliance with the mining law." Miller vs. Con. Royalty Oil Co., 23 Fed. (2d) 317.

[9] Meydenbauer vs. Stevens, *supra* [(8)].

§ 384. Law of Possession.

The law of possession means that the prior location and occupation carry with them the prior and better right;[10] or, in other words, the possessory right is the right to explore and work the property under the existing laws and regulations.[11] All controversies as to mining claims before patent must be determined by the law of possession.[12] The ordinary rule of law that the plaintiff must recover on the strength of his own title and not on the weakness of that of his adversary does not apply. The rule in possessory actions is that the better title prevails.[13]

§ 385. Laches.

The doctrine is well settled, both in the English courts and the courts of this country, as to the relentless enforcement of the doctrine of laches where the subject of controversy is mining and oil property purely speculative in value.[14] Inexcusable delay for a period short of

[10] Id. See Little Sespe Co. vs. Bacigalupi, 167 Cal. 381, 139 Pac. 802.

[11] Forbes vs. Gracey, *supra* [2]; U. S. vs. Rizzinelli, *supra* [2]; Miller vs. Chrisman, 140 Cal. 450, 73 Pac. 1083, 74 Pac. 444, aff'd. 197 U. S. 313.

[12] O'Connell vs. Pinnacle Co., *supra* [2]; Meydenbauer vs. Stevens, *supra* [8]; see Fulkerson vs. Chisna Co., *supra* [3]; Niagara Co. vs. Bunker Hill Co., 59 Cal. 612; Wilson vs. Triumph Co., 19 Utah 66, 56 Pac. 301.

[13] Schroeder vs. Aden Co., 144 Cal. 628, 78 Pac. 21; Rockey vs. Vieux, 179 Cal. 682, 178 Pac. 712; see McPhail vs. Nunes, 48 Cal. A. 383, 192 Pac. 55; Oroville Co. vs. Rayburn, 104 Wash. 137, 176 Pac. 14. In Smart vs. Staunton, 29 Ariz. 1, 239 Pac. 521, an action to quiet title, it is said: "While this rule has been usually announced in ejectment cases we think it applicable here. In the nature of things this is akin to a possessory action." It is elementary law that the plaintiff in ejectment must recover upon the strength of his own title, which must be sufficiently established to warrant a verdict in his favor. A mere intruder and trespasser can not make his wrong doing successful by asserting a flaw in the title of the one against whom the wrong has been committed by him. Haws vs. Victoria Co., 160 U. S. 303; McIntosh vs. Price, 121 Fed. 718; Rooney vs. Barnette, 200 Fed. 705.

In a possessory action between two mineral claimants the rule respecting the sufficiency of discovery of valuable mineral deposits is more liberal than when it is between a mineral claimant and one seeking an agricultural entry. The reason of this is that where land is sought to be taken out of the category of agricultural land the evidence of its mineral character should reasonably be clear, while in respect to mineral lands in the controversy between claimants the question simply is which is entitled to priority. Hagan vs. Dutton, 20 Ariz. 476, 181 Pac. 580; see, also, Chrisman vs. Miller, 197 U. S. 313, aff'g. 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444; Nevada Sierra Oil Co. vs. Home Oil Co., 98 Fed. 673; Steele vs. Tanana Co., 148 Fed. 678; Lange vs. Robinson, 148 Fed. 803; Hawley vs. Romney, 42 Ida. 650, 247 Pac. 1069. But even then the existence of mineral should be shown, without, however, weighing the scales to determine the value of the mineral found. Bonner vs. Meikle, 82 Fed. 697. "But even in such a case * * * there must be such a discovery of minerals as gives reasonable evidence of the fact that there is a vein or lode carrying the precious mineral, or if claimed as a placer ground that it is valuable for such mining." Chrisman vs. Miller, *supra*; see Cole vs. Ralph, *supra* [1].

[14] Twin Lick Co. vs. Marbury, 91 U. S. 587; Johnston vs. Standard Co., 148 U. S. 360; Gaines vs. Chew, 167 Fed. 630; Taylor vs. Salt Creek Co., 285 Fed. 532; Hodgson vs. Federal Oil Co., 285 Fed. 552; Mason vs. McFadden, 298 Fed. 391; Beck vs. Finley, 77 Okla. 213, 187 Pac. 488; Harvey vs. Laurier Co., 106 Wash. 192, 179 Pac. 864; Hazzard vs. Johnson, 45 Cal. App. 19, 187 Pac. 121; see Texas Co. vs. Herring, 19 Fed. (2d) 56; Miller vs. Con. Royalty Co., *supra* [8].

The doctrine of laches is based upon grounds of public policy which requires, for the peace of society, the discouragement of stale demands. Hammond vs. Hopkins, 143 U. S. 427; Kavanaugh vs. Flavin, 35 Mont. 133, 88 Pac. 766; Hynes vs. Silver Prince Co., 86 Mont. 10, 281 Pac. 550, except where fraud or injustice will result. Lichtenberg vs. Burdell, 101 Cal. A. 20, 281 Pac. 529.

Under the doctrine of laches when an assertion of the right is neglected or omitted for a period of time more or less great, and under such circumstances as to cause prejudice to an adverse party, it may operate as a bar in equity. Pioneer Co. vs. Pacific Co., 4 Alaska 463, and cases therein cited. Patterson vs. Chrisman State Bank, 55 Ind. A. 321, 102 S. E. 884.

An illustration of this doctrine is found in Emerson vs. Kennedy Co., 169 Cal. 718, 147 Pac. 939. This was an action to quiet title to certain mining property situate within a patented townsite. The court said: "The court will conclusively presume in aid of the defendants and those under whom they claim who have so

the time provided by the statute of limitations may constitute laches, and is an equitable defense wholly independent and outside of such statute, whenever the relief sought is wholly equitable.[15] Delay can

long relied on the validity of the townsite patent, that the mining locations by virtue of which it is claimed the patent failed to convey title, had been abandoned, or that the mineral therein had all been extracted long before the plaintiff initiated his location, and the plaintiff's claim will be held to be stale and not enforceable in a court of equity."

In Verdugo Co. vs. Verdugo, 152 Cal. 674, 93 Pac. 1021, the court said: "It is said that the cases on the subject 'proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper forum'; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that 'because of the change of conditions during this period of delay it would be an injustice to permit the' claimant now to assert his rights. (Galligher vs. Cadwell, 145 U. S. 372)." See, also, Penn Mut. Co. vs. Austin, 168 U. S. 698.

The ultimate inquiry is on which side would fall the balance of justice in sustaining or denying the defense. N. P. R. Co. vs. Boyd, 170 Fed. 779. See Hawlay vs. Von Lanken, 75 Neb. 597, 106 N. W. 456. See, also, Akley vs. Bassett, 189 Cal. 625, 209 Pac. 576, e.c. 68 Cal. A. 270, 228 Pac. 1057.

"No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every complainant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many." Naddo vs. Bardon, 51 Fed. 493; Gill vs. Colton, 14 Fed. (2d) 531. There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which today may have no saleable value may in a month become worth its millions. Years may be spent in working such property apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstances persons having claims to such property are bound to the utmost diligence in enforcing them. Patterson vs. Hewitt, 195 U. S. 309; aff'g. 66 Pac. 553; Starkweather vs. Jenner, 216 U. S. 524; aff'g. 27 App. D. C. 348. In some cases the diligence required is measured by months rather than by years. And in some others a delay of two, three or four years has been held to be fatal. Patterson vs. Hewitt, *supra*; Starkweather vs. Jenner, *supra*; Barnette vs. Wells Fargo Bank, 270 U. S. 438, aff'g. 298 Fed. 689; Bacon vs. Neill, 283 Fed. 717. Under the general equity principles, not the time when the fraud is committed, but when it is discovered, or might have been discovered by the exercise of ordinary diligence, fixes the time when the cause of action accrues. Tilden vs. Barber, 168 Fed. 591; Taylor vs. Salt Creek Co., *supra*. In Jackson vs. Jackson, 175 Fed. 719, a delay of three years in asserting an interest in oil lands was held laches. The owner of minerals in land can not be barred by laches for failing to assert his ownership where his title has not been questioned nor his right invaded. No lapse of time bars one's right to property, and it is only in case his right has been invaded that it can be barred by laches. Morse vs. Smythe, 255 Fed. 984. Failure to search the records for several years is laches. Redd vs. Brun, 157 Fed. 190; Buchler vs. Black, 226 Fed. 703; see Pittsburgh Co. vs. Cleveland, 178 U. S. 270; Johnson vs. Nevada Co., 272 Fed. 291.

[15] Jewell vs. Trilby Mines, 229 Fed. 98; Scruggs vs. Decatur Co., 86 Ala. 173, 5 So. 440; Great West Co. vs. Woodmas Co., 14 Colo. 90, 23 Pac. 908; Morrow vs. Mathew, 10 Ida. 423, 79 Pac. 196. When a suit is brought within the time limited by the statute of limitations the burden is upon the defendant to show, by demurrer or answer, that unusual conditions or extraordinary circumstances exist which require the application of the doctrine of laches. When suit is brought after the statutory time has elapsed, the burden is upon the plaintiff to show by suitable allegations in the complaint that it would be inequitable to apply it to his case. Wagner vs. Baird, 7 How. 234; Landsdale vs. Smith, 106 U. S. 391; Kelley vs. Boettcher, 85 Fed. 62; Stevens vs. Grand Central Co., 133 Fed. 28; Steinbeck vs. Bon Homme Co., 152 Fed. 333; Morse vs. Smythe, 255 Fed. 981; Allen vs. Blanche Co., 46 Colo. 199, 102 Pac. 1072. Laches, however, does not depend upon mere lapse of time. As was stated, after a review of many cases, in Galligher vs. Cadwell, 145 U. S. 368, 373: "But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an equity founded upon some change in the condition or relations of the property or the parties. Nor can a person avail himself of the defense of laches by changing his position in order to create apparent equities with notice of the rights of the person against whom delay is asserted." U. S. vs. Work, 13 Fed. (2d) 394; Spiller vs. St. Louis Co., 14 Fed. (2d) 288. See Knaggs vs. Cleveland Co., 287 Fed. 319. In other words, mere delay of itself is not laches, but delay that has worked to the injury of another. May vs. Roberts, ___ Or. ___, 286 Pac. 546.

not be excused except by some actual hindrance or impediment caused by the fraud or concealment of the party in possession.[16] Mere lapse of time never constitutes laches, but in addition the court must find that it would be inequitable to grant the relief prayed for.[17] The mere institution of a suit does not relieve the plaintiff of the charge of laches. Because of his failure to prosecute the suit, the consequences are the same as if no suit had been begun.[18] In other words, a party is as much open to the charge of laches for the failure to prosecute a suit diligently as if he had unduly delayed its institution.[19]

§ 386. When United States Not Barred by Laches.

While the United States is not barred by laches from maintaining a suit brought to enforce a public right or to assert a public interest, and in which it is the real party in interest, it is so barred from maintaining suits in which it merely is a formal party, brought to enforce the rights of individuals, and involving no interest of the government. This distinction often has been declared in suits brought in the name of the United States to cancel grants of the public lands.[20]

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[16] Wagner vs. Baird, *supra* (15); Landsdale vs. Smith, *supra* (15); Westerman vs. Dinsmore, 68 W. Va. 591, 71 S. E. 250. While the law imposes the requirement of reasonable promptness in all cases to avoid laches, it requires greater diligence and activity in seeking to rescind transactions with reference to oil values affected by extraordinary uncertainty and fluctuations as they are, than with reference to ordinary dealings. Minchew vs. Morris, ___ Tex. C. A. ___, 241 S. W. 215. For instances of excusable delay, see Mexico-Wyoming Co. vs. Valentine, 237 Fed. 539; Bacon vs. Neill, *supra* (14); *certiorari* denied, 243 U. S. 637; Pond Creek vs. Hatfield, 239 Fed. 628; Plews vs. Burrage, 274 Fed. 881; Rose vs. Union Gas & Oil Co., 297 Fed. 19; Stone vs. Marshall Co., 188 Pa. St. 602, 41 Atl. 718, 1119.

[17] O'Brien vs. Wheelock, 184 U. S. 482; Stevens vs. Grand Central Co., *supra* (15); Mexico-Wyoming Co. vs. Valentine, *supra* (16); Minnesota Co. vs. McGirr, 263 Fed. 847; Mason vs. McFadden, *supra* (14); Spiller vs. St. Louis Co., *supra* (15); Gill vs. Colton, *supra* (14); Baber vs. Baber, 141 Va. 740, 94 S. E. 209; Mayer vs. Ritter, 268 Fed. 937. In Brownrigg vs. de Frees, 196 Cal. 539, 238 Pac. 714, the court said: "This action is one at law by which the plaintiff sought to recover certain payments owing by reason of a breach of contract by the defendant's intestate, and it has been held in this state, and generally elsewhere, that the defense of laches is a creature of equity. Trail vs. Firth, 186 Cal. 68, 198 Pac. 1033; 10 Cal. Jur. 522; 21 C. J. 214. 'It is scarcely necessary to say that complainants can not avail themselves as a matter of law of the laches of the plaintiff in an ejectment suit. Though a good defense in equity, laches is no defense at law.' Wehrman vs. Conklin, 155 U. S. 314; see, also, Rose's U. S. Notes; see, also, Arzar vs. Miller, 90 Cal. 342, 27 Pac. 299; Waits vs. Moore, 89 Ark. 19, 115 S. W. 931; Wells vs. Western Union Tel. Co., 144 Iowa 605, 123 N. W. 371; Commercial Sec. Co. vs. Archer, 179 Ky. 842, 201 S. W. 479. In an action at law, or where the plaintiff asserts no equitable rights 'the statute of limitations, rather than the doctrine of laches, furnishes the rule of decision.' 10 Cal. Jur. 526. Respondent insists that the defense may be pleaded in bar to an action at law as well as an action in equity, but the cases, such as Stevinson vs. San Joaquin Co., 162 Cal. 141, 121 Pac. 398; Elliott vs. Bunce, 10 Cal. A. 741, 103 Pac. 897; Emerson vs. Kennedy Co., 169 Cal. 718, 147 Pac. 939, are actions of an equitable nature."

[18] Johnson vs. Standard Co., *supra* (14); Northrup vs. Browne, 204 Fed. 224; U. S. vs. Fletcher, 231 Fed. 326; aff'd. 242 Fed. 818; Taylor vs. Salt Creek Co., *supra* (14); Wells Fargo Bank vs. Barnette, 298 Fed. 691; aff'd. 270 U. S. 438; see, also, Mackall vs. Casilear, 137 U. S. 556; Johnston vs. Standard Co., *supra* (14); Willard vs. Wood, 164 U. S. 525; O'Brien vs. Wheelock, *supra* (17); Drees vs. Waldron, 212 Fed. 93.

[19] U. S. vs. Fletcher, *supra* (18). Where the defendant has not been prejudiced and there is a reasonable excuse for the delay, the suit is not barred. Central Co. vs. Jersey City, 199 Fed. 245; see Porto Rico Co. vs. Conklin, 271 Fed. 570. Where a party interposing a defense of laches has contributed to or caused the delay, he can not take advantage of it. N. P. R. Co. vs. Boyd, 177 Fed. 804; aff'g. 170 Fed. 779; aff'd. 228 U. S. 482; see Jewell vs. Trilby Mines, *supra* (15); Spiller vs. St. Louis Co., *supra* (15); Great West Co. vs. Woodmas Co., *supra* (15).

[20] U. S. vs. Beebe, 127 U. S. 338; U. S. vs. Des Moines Co., 142 U. S. 510; Moran vs. Horsky, 178 U. S. 205; dis'g. 21 Mont. 315, 53 Pac. 1064; U. S. vs. Chicago Co., 195 U. S. 524; U. S. vs. Fletcher, *supra* (18).

The laches, neglect, or affirmative acts of executive officers, not themselves supplied with power over the subject through an act of congress, will not avail to estop the government from asserting the proprietary or other rights of the United States. U. S. vs. Kirkpatrick, 9 Wheat. 735; Frisbie vs. Whitney, 9 Wall. 187; Gibson vs. Choteau, 13 Wall. 92; U. S. vs. Insley, 130 U. S. 263.

§ 386a. Pleadings in Equity.

The bill must set forth specifically what were the impediments to an earlier prosecution of the claim, how the plaintiff came to be so long ignorant of his rights, and how and when he first came to a knowledge of the matters alleged in the bill; otherwise the chancellor must refuse to consider the case upon his own showing, whether there is a demurrer or formal plea of the statute of limitations [20a] contained in the answer. Inferences, generalities, presumptions and conclusions have no place in such a pleading.[20b]

The defense of laches need not be pleaded, but when it appears from the evidence that the seeker of relief in equity has been guilty of laches the court will deny such relief *sua sponte*.[20c]

§ 387. Pleadings at Law.

The pleadings need not be different from that required in possessory actions generally.[21] It is sufficient to allege in the complaint ownership and right of possession in the plaintiff and that the defendant wrongfully entered therein, or asserts title thereto. The means by which the possessor is entitled to the possession are mere matters of evidence.[22] It is not necessary in this class of actions to either plead

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[20a] Musick Oil Co. vs. Chandler, 158 Cal. 13, 109 Pac. 613.

[20b] Davitt vs. American Baker's Union, 124 Cal. 99, 56 Pac. 775.

[20c] Stevinson vs. San Joaquin Co., 162 Cal. 143, 141 Pac. 143; and cases therein cited; Akley vs. Bassett, *supra* [14]. See Garrity vs. Miller, 204 Cal. 454, 268 Pac. 622; *but see* Faria vs. Bettencourt, 100 Cal. A. 49, 279 Pac. 679; Bishop vs. Jordan, 104 Cal. A. 319, 285 Pac. 1096.

In Faria vs. Bettencourt, *supra*, the court said: "Laches is a defense which must be pleaded and proved unless it appears upon the face of the complaint (Victor Oil Co. vs. Drum, 184 Cal. 226, 193 Pac. 243), and, in addition to the mere lapse of time in bringing the suit, it must appear that the defendant has been prejudiced by the delay. (10 Cal. Jur., p. 530; Victor Oil Co. vs. Drumm, *supra.*)"

[21] A mining claim is real estate, and the rules of pleading relative to real estate are applicable to it. Harris vs. Kellogg, 117 Cal. 488, 49 Pac. 708; Contreras vs. Merck, 131 Cal. 211, 63 Pac. 336; Jones vs. Peck, 63 Cal. A. 397, 218 Pac. 1030; Root vs. Conlin, 65 Cal. A. 241; 233 Pac. 1023; Mt. Rosa Co. vs. Palmer, 26 Colo. 56, 56 Pac. 176. See Caperton vs. Schmidt, *supra* [4a]. In a contest as to whether or not lands are known mineral lands it is sufficient to "allege that said lands never contained, and do not now contain, known minerals in lode deposits of any value sufficient to justify expense of exploitation or expenditure in the effort to extract the same." These allegations are not legal conclusions, but allegations of fact. It is but one mode of alleging that the ground is nonmineral. O'Keefe vs. Cannon, 52 Fed. 899. "In the federal equity procedure, the defense of laches need not be set up by plea or answer, but may be taken advantage of either by demurrer, motion to dismiss, or upon final hearing." Hays vs. Port of Seattle, 251 U. S. 239, aff'g. 226 Fed. 287, and cases therein cited.

[22] Fulkerson vs. Chisna Co., *supra* [3]; Harris vs. Kellogg, *supra* [21]; Hammitt vs. Virginia Co., 32 Ida. 245, 181 Pac. 336; Independence Co. vs. Knauss, 32 Ida. 269, 181 Pac. 701; National Co. vs. Piccolo Co., 84 Wash. 617, 104 Pac. 128. In Jones vs. Peck, *supra* [21], it is said that in a possessory action it is sufficient for the plaintiff to allege that he is the owner of the land in question. "The right of possession accompanies the ownership, and from the allegation of the fact of ownership—which is the allegation of seisin in ordinary language—the right of present possession is presumed as a matter of law. It is not necessary to allege ownership in terms as of date of commencement of action. Betsch vs. Umphrey, 252 Fed. 573. See, also, Ely vs. New Mexico Co., 129 U. S. 291; Stockton vs. Oregon Co., 170 Fed. 627; Harris vs. Kellogg, *supra* [21]; Davis vs. Crump, 162 Cal. 513, 123 Pac. 294; Hindle vs. Warden, 50 Cal. A. 359, 195 Pac. 428; Pettingill vs. Blackman, 30 Ida. 241, 164 Pac. 358. See Robinson vs. Glendale, 182 Cal. 211, 187 Pac. 741. As against a mere intruder, the right of possession is sufficient. Smart vs. Staunton, *supra* [13]. Actual possession for any period, under claim of ownership, is sufficient evidence of title in plaintiff as against a trespasser or one who established no title in himself. Morris vs. Clarkin, 156 Cal. 16, 103 Pac. 180.

Bona fide possession of mining property under a claim of right entitles the one in possession to an injunction against a trespasser who threatens irreparable injury to the realty. Kellogg vs. King, 114 Cal. 378, 46 Pac. 166; Thomas vs. Village, 34 Ida. 430, 201 Pac. 719; Diamond Match Co. vs. Village, 72 Mich. 249, 40 N. W. 448.

or prove the citizenship of either party.[23] The decisions are not in unison as to whether or not abandonment should be specially pleaded.[24] The party relying upon a forfeiture must allege and prove it, and the burden of proof in the first instance rests upon him to establish the forfeiture.[25]

§ 388. Evidence.

The possession of the surface of a mining claim is sufficient evidence of title as against any one not showing any higher or better right.[26] The burden is upon the plaintiff to show that the prior location was made and perfected in compliance with the provisions of the mining law. The proof must show a discovery, as it will not be presumed that a

[23] Thompson vs. Spray, 72 Cal. 528, 14 Pac. 182; Harris vs. Kellogg, *supra* [21]; Gruwell vs. Rocca, 141 Cal. 417, 74 Pac. 1082; Owen vs. Heim, 81 Colo. 295, 269 Pac. 899; *see* Buckley vs. Fox, 8 Ida. 248, 67 Pac. 659; see Altoona Co. vs. Integral Co., 111 Cal. 100, 45 Pac. 1047. In a suit to quiet title to a mining claim the complaint need not allege in detail the manner in which the claim was located nor the qualifications of the locator. In such a case it only is necessary to allege the ultimate fact of the plaintiff's interest in, or claim to, the property. Although a complaint to quiet title to a mining claim did not sufficiently describe nor identify the claim, but where the plaintiff at the trial introduced the notice of location, together with oral testimony, touching the location and description, and this evidence was admitted without objection as to the sufficiency of the complaint, it is sufficient to sustain the judgment. Independence Co. vs. Knauss, *supra* [22]. See Ginaca vs. Peterson, 262 Fed. 204.

[24] That abandonment need not be pleaded but may be shown under a general denial or general allegation of ownership, see Trevaskis vs. Peard, 111 Cal. 599, 44 Pac. 246; Contreras vs. Merck, *supra* [23]; Duncan vs. Eagle Rock Co., 48 Colo. 587, 111 Pac. 588; Atkins vs. Hendree, 1 Ida. 95. The contrary doctrine is held in Renshaw vs. Switzer, 6 Mont. 464, 13 Pac. 127. In Morenhaut vs. Wilson, 52 Cal. 263, it was held that while abandonment need not be alleged that forfeiture should be pleaded. To the same effect see Cache Creek Co. vs. Brahenberg, 217 Fed. 240; Power vs. Sla, 24 Mont. 243, 61 Pac. 468; Bishop vs. Baisley, 28 Or. 119, 41 Pac. 936. See, generally, Yosemite Co. vs. Emerson, 208 U. S. 25; aff'g. 149 Cal. 50; Richen vs. Davis, 76 Or. 311, 148 Pac. 1130; Lancaster vs. Coale, 27 Colo. A. 495, 150 Pac. 821. In McShane vs. Kenkle, 18 Mont. 208, 41 Pac. 979, it was said "Where abandonment is relied upon it would seem to be safer to plead it."

[25] Hall vs. Kearney, 18 Colo. 505, 33 Pac. 373; Justice Co. vs. Barclay, 82 Fed. 551. The plea of forfeiture in itself is an admission of a prior valid location. Power vs. Sla, *supra* [24]; Bakke vs. Latimer, 3 Alaska 99. See, also Zerres vs. Vanina, 134 Fed. 614, aff'd. 150 Fed. 561; Betsch vs. Umphrey, *supra* [22]. Where the party alleging forfeiture shows that no work was performed within the limits of the claim, he makes out a *prima facie* case; and thereafter should his adversary depend upon labor done outside the claim the burden is cast upon him of proving the performance of such labor, and that its reasonable tendency is to the benefit of the claim. Hall vs. Kearny, *supra*; Justice Co. vs. Barclay, *supra*. If the work has in fact been done for the development of the claim, it may properly be considered as annual assessment work, although it may have been performed without the exterior boundaries of the claim. And in such case it is held immaterial whether the improvement is upon patented or unpatented property, except as this may throw light upon the intention of the parties doing the work. Strassburger vs. Beecher, 20 Mont. 143, 49 Pac. 740; Hall vs. Kearny, *supra*; Justice Co. vs. Barclay, *supra*; Mt. Diablo Co. vs. Callison, Fed. Cas. 9886. The reason of the rule which shifts the burden of proof in such cases is obvious. It is not a legal presumption that all labor done outside a claim by the owner is performed as annual labor, or representation work. If so performed, and it was intended as the required annual labor, the fact was peculiarly within the knowledge of the claimant; and one charging a forfeiture can hardly be expected to be informed as to all work which may have been performed off the claim, or as to intention or purpose thereof. Sherlock vs. Leighton, 9 Wyo. 297, 63 Pac. 580; Merchants Bank vs. McKeon, 60 Or. 325, 119 Pac. 334; *but see* Holmes vs. Salamanca Co., 5 Cal. A. 659, 91 Pac. 160; Goldberg vs. Bruschi, *supra* [24], where evidence of forfeiture was admitted under general denial. See, generally, Buckeye Co. vs. Powers, 43 Ida. 532, 257 Pac. 833.

[26] Carson City Co. vs. North Star Co., 83 Fed. 668; see Vogel vs. Warsing, 146 Fed. 949.

In possessory actions, proof of possession of a mining claim is *prima facie* evidence of title. DeWitt vs. Sides, 81 Cal. A. 646, 254 Pac. 658; Patchen vs. Keeley, 19 Nev. 404, 14 Pac. 347; see, also, Campbell vs. Rankin, 99 U. S. 261, citing 2 Greenl. Ev. § 311; Attwood vs. Fricot, 17 Cal. 37; English vs. Johnson, 17 Cal. 107; Hess vs. Winder, 30 Cal. 349.

See § 391.

discovery was made from proof of the record of a location and the marking of it on the ground.[27]

§ 389. Proof of Assessment Work.

The method of proving the doing of the assessment work is not uniform. The mere proof of the expenditure of one hundred dollars is not sufficient, but only furnishes an element tending to establish the good faith of the locator. It is not the question of what or how much was paid for such labor or improvements but whether or not the same were reasonably worth that sum.[28] That is to say, it must be shown that the work is of value to the claim upon which it is sought to apply the same as annual labor or expenditure, either generally in enhancing the money value of the property or in the way of prospecting, developing or operating it.[29] Where the work is done outside of a location, or outside of a group, or within a group, but not upon all of the locations therein, the burden of proof is upon him who asserts such work was for the benefit of all thereof[30] and that the expenditure of money or labor equals in value that which would be required on all the claims if they were separate and independent.[31] The burden of proving the nonperformance of the annual assessment work rests upon him who asserts it.[32] The proof must be clear and convincing.[33] No testimony as to annual assessment work or expenditure is admissible in the absence of proof of discovery.[34]

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[27] Copper Globe Co. vs. Allman, 23 Utah 417, 64 Pac. 1019; Cunningham vs. Pirrung, 9 Ariz. 288, 80 Pac. 329; Copper Co. vs. Kidder, *supra* (24).

[28] Jackson vs. Roby, *supra* (1); McCulloch vs. Murphy, 125 Fed. 147; McKay vs. Neussler, 148 Fed. 86; Wright vs. Killian, 132 Cal. 56; 64 Pac. 98; Penn vs. Oldhauber, 24 Mont. 287, 61 Pac. 649; *but see* Whalen Co. vs. Whalen, 127 Fed. 611, holding on an issue as to the performance of necessary assessment work, evidence of large amount of money expended is admissible as bearing on the question of good faith.

[29] McCulloch vs. Murphy, *supra* (28); McKirahan vs. Gold King Co., 39 S. Dak. 535, 165 N. W. 542; see Willitt vs. Baker, 133 Fed. 948; Bakke vs. Latimer, *supra* (23); Wright vs. Killian, *supra* (28); Mattingly vs. Lewishohn, 13 Mont. 508; Penn vs. Oldhauber, *supra* (28).

[30] Anvil Co. vs. Code, 182 Fed. 205; see Con. Mutual Oil Co. vs. U. S., 245 Fed. 523; Whalen vs. Whalen Co., *supra* (29); see Wailes vs. Davies, 158 Fed. 667; Yreka Co. vs. Knight, 133 Cal. 544, 65 Pac. 1091; Power vs. Sla, *supra*, (24); Little Dorritt Co. vs. Arapahoe Co., 30 Colo. 431, 71 Pac. 389. The test as to whether work done upon one claim for a group of claims will constitute the annual labor for the group, is whether it is done in a manner tending to develop the entire group and for the purpose of developing the entire group in the honest belief that it so tends to develop them, and where the driving of a tunnel on one of a group of claims was in a direction opposite from the other claims, it was held that it could not possibly benefit the other claims. Reik vs. Messenger, 49 Nev. 1, 234 Pac. 30.

In order that this work may inure to the benefit of the claims held in common such claims must be contiguous. St. Louis Co. vs. Kemp, *supra*, (4); Chambers vs. Harrington, 111 U. S. 350; Union Oil Co. vs. Smith, *supra* (2); Con. Mutual Oil Co. vs. U. S., *supra*; Anvil Hydraulic Co. vs. Code, *supra*; Gird vs. California Oil Co., 60 Fed. 531; Miller vs. Chrisman, *supra* (11). See, generally, U. S. vs. Stockton Midway Oil Co., 240 Fed. 1006; Golden Giant Co. vs. Hill, 27 N. M. 124, 198 Pac. 276, *but see*, Altoona Co. vs. Integral Co., *supra* (3).

[31] St. Louis Co. vs. Kemp, *supra* (30); Chambers vs. Harrington, *supra* (30); Mt. Diablo Co. vs. Callison, *supra* (25); Book Co. vs. Justice Co., 58 Fed. 106; Gird vs. California Oil Co., *supra* (30); Justice Co. vs. Barclay, *supra* (25); Cassel, 32 L. D. 85; Power vs. Sla, *supra* (24). See Con. Mutual Oil Co. vs. U. S., *supra* (30).

[32] Hammer vs. Garfield Co., 130 U. S. 301; Wailes vs. Davies, *supra* (30); Providence Co. vs. Burke, 6 Ariz. 332, 57 Pac. 641; Copper Co. vs. Kidder, *supra* (27); Quigley vs. Gillett, 101 Cal. 462, 35 Pac. 1040; Harris vs. Kellogg, *supra* (21); Emerson vs. McWhirter, 133 Cal. 510, 65 Pac. 1036; Lancaster vs. Coale, *supra* (24); Lewis vs. Carr, 49 Nev. 366, 246 Pac. 695; Axiom Co. vs. White, 10 S. Dak. 198, 72 N. W. 462. For exception to rule see Willison vs. Ringwood, 190 Fed. 111; Florence-Rae Co. vs. Kimbel, 85 Wash. 162, 147 Pac. 881.

[33] Hammer vs. Garfield Co., *supra* (32); Justice Co. vs. Barclay, *supra* (25); Wailes vs. Davies, *supra* (30); Gear vs. Ford, 4 Cal. A. 556, 88 Pac. 600; Strassburger vs. Beecher, *supra* (25); Upton vs. Santa Rita Co., 14 N. M. 96, 88 Pac. 275; Richen vs. Davis, *supra* (24). "A forfeiture can not be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law," *supra* (28); McCulloch vs. Murphy, *supra* (28); McKay vs. Neussler, *supra* (28); Wailes vs. Davies, *supra*; Copper State Co. vs. Kidder, *supra* (27); Hammer vs. Garfield Co., *supra*.

[34] McLemore vs. Express Oil Co., 158 Cal. 539, 112 Pac. 59.

§ 390. Trespass.

A trespass may be due to accident, innocent mistake,[35] be intentional and justifiable,[36] or be intentional and wilful[37] and may be committed upon or beneath the surface.[38] An injunction will be granted to restrain the commission of acts by which the substance of the estate is injured, destroyed or carried away.[39] The ultimate recovery against a trespasser must be determined largely upon the question of the good or bad faith of the undertaking.[40]

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[35] Liberty Bell Co. vs. Smuggler-Union Co., 203 Fed. 795; *certiorari* denied, 231 U. S. 747; Doe vs. Tyler, 73 Cal. 21, 11 Pac. 375; Donovan vs. St. Louis Co., 187 Ill. 28, 58 N. E. 290. The test to determine whether one is a wilful or innocent trespasser is not his violation of the law in the light of the maxim that every man knows the law, but his honest belief and his actual intention at the time he committed the alleged trespass; and neither a justification of the acts nor any other complete defense is essential to the proof that the person committing such acts was not a wilful trespasser. Durant Co. vs. Percy Co., 93 Fed. 166; Gentry vs. U. S., 101 Fed. 51; U. S. vs. Homestake Co., 117 Fed. 186; see, also, Barnes vs. Winona Oil Co., 183 Okla. 253, 200 Pac. 985; Zelma Oil Co. vs. Nemo Oil Co., 84 Okla. 217, 203 Pac. 203; Mullendore vs. Minnehoma Oil Co., 114 Okla. 251, 233 Pac. 1051.

[36] Del Monte Co. vs. Last Chance Co., *supra* [8]; Liberty Bell Co. vs. Smuggler-Union Co., *supra* [35]. The purchaser of a lode claim takes it subject to the provisions of the statute reserving to locators of other mining claims the right to follow and take ore under its surface from any vein, lode or ledge having its top or apex within the surface lines of such other location. Doe vs. Waterloo Co., 54 Fed. 939, aff'd. 82 Fed. 45; Bourne vs. Federal Co., 243 Fed. 466; see Duggan vs. Davey, *supra* [8]; see also, Golden Cycle Co. vs. Christmas Co., 204 Fed. 939. The owner of a mining claim charged with trespass may justify such trespass by showing he brought himself within the provisions of the mining law and reached the point of the alleged trespass by pursuing and excavating a vein or lode which had its apex within the side lines of his location; and that his location was made pursuant to law. Cheesman vs. Shreeve, 40 Fed. 790; Daggett vs. Yreka Co., 119 Cal. 361, 86 Pac. 968. See, also, Keely vs. Ophir Co., 169 Fed. 601; and see Iron Co. vs. Elgin Co., 118 U. S. 196; King vs. Amy Co., 152 U. S. 222; Grand Central Co. vs. Mammoth Co., 29 Utah, 551, 83 Pac. 648. Until such proof is made *prima facie* he is a trespasser. Cheesman vs. Shreeve, 37 Fed. 36; Montana Co. vs. Clark, 42 Fed. 630; Doe vs. Waterloo Co., *supra*. A statutory tunnel owner may have the right to continue his tunnel through a lode claim located subsequent to the commencement of the construction of the tunnel either before or after patent. Creede Co. vs. Uinta Co., 196 U. S. 358; see also, Enterprise Co. vs. Rico-Aspen Co., 167 U. S. 108, aff'g. 66 Fed. 200; Corning Co. vs. Pell, 4 Colo. 507.

[37] See Benson Co. vs. Alta Co., 145 U. S. 428; aff'g. 2 Ariz. 362, 16 Pac. 565; Omaha Co. vs. Tabor, 13 Colo. 41, 21 Pac. 925. The fact that the trespass is due to ignorance of the dividing line between two mining claims is no excuse nor justification but makes the defendant a willful trespasser. Maye vs. Yappen, 23 Cal. 306; see Resurrection Co. vs. Fortune Co., 129 Fed. 668; *compare* U. S. vs. Ute Co., 158 Fed. 20, as one is bound to know the boundaries of his own property and to refrain from injuring the property of others. Durant Co. vs. Percy Co., *supra* [35]; Central Co. vs. Penny, 173 Fed. 340; Elkhorn Hazard Co. vs. Kentucky Co., 20 Fed. (2d) 71.

The law not only looks with great disfavor upon claims which are grounded in and sustained by a trespass, but regards them as of no validity against those whose property is the subject of the trespass, save when by acquiescence or neglect the right to object to it is waived or lost. Snyder vs. Colorado Co., 181 Fed. 70; McGuire vs. Brown, 106 Cal. 670, 39 Pac. 1060.

[38] Lincoln Co. vs. Hendry, 9 N. M. 155, 50 Pac. 330. A locator in the actual possession of a placer mining claim which in fact exceeds the legal limit of twenty acres, but who is diligently working the same in good faith, is at liberty to elect what portion of the claim he will reject as excess, and another locator has no right to enter upon that part of the claim which is being so worked because of any alleged excess. McIntosh vs. Price, *supra* [13]; Zimmerman vs. Funchion, 161 Fed. 859. Where without notice or attempt to give notice to all coowners entitled to be notified of an excess area, a locator went within the limits of a valid placer location and without giving the owners opportunity to cast off the excess area, endeavored to make a location for his own benefit, his attitude is that of a trespasser and he can not profit by his pretended location. Jones vs. Wild Goose Co., 117 Fed. 98; Adams vs. Yukon Co., 251 Fed. 226; see Atherton vs. Fowler, 96 U. S. 515; Walton vs. Wild Goose Co., 123 Fed. 218; see, also, Eilers vs. Boatman, 111 U. S. 357; Haws vs. Victoria Co., *supra* [13].

[39] Allen vs. Dunlap, 24 Or. 229, 33 Pac. 675; Barnes vs. Esch, 87 Or. 1, 169 Pac. 512; see Waskey vs. McNaught, *supra* [9]; Haggin vs. Kelly, 136 Cal. 481, 69 Pac. 140. In an action in ejectment the defendant can not be restrained from entering upon nor from "working" the property in dispute, provided, he does not commit waste, nor extract nor remove ore therefrom. Williams vs. Long, 129 Cal. 229, 72 Pac. 911; Safford vs. Fleming, 13 Ida. 271, 89 Pac. 827. For a collection of cases relating to injuries, other than mining of ore, see Morrison's Mining Rights (15th Ed.) 465.

[40] Backer vs. Penn. Co., 162 Fed. 627; Woodenware Co. vs. U. S., 106 U. S. 432, the court in discussing the question of damages for wrongful cutting of timber used the following language: "In the English courts the decisions have in the main grown out of coal taken from the mine, and in such cases the principle seems to be established in those courts, that when suit is brought for the value of the coal

so taken, and it has been the result of an honest mistake as to the true ownership of the mine, and the taking was not willful trespass, the rule of damages is the value of the coal as it was in the mine before it was disturbed, and not its value when dug out and delivered at the mouth of the mine (citing cases). * * * The doctrine of the English courts on this subject probably is as well stated by Lord Hatherly in the House of Lords, in the case of Livingstone vs. Rawyards Co., L. R. 5 App. Cas. 33, as anywhere else. He said: 'There is no doubt that if a man furtively and in bad faith robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or I would rather say, will assert authority to punish the fraud by fixing the person with the value of the whole of the property, which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have been justly made to him if the parties had been working by agreement.'" In St. Clair Co. vs. Cash Co., 9 Colo. A. 235, 47 Pac. 466, the rule is thus stated: "It has been settled that a recovery on an innocent trespass is based on a totally different rule from one which is not the result of an honest mistake, and is, therefore, a willful trespass, within the ordinary legal acceptation of this term. In the first class of cases the defendants are undoubtedly compelled to pay only the value of the ore as it was in the mine, and therefore they can limit recovery. First, by the value of what is taken; second, by the cost of mining and extraction, tramming and hoisting to the surface, or delivering it at the pit's mouth. This is the value of the stuff to the plaintiff, who would be compelled to stand these expenses if he had mined the ore himself. In this statement there had been no mention of the cost of reduction, for, while this is usually a legitimate item of deduction, it is unimportant to the present discussion. On the other hand, if the defendants had taken out the ore, not as a result of an honest mistake or an honest intention, but under circumstances which showed that they had knowledge of the situation, or the circumstances were such as to legally charge them with this knowledge, they are entitled to no such deduction, and they may not reduce the amount of recovery by proving the cost of mining. Having been guilty of a willful trespass, they shall reap no benefit from their own wrong, and they shall pay the value of the ore without credit for the labor incident to its extraction. This doctrine is too well settled to admit of controversy." Waters vs. Stevenson, 13 Nev. 157; Manufacturing Co. vs. Moses, 15 Lea 300; Wooden-ware Co. vs. U. S., *supra;* Benson Co. vs. Alta Co., *supra* [37]; Jewett vs. Dringer, 30 N. J. Eq. 291; Little Pittsburg Co. vs. Little Chief Co., 11 Colo. 223, 17 Pac. 760. Resurrection Co. vs. Fortune Co., *supra* [37], was an action of trespass for the intentional removal of ore. The court said: "The measure of damages for the reckless, willful, or intentional taking of ore from the land of another without right is the enhanced value of the ore where it is finally converted to the use of the trespasser. The measure of damages for wrongfully taking ore from the lands of another through inadvertence or mistake, or in the honest belief that one is acting within his legal rights, is the value of the ore in the mine. The wrongful taking of the ore, in the absence of all other evidence, raises a presumption of fact that the trespasser took it intentionally and willfully. This presumption, however, is a disputable one, which evidence may so completely overcome that it will become the duty of the court to instruct the jury that it can not prevail. The trespasser may overcome it, and may limit the recovery against him to the lower measure of damages, by proof presented on behalf of the owner, or on his own behalf, that he took the ore unintentionally, in good faith, in the honest belief that he was lawfully exercising a right which he possessed. When the issue is presented for determination, the question is, did the trespasser take the ore from his neighbor's land recklessly, or with an actual intent to do so, or inadvertently or unintentionally, or in the honest belief that he was exercising his own right? If the former he was a willful trespasser, if the latter he was an innocent trespasser, within the meaning of the rule relative to the measure of damages. U. S. vs. Homestake Co., 117 Fed. 481, 482, 485, 486; Golden Reward Co. vs. Buxton Co., 97 Fed. 413, 422; St. Clair vs. Cash Co., *supra.* The rules upon this subject have been again stated, because some discussion has arisen at the bar whether or not a jury may lawfully infer that a trespass was willful and intentional from the single fact that the trespasser failed to exercise ordinary care in ascertaining the limits of his victim's land or rights. Our answer is that the wrongful taking raises the presumption of an intentional and willful trespass, and that negligence in ascertaining the limits of the land or of the rights of the owner is competent evidence upon the issue, but that negligence which amounts to mere inadvertence, without evil intent or recklessness, is not in itself sufficient proof to sustain a finding of fraud, bad faith, willfulness and evil intent in committing the trespass. In Durant Co. vs. Percy Co., *supra* [35], this court held that a jury was not required to find a trespass to be willful from the negligence of the trespasser in ascertaining the line between his own property and that of the owner whose ore he took; and he said in the course of the discussion of that question, that 'a jury may lawfully infer that a trespasser had knowledge of the right and title of the property upon which he entered, and that he intended to violate that right, and appropriate the property to his own use, from his reckless disregard of the owner's right and title, or from his failure to exercise ordinary care to discover and protect them.' It was not, however, our intention to hold that lack of ordinary care alone would justify a finding that a trespasser was guilty of that bad faith, fraud, knowledge, or intent which renders him liable for the higher measure of damages, or to further than to intimate that the negligence of the trespasser, like all his other acts and omissions, is competent evidence for the consideration of the jury in determining the real issue whether his trespass was intentional or reckless on the one hand, or inadvertent or innocent on the other. While mere negligence, which is synonymous with inadvertence, will not alone sustain a finding of willful trespass, one may be 'so far negligent as to justify an inference that he acted

knowingly and inadvertently' and to warrant a jury in finding his trespass willful. Golden Reward Co. vs. Buxton Co., *supra*. An intentional or reckless omission to exercise care to ascertain the boundaries of his victim's land or rights, for the purpose of maintaining ignorance regarding them, or a reckless disregard of them, is as fatal to the claim of a trespasser to limit the recovery of damages against him to the lower measure as an intentional and willful trespass." See, also, Alta Co. vs. Benson Co., 2 Ariz. 362, 16 Pac. 565, aff'd. 145 U. S. 428; Dorsey vs. Manlove, 14 Cal. 553; United Co. vs. Canon City Co., 24 Colo. 116, 48 Pac. 1045; Sunnyside Co. vs. Reitz, 14 Ind. A. 478, 39 N. E. 541; Donovan vs. Con. Coal Co., 187 Ill. 28, 58 N. E. 290; Martin vs. Porter, 15 M. & W. 351; Morgan vs. Powell, 3 Add. & El. N. S. 218 43 E. C. L. 736; Wood vs. Morewood, 3 Add. & El. 440, 43 E. C. L. 810; Wild vs. Holt, 9 M. & W. 674.

In Original Sixteen Co. vs. Twenty-one Mine, 251 Fed. 630, aff'd. 255 Fed. 658, the owner of a mining claim sued the owner of the adjoining claim in trespass for mining and removing ore from a vein that apexed within the claim of the plaintiff. In such case the measure of damages, if the trespass was willful, is the full value of the ore taken; but if the trespass was an innocent one, the measure of damages is the value of the ore in place; or the value of the ore after its removal, less the actual cost of mining, transporting, and reducing the ore. In this case the jury returned a verdict assessing the damages for a sum certain "less the cost of extraction of the ore, on account of unwillful trespass." The cost of mining the ore was shown to be of a certain named amount and the plaintiff moved for judgment on the verdict for the first mentioned sum less the sum shown as the cost of mining. The defendant moved for a new trial on the ground that the verdict was indefinite, uncertain, and void. The verdict was permitted to stand in so far as it found the issues in favor of the plaintiff and a new trial was awarded for the sole purpose of assessing the amount of recovery.

The issue as to the quantity and value of the ore taken can not be determined by testimony showing the total number of miners engaged in working on defendant's and plaintiff's mines, nor the total production of all the mines, nor that the average working capacity of the miners in removing the ores was the same in all the workings; nor can the assays made of each shipment of ore at the mill be shown for the purpose of indicating the value of the plaintiff's ore. Golden Reward Co. vs. Buxton Co., *supra*.

Good faith is not necessarily dependent upon the ignorance of an adverse claim. Backer vs. Penn. Co., *supra*.

No relocation, in whole or in part, can be made of a valid subsisting location. Where such a relocation has been attempted a purchaser of ore from the relocator, although the latter may be in possession of a part of the original claim, is not an innocent purchaser and may be liable to the lawful owner for the value of such ore. Kelvin Co. vs. Copper State Co., ___ Tex. C. A. ___, 203 S. W. 70; aff'd. 232 S. W. 858; see same case, 227 S. W. 938. Where parties took possession of land, extracted oil, in good faith, under a patent which had long been erroneously treated by government officials as conveying the tract, such parties are liable as innocent trespassers, for the value of the oil after deducting the cost of drilling and operating the wells. Mason vs. U. S., 260 U. S. 545; Jeems Bayou Club vs. U. S., 260 U. S. 561; aff'g. 274 Fed. 18, *supra* [35]. In Gulf Ref. Co. vs. Novell, 269 U. S. 125, rev'g. 298 Fed. 281, under a Louisiana statute which allows a trespasser whose trespass is qualified by moral though not legal good faith, to offset his expenditures against the value of oils extracted from the land illegally held, when required to account by the land owner, in a suit brought to enforce the latter's title and possessory right, it was *held* that this rule applies not only to the operations of the defendant preceding entry of decree, against him in the lower court, (Mason vs. U. S., *supra*), but also to the continuance of those operations pending decision on appeal and while he is in possession through a supersedeas.

In Weimer vs. Lowery, 11 Cal. 112, it is said that: "It has never been held that a trespasser upon lands in the possession of another can justify his acts by setting up an outstanding title in which he has no privity." See, also, Omaha Co. vs. Tabor, 13 Colo. 41, 21 Pac. 925, 21 Ency. Pl. & Pr., 834. "Possession in the plaintiff is sufficient to enable him to recover against a trespasser, and although a higher title may be attempted to be set up, the failure to sustain it will not operate against the right to recover damages." McCannon vs. O'Connell, 7 Cal. 152. See, also, Cotton vs. Onderdonk, 65 Cal. 155, 10 Pac. 395. In Golden Gate vs. Joshua Hendy Works, 82 Cal. 181, 23 Pac. 45, the court said: "This was an action of trespass, for breaking into the building of the plaintiff, and injuring and carrying away certain machinery which was affixed thereto. * * * It is contended that the plaintiff showed no title to the property, and that there were errors in the introduction of his attempted chain of title. But the plaintiff introduced evidence to the effect that it was in possession of the property. And this was sufficient as against a mere trespasser. * * * The evidence as to plaintiff's possession renders it unnecessary to consider the questions raised in regard to its chain of title." In Kellogg vs. King, *supra* [21], the court said: "Title in fee is not necessary to a recovery for trespass, and, although title may be alleged, it is not required to be shown where, as here evidence shows, a *bona fide* possession of the invaded premises under claim and color of right. Possession is itself evidence of title and a party may rely upon his possession as against a mere trespasser." Hanson vs. Seawell, 35 Ida. 92, 204 Pac. 660, citing numerous cases. See *infra*, notes 47 and 49. The owner in a case of intentional trespass is not confined merely to recovering the value of the property, but may pursue and reclaim the same wherever he can find and identify it. Liberty Bell Co. vs. Smuggler-Union Co., *supra* [35].

§ 391. Title.

Possession of land is sufficient to maintain trespass when coupled with some interest in the land,[41] although the title may be voidable.[42] A subsequent location or conveyance of the claim, itself, will not carry a right of action for a prior trespass, nor for waste.[43]

§ 392. Pleadings in Trespass Cases.

It is proper to join all persons, either as plaintiffs or defendants, who may be interested in the subject matter of the suit.[44] A general averment of plaintiff's title or possession is sufficient in an action against a wrongdoer without right or title.[45] Where damage is irreparable the insolvency of the defendant need not be pleaded, as it is

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[41] Courchaine vs. Bullion Co., 4 Nev. 369; see, also, Rogers vs. Cooney, 7 Nev. 213. The proper party plaintiff in an action for trespass is the person in actual possession. Uttendorffer vs. Saegers, 50 Cal. 496; Lightner Co. vs. Lane, 161 Cal. 689, 120 Pac. 773; see, also, O'Brien vs. Webb, 279 Fed. 126; and see Thompson vs. Underwood, 138 Ark. 323, 211 S. W. 164. In Schwartz vs. Arata, 45 Cal. A. 596, 188 Pac. 313, the court said: "It is not indispensably essential that in an application for preliminary relief the party making it should disclose the source of his title to the fee in the property, if he has such title, or how his right to the possession arose." Persons having separate interests which are affected by trespass can sue jointly. See Western Co. vs. Tate, 129 Ga. 526, 59 S. E. 266; McIntire vs. Westmoreland Co., 188 Pa. St. 108, 11 Atl. 808. In Ewert vs. Robinson, 289 Fed. 741, it was said a lessee of a gas and oil mineral lease which provided for a fixed term of years with right of occupancy to the exclusion of others, could maintain ejectment prior to actual entry. See Alechoff vs. Los Angeles Corp., 84 Cal. A. 33, 257 Pac. 572. In this case the court said: "The case of Lightner Min. Co. vs. Lane, 161 Cal. 689, 120 Pac. 771, definitely disposes of this matter adversely to the defendant's contention. The Supreme Court says: 'It is a well settled proposition that the proper party plaintiff in an action for trespass to real property is the person in actual possession. No averment of title is necessary' (citing cases). The person in possession can recover no damage for injuries except such as affect his own right, unless he ho'd in such relation to other parties interested that his recovery will bar their claims. (4 Sutherland on Damages, § 1012.) A defendant who is a mere stranger to the title will not be allowed to question the title of a plaintiff in possession of the land. It is only where the trespasser claims title himse'f, or claims under the real owner, that he is allowed to attack the title of the plaintiff whose peaceable possession he has disturbed. (21 Ency. of Plead. & Prac. 834.) One who is in possession under an agreement to convey giving him the right of possession, may maintain an action against a stranger to the title for a trespass which consists of the removal and conversion of the substance of the estate (citing cases). He may even recover of his vendor for injuries amounting to waste, committed upon the premises after such delivery of possession (citing cases). In Estate of Dwyer, 159 Cal. 664, 115 Pac. 235, the court says, 'When a contract of sale of real property binding on the parties is executed, an equitable conversion is worked; the purchaser of the land is deemed the equitable owner thereof and the seller is considered the owner of the purchase price.'" In Burt vs. Panjaud, 99 U. S. 182, it is said that in actions in ejectment or trespass *quare clausum fregit* actual possession of the land by the plaintiff, or his receipt of rent therefor prior to his eviction, is *prima facie* evidence of title, on which he can recover against a mere trespasser. The same principle was enforced in Campbe'l vs. Rankin, 99 U. S. 262, and application of it to various conditions of fact is shown in Atherton vs. Fowler, 96 U. S. 513; Belk vs. Meagher, 104 U. S. 287; Glacier Co. vs. Willis, 127 U. S. 481; Haws vs. Victoria Co., 160 U. S. 317; Clipper Co. vs. Eli Co., 194 U. S. 231; Overgaard vs. Westerberg, 3 Alaska 187; see Foster vs. Black, 20 Ariz. 69, 176 Pac. 847.

[42] Bigelow vs. Hillman, 37 Me. 52; Toothaker vs. Greer, 92 Me. 546, 43 Atl. 498.

[43] U. S. vs. Loughrey, 172 U. S. 206; Caledonian Co. vs. Rocky Cliff Co., 16 N. M. 517, 120 Pac. 715. See Arnold vs. Bennett, 92 Mo. A. 156. In U. S. vs. Inman-Poulsen Co., 211 Fed. 680, it is said: "The action is essentially in trover, and to entitle the plaintiff to recover it is necessary for it to show a general or special property in the timber cut and a right to the possession of the same at the commencement of this action. 38 Cyc. 1014 *et seq.* * * * As the government had no title to the land or timber at the time the timber was cut and removed or the action commenced, it can not, in my judgment, maintain an action to recover the value thereof."

For right of option holder see Lightner Co. vs. Lane, *supra* [41].

[44] Niles Co. vs. Iron Moulders, 254 U. S. 77; Gnerich vs. Yellowly, 277 Fed. 632; Gates vs. Lane, 44 Cal. 392; Andrews vs. Donnelly, 59 Or. 138, 116 Pac. 569; Harlow vs. Feder, 89 Cal. A. 440, 264 Pac. 782.

[45] Merced Co. vs. Fremont, 7 Cal. 130; Kellogg vs. King, *supra* [21]; McFeters vs. Pierson, 15 Colo. 201, 24 Pac. 1076; see Lightner Co. vs. Lane, *supra* [41]; Alehoff vs. Los Angeles Co., *supra* [41]. Trespass *quare clausum fregit* and trespass *de bonis asportatis* may be counted in the same action. Graham vs. Roark, 23 Ark. 19; Rippey vs. Miller, 46 N. C. 479; Smith vs. Brazelton, 1 Heisk 44; Sawyer vs. Childs, 83 Vt. 329, 75 Atl. 886. See, also, Maloon vs. Read, 73, N. H. 153, 59 Atl. 946. For appropriate allegations in a complaint *quare clausum fregit*, see Rico-Aspen Co.

the nature of the injury, and not the incapacity of the defendant to respond in damages, which determines the right to an injunction in cases of trespass or waste.[46]

§ 393. Presumptions.

Where a mineral claimant passes beyond the vertical plane of a side line of his claim and extracts and removes ore from beneath the surface of an adjoining claim, the presumption is against him. *Prima facie* he is a trespasser unless and until he makes it appear that he reached the point from which the ore was taken by following on its dip a vein or lode having its apex within the surface lines of his claim.[47] The presumption of ownership of all beneath the surface, including minerals, may be overcome by proof showing that such mineral is a part of a vein or lode apexing within a claim belonging to another.[48] This presumption can not be overturned by speculative conjecture or intelligent guess.[49] For every trespass upon real property the law presumes

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vs. Enterprise Co., 56 Fed. 131; Montana Co. vs. St. Louis Co., 102 Fed. 434; Daggett vs. Yreka Co., *supra* [36]; Central Eureka Co. vs. East Central Eureka Co., 146 Cal. 147, 79 Pac. 834; aff'd. 204 U. S. 266; Jackson vs. Dines, 13 Colo. 90, 21 Pac. 918; Esselstyn vs. U. S. Co., 59 Colo. 294, 149 Pac. 93; Ohio Co. vs. Griest, 30 Ind. A. 84; 65 N. E. 534; McKay vs. McDougal, 19 Mont. 488, 48 Pac. 988; Jones vs. Prospect Co., *supra* [5]. For precedent for an answer in an apex suit, see Esselstyn vs. U. S. Co., *supra*.

A complaint stating an entry on "land of the plaintiff" and alleging appropriately by way of damages, the doing there of certain unlawful acts, although not stating the entry was forcible, states facts constituting *trespass quare clausum*. Smith vs. Highland Co., 82 Colo. 288, 259 Pac. 1025. No averment of title is necessary. A defendant who is a mere stranger to the title will not be allowed to question the title of the plaintiff in possession of the land. It is only where the trespasser claims title himself, or claims under the real owner, that he is allowed to attack the title of the plaintiff whose peaceful possession he has disturbed. 21 Enc. Pl. & Pr. 834; cited in Lightner Co. vs. Lane, *supra* [41].

[46] Waskey vs. McNaught, *supra* [6]; Halla vs. Rogers, 176 Fed. 709; Bettes vs. Brower, 184 Fed. 342; Halla vs. Rogers, 187 Fed. 780; Merced Co. vs. Fremont, *supra* [45]; Crescent Co. vs. Simpson, 77 Cal. 286, 19 Pac. 426; Kellogg vs. King, *supra* [40]; Haggin vs. Kelly, *supra* [39]; Dingley vs. Buckner, 11 Cal. A. 181, 104 Pac. 480; Ganse vs. Perkins, 3 Jones Eq. (N. C.) 177; Kerlin vs. West, N. J. Eq. 449; Sullivan vs. Dooley, 31 Tex. C. A. 589; 73 S. W. 82; *but see* King vs. Mullins, 27 Mont. 364, 71 Pac. 155; Harley vs. Montana Co., 27 Mont. 388, 71 Pac. 407; Butte Co. vs. Frank, 27 Mont. 392, 71 Pac. 1129; Hicks vs. American Co., 207 Pa. St., 570, 57 Atl. 55. See, generally, Lockhart vs. Leeds, 195 U. S. 427; Mable Co. vs. Pearson, 121 Ala. 567, 25 So. 754; Clark vs. Wall, 32 Mont. 219, 79 Pac. 1052; Boyd vs. Desrozier, 20 Mont. 444, 52 Pac. 53; Ringling vs. Mahurin, 59 Mont. 38, 197 Pac. 829; Parker vs. Furlong, 37 Or. 248, 62 Pac. 490; Smith vs. Howell, 91 Or. 279, 176 Pac. 805. "Wherever there is a threat and intent to wrongfully enter upon another's real property and to take permanent possession thereof, and effect a permanent lodgment there, the threatened injury is 'irreparable' in itself and the insolvency of the intruder or the actual damage which may ensue is immaterial." Trade Dollar Co. vs. Fraser, 148 Fed. 593.

[47] Del Monte Co. vs. Last Chance Co., *supra* [8]; Stewart Co. vs. Ontario Co., 237 U. S. 350; Cheesman vs. Shreeve, *supra* [36]; Montana Co. vs. Clark, 42 Fed. 626; Doe vs. Waterloo Co., *supra* [36]; Bourne vs. Federal Co., *supra* [36]; Barker vs. Condon, 53 Mont. 585, 165 Pac. 909; Red Wing Co. vs. Clays, 30 Utah 242, 83 Pac. 841. The presumption in the first instance is that the owner of a mining claim owns all the veins or lodes found within the boundary lines, but, when there is evidence tending to prove that the vein or lode in controversy apexes outside of those lines, that, if sufficient, will rebut that presumption; and as the burden of proving ownership is, when denied, always upon the party alleging it, he must also meet and overcome this evidence, or he will fail in establishing his title. Jones vs. Prospect Co., 21 Nev. 339, 31 Pac. 642; see, also, Reynolds vs. Iron Co., 116 U. S. 692; Roxana Co. vs. Cone, 100 Fed. 179. *Prima facie* evidence of plaintiff's ownership is sufficient. Utah Co. vs. Utah Co., 285 Fed. 249; Daggett vs. Yreka Co., 149 Cal. 357, 86 Pac. 974; but the defendant has the burden of showing that the apex of the vein or lode is within his surface boundaries. Cheesman vs. Shreeve, *supra*; Barker vs. Condon, *supra*; see, also, Doe vs. Waterloo Co., *supra* [36]; Con. Wyoming Co. vs. Champion Co., 63 Fed. 540; Keely vs. Ophir Co., 169 Fed. 603; Collins vs. Bailey, 22 Colo. A. 149, 125 Pac. 548; Duggan vs. Davey, *supra* [8]; Parrott Co. vs. Heinze, 25 Mont. 139, 64 Pac. 330; Maloney vs. King, 25 Mont. 188, 64 Pac. 351; Lincoln Co., vs. Hendry, *supra* [38]; Grand Central Co. vs. Mammoth Co., 29 Utah 490, 83 Pac. 667, dis. 213 U. S. 72.

[48] Lightner Co. vs. Lane, *supra* [41]; Courchaine vs. Bullion Co., *supra* [41]; Rogers vs. Cooney, *supra* [41].

[49] Heinze vs. Butte & M. Co., 30 Mont. 484, 77 Pac. 421.

at least nominal damages and that the taking was willful.[50] The presumption is that the defendant has the means to show the actual value of the ore removed.[51]

§ 394. Proof of Apex Right.

The burden of proof is upon the plaintiff to affirmatively show that he is entitled to a vein or lode claimed by him and the apex of which is within the surface lines of his location.[52] In determining the identity of ore bodies or the continuity of a vein or lode found on different levels, or where it is broken by the interjection of country rock, a wide latitude is permissible in order to ascertain the reasoning on which the conclusions or witnesses are based.[53]

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[50] Attwood vs. Fricot, 17 Cal. 38; Empire Co. vs. Bonanza Co., 67 Cal. 406, 7 Pac. 810; Patchen vs. Keeley, 19 Nev. 404, 14 Pac. 353; see Liberty Bell Co. vs. Smuggler-Union Co., *supra* (35). There are two standards of measures of damages to property, the one the severe, the other the lenient, which, according to some of the authorities, depend upon the intention or *mala fides* of the defendant, and according to others, upon the form of the action. Barton Co. vs. Cox, 39 Ind. 1. In other words, "It has been settled that a recovery on an innocent trespass is based on a totally different rule from one which is not an honest mistake, and is, therefore, a willful trespass, within the ordinary legal acceptation of this term." St. Clair vs. Cash Co., *supra* (6). See, also, Dorsey vs. Manlove, 14 Cal. 553; Elkhorn Hazard Co. vs. Kentucky Co., *supra* (37).

[51] Montana Co. vs. St. Louis Co., 183 Fed. 51, *certiorari* denied, 220 U. S. 611; see Benson vs. Alta Co., *supra* (37); R. C. L., p. 1252, § 148. Where a person without authority or right mines, ships and sells ore from another's property, the measure of damages for such conversion is the net value of the ore, and the trespasser is not entitled to deduct therefrom the expense of mining, freight and reduction charges. Silver King Co. vs. Silver King Co., 204 Fed. 166; *certiorari* denied, 229 U. S. 624; Alvarado Co. vs. Warnock, 25 N. M. 694, 187 Pac. 542; 23 A. L. R. 193, note. Where the trespass is willful the measure of damages is the enhanced value of the mineral at the mouth of the shaft, or where it was finally converted to the use of the defendant. See Wooden-ware Co. vs. U. S., *supra* (40); Durant Co. vs. Percy Co., *supra* (35); Waters vs. Stevenson, 13 Nev. 157; Hall vs. Abraham, 44 Ore., 477, 75 Pac. 882; Dougherty vs. Chestnutt, 86 Tenn. 1, 5 S. W. 441. There can be no recovery by the United States for timber cut on a mining claim and on mineral land where such timber was cut in preparing for and in mining such land. U. S. vs. Ellis, 122 Fed. 1016; see Morgan vs. U. S., 148 Fed. 193; Gray Co. vs. Gaskin, 122 Ga. 342, 50 S. E. 164. A person cutting and disposing of timber upon a mining claim can not be held in damages as a willful trespasser merely because he failed to keep a record of the details of the transaction as prescribed by the regulations of the Secretary of the Interior, where he believed he was a resident, and his failure to keep such record was due to his ignorance that it was required. Powers vs. U. S., 119 Fed. 568. In Montana Co. vs. St. Louis Co., *supra*, it appears that "the ore sued for had been taken and carried away by the Montana Co. The St. Louis Co. was therefore unable to prove the value of the specific ore taken, but it was allowed to show the value of similar ores taken from the same vein nearby. The evidence appears to have been the best the St. Louis Co. could secure. If the value of the ore thus ascertained was incorrect and excessive, the presumption is that the Montana Co., having taken the ore and disposed of it, had the means to show its actual value." In an action for damages by a sublessee against a sublessor for removal of ores an instruction permitting the jury to take into consideration in ascertaining the damages, the smelter settlements which the defendant received for the ore in question was held proper. Page vs. Savage, 42 Ida. 458, 246 Pac. 304. See Kjelsberg vs. Chilberg, 177 Fed. 109; Hartford Co. vs. Cambria Co., 93 Mich. 90, 53 N. W. 4.

[52] Waterloo Co. vs. Doe, 82 Fed. 55, aff'g. 54 Fed. 939; Bourne vs. Federal Co., *supra* (36); Stewart Co. vs. Ontario Co., 23 Ida. 280, 129 Pac. 932; Id. 23 Ida. 724, 132 Pac. 787, aff'd. 237 U. S. 350; see St. Louis Co. vs. Montana Co., 194 U. S. 235; Grand Central Co. vs. Mammoth Co., 29 Utah 490; 83 Pac. 667.

Ores beneath a claim are presumed to be of that claim in the absence of proof that they are in a vein apexing without it. Clark-Montana Co. vs. Butte & S. Co., 233 Fed. 576. Priority of right is not determined by dates of entries or patents of the respective claims, but priority of discovery and location, which may be shown by testimony other than the entries and patents. Butte & S. Co. vs. Clark-Montana Co., 248 Fed. 609, aff'd. 249 U. S. 12. In the absence from the record of an adverse suit there is no presumption that anything was considered or determined except the question of the right to the surface. Lawson vs. U. S. Co., *supra* (4).

[53] Justice Co. vs. Barclay, *supra* (25); Con. Wyoming Co. vs. Champion Co., *supra* (47); Overman Co. vs. Corcoran, 15 Nev. 153; see Alameda Co. vs. Success Co., 29 Ida. 618, 161 Pac. 862.

§ 395. Inspection and Survey.

Incidental to an action in trespass is the right, by one having a real interest therein, to inspect, examine, survey[54] and take samples for assay, from the property involved in the suit.[55]

§ 396. Grounds for Order.

From the very nature of the case the ignorance of the party invoking the aid of the court and the want of the means to acquire the information necessary to make out his case are of the greatest import. If these facts appear, and the circumstances otherwise appearing to the court in the evidence to furnish reasonable ground for the belief that an inspection will aid the court in the investigation of the case the order should be granted.[56]

§ 397. Substance of Order.

The order for the examination, inspection and survey of the defendant's claim should strictly limit the examination to the workings of which it is necessary for the moving party to have knowledge and to the making of the survey maps and assays thereof.[57] The expense of inspection may be allowed as costs.[58]

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[54] Silver King Co. vs. Conklin Co., 255 Fed. 741; Bacon vs. Federal Co., 19 Ida. 136, 112 Pac. 1055; see Penny vs. Central Co., 138 Fed. 769; Hobbs vs. Tom Reed Co., 164 Cal. 497, 129 Pac. 781. The right of inspection being inherent in a court of equity, Ennor vs. Barwell, 1 DeG. & F. & J. 529, it may be exercised without statutory provision therefor. Bluebird Co. vs. Murray, 9 Mont. 468, 23 Pac. 1022. See Montana Co. vs. St. Louis Co., 152 U. S. 166. It now is the recognized practice to direct the survey on the application of the party out of possession of the excavations. Without this course it is within the power of the party in possession to conceal from the party out of possession the direction of the excavation to determine whether or not it is beneath the surface survey and to ascertain the quantity of mineral extracted. Penny vs. Central Co., *supra*. The right to an order for inspection and underground survey of mines is discussed and many cases, both American and English, are cited in St. Louis Co. vs. Montana Co., 9 Mont. 288, 23 Pac. 510.

[55] Symmes vs. Sierra Nevada Co., 171 Cal. 427, 153 Pac. 710. In Culbertson vs. Iola Co., 87 Kan. 529, 125 Pac. 81, an order of inspection of gas wells made to determine capacity was sustained.

[56] In Montana Co. vs. St. Louis Co., *supra* [54], it is said: "Ought a court of equity, in a mining case, when it has been convinced of the importance thereof for the purposes of the trial, to compel an inspection and survey of the works of the parties, and admittance thereto by means of the appliances in use at the mine? All the analogies of equity jurisprudence favor the affirmative of this proposition. The very great powers with which a court of chancery is clothed were given to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law." The order for the examination, inspection and survey of the defendant's claim should strictly limit the examination to the workings of which it is necessary for the moving party to have knowledge and to the making of surveys and maps thereof. State vs. District Court, 30 Mont. 206, 76 Pac. 206; see Smuggler Co. vs. Kent, 47 Colo. 320. As to the rights of a stockholder to examine the mine accompanied by an expert, see Hobbs vs. Tom Reed Co., *supra* [54]; Hobbs vs. Davis, 168 Cal. 556, 143 Pac. 733; Kinnard vs. Ward, 21 Cal. A. 85, 130 Pac. 1149, 1196. "That a court of equity, having jurisdiction of the subject matter of the action, has the power to enforce an order of this kind will not be denied. And the propriety of exercising that power would seem to be clear, indeed, in a case where, without it the trial would be a silly farce. Take, as an illustration, the case at bar. It is notorious that the facts by which this controversy must be determined can not be discovered except by an inspection of works in the possession of the defendant, accessible only by means of a deep shaft and machinery operated by it. It would be a denial of justice, and utterly subversive of the objects for which courts were created, for them to refuse to exert their power for the elucidation of the very truth—the issue between the parties. Can a court justly decide a cause without knowing the facts? Montana Co. vs. St. Louis Co., *supra*. And can it refuse to learn the facts?" See, also, State vs. District Court, 26 Mont. 396, 68 Pac. 570, 1134; 69 Pac. 103. State vs. District Court, 28 Mont. 528, 73 Pac. 230. See, generally, National Co. vs. District Court, 34 Nev. 72, 116 Pac. 996.

[57] State vs. District Court, 28 Mont. 528, 73 Pac. 230; State vs. District Court, *supra* [56].

[58] Stockbridge Co. vs. Cone, 102 Mass. 80.

§ 398. Inspection by Court or Jury.

Two opposing theories are held as to an inspection of the ground in dispute by court or jury. According to some of the courts such a view is not for the purpose of obtaining evidence, but only for the better understanding of the evidence given. The facts ascertained by the view are not regarded by such courts as a part of the proof.[59] But, by the weight of authority, the facts ascertained by a view are to be considered as in evidence and given due weight in reaching a conclusion. Indeed, any other rule is incapable of practical application.[60]

§ 399. Injunction.

It now is the common practice in cases where irremediable mischief is being done or threatened,[61] going to the destruction of the estate, such

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[59] Jeffersonville Co. vs. Bowen, 40 Ind. 545; Heady vs. Turnpike Co., 52 Ind. 117; L. & N. Co. vs. Wood, 113 Ind. 544, 14 N. E. 572; Close vs. Samm, 27 Iowa 503; Sasse vs. State, 68 Wis. 530, 32 N. W. 849.

[60] U. S. vs. Seufert Bros. Co., 87 Fed. 35; Wall vs. U. S. Co., 232 Fed. 613, and cases therein cited; People vs. Milner 122 Cal. 171, 54 Pac. 833; People vs. Pompa, 192 Cal. 423, 221 Pac. 203; Hatton vs. Gregg, 4 Cal. A. 537, 88 Pac. 592; City of Oakland vs. Adams, 37 Cal. A. 614, 174 Pac. 914; Vaughan vs. Tulare Co., 50 Cal. A. 261, 205 Pac. 22; Denver Co. vs. Ditch Co., 11 Colo. A. 41, 52 Pac. 224; McGar vs. Bristol, 71 Conn. 652, 42 Atl. 1000; Mahaffey vs. McNicholl, 43 Ida. 108, 244 Pac. 403; Maywood Co. vs. Maywood, 140 Ill. 216, 29 N. E. 704; Chicago Co. vs. Parsons, 51 Kan. 408, 32 Pac. 1083; Tully vs. Railroad Co., 134 Mass. 499; Shepherd vs. Camden, 82 Me. 535, 20 Atl. 91; Seattle Co. vs. Roeder, 30 Wash. 244, 70 Pac. 498; Fox vs. B. & O. R. Co., 34 W. Va. 466, 12 S. E. 757; Washburn vs. Railroad Co., 59 Wis. 368, 18 N. W. 328; see, also, City vs. Sarber, 92 Okla. 59, 217 Pac. 866. Facts ascertained by a view of the *locus in quo* may be considered by the court, but where the matter involved requires special knowledge and experience, a court will not attach any weight to impressions gained by his inspection. Wall vs. U. S. Co., *supra*.

[61] Erhardt vs. Boaro, 113 U. S. 537; Halla vs. Rogers, *supra* [41]; Hunt vs. Steese, 75 Cal. 620, 17 Pac. 920, dist'g in Schwartz vs. Arata, *supra* [41]; Boyd vs. Desrozier, *supra* [46]. Any injury to the inheritance or substance of the estate is irreparable. U. S. vs. Guglard, 79 Fed. 23. A trespass is irreparable when from its nature it is impossible to make full and complete reparation in damages. Justice Co. vs. Plank, 11 Ga. 648. An injury is irreparable when there is no legal remedy furnishing full compensation or adequate redress because of the ineffectiveness of such legal remedy or when owing to the delay incident to the prosecution of an action at law to final judgment and obtaining execution thereon, such judgment and process would be fruitless of beneficial results. Gorham vs. New Haven, 82 Conn., 153 Atl. 1012. See, also, Walla Walla vs. Walla Walla Co., 172 U. S. 1.

In Schwartz vs. Arata, *supra*, the court said: "Since it was made to appear that the defendants are solvent and able to respond in damages for any injury which the plaintiff might suffer, the element of 'irreparable injury' was wanting as the basis for the provisional relief prayed for." See, also, Crescent Co. vs. Silver King Co., 14 Utah 57, 45 Pac. 1093. Inability to correctly estimate the damage after the evidence obtainable has been produced makes a case of irreparable damage; but difficulty in collecting evidence as to damage would not. Gray Co. vs. Gaskin, 122 Ga. 342; Bour vs. Illinois Co., 176 Ill. A. 199. But the unlawful extraction of oil or gas is an act of irreparable injury. Bettman vs. Harness, 42 W. Va. 433. The averment of irreparable injury in a complaint is futile in the absence of allegations of fact from which the court can see that irremediable mischief may be reasonably apprehended from the threatened wrong. Indian Co. vs. Schoenfeld, 135 Fed. 484; Martin vs. Danziger, 21 Cal. A. 563, 132 Pac. 284; Mechanics vs. Ryall, 75 Cal. 397, 17 Pac. 703; City Store vs. San Jose Co., 150 Cal. 277, 88 Pac. 977. In other words, inferences, generalities, presumptions and conclusions have no place in such a pleading. Davitt vs. American Baker's Union, 124 Cal. 99, 56 Pac. 775, and mere allegations of irreparable injury constitute no ground for the granting of the writ. Merced Falls Co. vs. Turner, 2 Cal. A. 720, 84 Pac. 241; Sunderland vs. Bishop, 100 Okla. 54, 227 Pac. 399. See Willis vs. Lauridson, 161 Cal. 106, 118 Pac. 530; Genazzi vs. Marin Co., 88 Cal. A. 545, 263 Pac. 825. It has been said, however, that "in the case of mines, timber and quarries the statement of injury is sufficient. In the nature of the case, all the party could well state as matter of fact is the destruction of timber in the one case, and the taking away the minerals in the other." Merced Co. vs. Fremont, *supra* [45]. If the evidence is continuous in its nature—if repeated acts of wrong are done or threatened—although each of these facts taken by itself, may not be destructive, and the legal remedy may, therefore, be adequate for each single act, if it stood alone, then also the entire wrong will be prevented by injunction, on the ground of avoiding a repetition of similar actions. In both cases the ultimate criterion is the adequacy of the legal remedy. N. P. R. Co. vs. Cunningham, 103 Fed. 708; Sailor's Union vs. Hammond, 156 Fed. 454; Davidson vs. Sykes, 157 Cal. 686, 109 Pac. 87; Eames vs Philpot, 72 Cal. A. 151, 236 Pac. 373.

as the extraction of ore from a mine,[62] to issue an injunction, though the paramount title remains in the United States.[63] The courts are more liberal in granting a writ of injunction in mining cases than in those affecting other real estate[64] because of the necessity of preventing injury which can not accurately be estimated and therefore can not be adequately compensated; or, in order that neither party may get the advantage of the other during the litigation, by force or violence.[65] The courts are divided as to whether the doubt should be resolved in favor of granting the writ.[66]

In addition to injunctions to prevent waste, injunction will issue to prevent damage from the deposition of debris or tailings;[67] or the

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[62] Mabel vs. Pearson, 121 Ala. 567, 25 So. 754; Safford vs. Flemming, *supra* [59]; Stewart Co. vs. Ontario Co., *supra* [52]; Anaconda Co. vs. Heinze, 27 Mont. 161, 69 Pac., 912; Allen vs. Dunlap, 24 Or. 229, 33 Pac. 675; Bullion Beck Co. vs. Eureka Co., 5 Utah 3, 11 Pac. 515. See Waskey vs. McNaught, *supra* [60]; Haggin vs. Kelly, *supra* [59]. But it requires a very clear and strong showing to induce a court of equity to grant or sustain an injunction to stop the work. There must be an urgent necessity, and, as a general rule, the title and right of the plaintiff should be shown to be clear, well-established, and not in dispute. The application should also be made promptly, and not delayed until large expenditures have been made by the defendant. Schwartz vs. Arata, *supra* [41]. For a collection of cases relating to injuries other than mining ore see Morrison's Mining Rights (15th ed.) 465.

[63] Bradford vs. Morrison, *supra* [62]; Union Oil Co. vs. Smith, 249 U. S. 337; aff'g. 166 Cal. 217, 135 Pac. 966; Anaconda Copper Co. vs. Heinze, *supra* [62]; Halla vs. Rogers, *supra* [60]; U. S. vs. Hurst, 2 Fed. (2d) 73; Waskey vs. McNaught, *supra* [60]; Allen vs. Dunlap, *supra* [62].

[64] Mabel vs. Pearson, *supra* [62]; Safford vs. Flemming, *supra* [59].

[65] Safford vs. Flemming, *supra* [59]; Bullion Beck Co. vs. Eureka Co., *supra* [62].

[66] Erhardt vs. Boaro, *supra* [63]; Big Six Co. vs. Mitchell, 138 Fed. 279; Hunt vs. Steese, *supra* [63]; Stewart Co. vs. Ontario Co., *supra* [52]; see, generally, Buskirk vs. King, 72 Fed. 22; Vogel vs. Warsing, *supra* [62]; Maloney vs. King, 25 Mont. 188, 64 Pac. 351; Cardelli vs. Comstock Co., 26 Nev. 284, 66 Pac. 950; *but see* Crescent Co. vs. Silver King Co., 14 Utah 57, 54 Pac. 214. It is as firmly settled as is any rule of law that whether in any particular case a restraining order or an injunction *pendente lite* should be granted or refused is a matter resting largely in the discretion of the court before which the application is made and heard. Bush vs. Pioneer Co., 154 Fed. 480; Porters Bar Co. vs. Beaudry, 15 Cal. A. 754, 115 Pac. 971; Schwartz vs. Arata, *supra* [41]; Independent Co. vs. Baldwin, 43 Ida. 371; 252 Pac. 491. The rule as thus stated results from the extraordinary nature of the power to grant temporary or provisional relief to litigants by way of a preliminary injunction and the consequences following from the exercise of such power. It is an extraordinary power, and is to be exercised always with great caution and in those cases only where it fairly appears "upon all the papers presented, before such injunction is granted, that the plaintiff will suffer irreparable injury if it is not issued, or that it is necessary to preserve the estate of the parties or some sufficient cause showing that need of hasty action exists." Joyce on Injunctions, § 109. The power, therefore, should rarely, if ever, be exercised in a doubtful case. "The right must be clear, the injury impending and threatened, so as to be averted only by the protecting preventive process of injunction." St. Louis Co. vs. Sanitary Co., 161 Fed. 725; Buskirk vs. King, *supra*; Willis vs. Lauridson, *supra* [63]; or the case is such that the *status quo* should be maintained until the final hearing. Denver Co. vs. U. S., 121 Fed. 161; Henry Co. vs. U. S., 191 Fed. 136; Wilmington City Co. vs. Taylor, 198 Fed. 198; Magruder vs. Belle Ass'n., 219 Fed. 81; Chew vs. First Church, 237 Fed. 222; American Smelting Co. vs. Bunker Hill Co., 248 Fed. 182; Weeks vs. Goltra, 7 Fed. (2d) 853; Schwartz vs. Arata, *supra* [41]; citing Real Del Monte Co. vs. Pond Co., 23 Cal. 83; Wood vs. Bufford, 61 Cal. A. 155, 214 Pac. 516, citing Schwartz vs. Arata, *supra*.

It is the common practice at this day for the courts to issue injunctions where the title is in dispute. The jurisdiction of the court in these cases is asserted for the preservation of the property pending proceedings at law for the determination of the title of the parties. LeRoy vs. Wright, Fed. Cas. 8273; Bullard vs. Kempff, 119 Cal. 13, 50 Pac. 780. See Salton Sea Cases, 172 Fed. 792, following Erhardt vs. Boaro, *supra* [63].

Equity will protect a perfect equitable title by injunction as fully as the legal title. Flickinger vs. Shaw, 87 Cal. 133, 25 Pac. 268.

[67] Woodruff vs. North Bloomfield Co., 18 Fed. 753; U. S. vs. North Bloomfield Co., 81 Fed. 249; North Bloomfield Co. vs. U. S., 88 Fed. 664; Smith vs. Staso Co., 18 Fed. (2d) 737; Sutter County vs. Nichols, 152 Cal. 688, 93 Pac. 872; Hulbert vs. Cal. Portland Cement Co., 161 Cal. 239, 118 Pac. 928; Dripps vs. Allison's Co., 45 Cal. A. 100, 187 Pac. 450; Fuller vs. Swan Co., 12 Colo. 12, 19 Pac. 836; Rhodes Co. vs. Belleville Co., 32 Nev. 230, 106 Pac. 561; see Arizona Co. vs. Gillespie, 230 U. S. 46, aff'g. 12 Ariz. 190, 100 Pac. 465; Otaheite Co. vs. Dean, 102 Fed. 929; McCarthy vs. Bunker Hill Co., 164 Fed. 927; *certiorari* denied, 212 U. S. 583; aff'g. 147 Fed. 981; Carson vs. Hayes, 39 Or. 104, 65 Pac. 814; see, also, Atchison vs.

diversion[68] or pollution of water[69] or streams;[70] or escaping oil;[71] or smoke and fumes from a smelter;[72] or the casting of a cloud upon title,[73] and in such other cases as the discretion of the court may dictate.[74]

§ 400. Injury Not Irreparable.

The sinking of a shaft[75] where it does not interfere with the working of property otherwise held,[76] or making preparation upon the claim for the drilling of an oil well,[77] or the "working" of the property in dispute, provided the defendant does not commit waste, nor extract nor remove ore therefrom[78] or the hauling of lumber on to the location or the erection of a rig thereon[79] are not irreparable injuries. Conflicting prospectors can not make use of the writ of injunction to secure priority of discovery or location on, or apparent superiority of right, to a mining claim.[80]

§ 401. Limitations.

Where an injunction *pendente lite* issues the plaintiff is or may be restrained from doing that which the injunction which he has secured

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Peterson, 87 U. S. 507; McCauley vs. McKeig, 8 Mont. 389, 21 Pac. 22. In Schwab vs Smuggler Union Co., 174 Fed. 305, it was held that the grant of the right to deposit tailings and debris in a river whence they could be carried through flumes and sluices and reservoirs of the grantor, gave the implied right to deposit the tailings on the grantor's land and claims, as they were precipitated at the ends of the flumes and sluices. See, also, Himrod vs. Ft. Pitt Co., 220 Fed. 80; aff'd. 238 Fed. 746; Scheel vs. Alhambra Co., 79 Fed. 821. A person located upon a mining stream and operating a placer mine is entitled to a reasonable and proper use of the channel and the water. To unreasonably restrict such use is to interdict the prosecution of a lawful and valuable enterprise. However, such miner has no legal right to dump his mining debris into the channel or stream and allow it to be carried down by the water to the land of a lower proprietor, or to fill up the channel to the injury of such riparian proprietor. Provolt vs. Bailey, 62 Or. 50, 121 Pac. 961.

[68] Dripps vs. Allison's Co., *supra* [67]. See Woodlawn Bank vs. Drainage Dist., 251 Fed. 568; *but see* Sussex Co. vs. Midwest Co., 294 Fed. 597. See Smith vs. Staso Co., *supra* [67]; Strobel vs. Kerr Salt Co., 164 N. Y. 303, 58 N. E. 142.

[69] Travis Co. vs. Mills, 94 Fed. 909; Thropp vs. Harpers Co., 142 Fed. 690; Sussex Co. vs. Midwest Co., 294 Fed. 597, aff'g. 276 Fed. 947; Bunker Hill Co. vs. Polak, 7 Fed. (2d) 583, *certiorari* denied, 269 U. S. 581. Yuba County vs. Kate Hayes Co., 141 Cal. 360, 74 Pac. 1049; Sutter Co. vs. Nichols, *supra* [67].

See, also, McCarty vs. Bunker Hill Co., 164 Fed. 597, modifying judgment in 147 Fed. 981, refusing injunction which would necessitate the closing of mines and mills employing thousands of men, etc. See this case also for an elaborate bill and answer.

[70] Arizona Co. vs. Gillespie, *supra* [67]; Antioch vs. Williams Dist., 188 Cal. 451, 205 Pac 688.

[71] Sussex Co. vs. Midwest Co., *supra* [69]. For permitting salt water from an oil well to flow over the surface of the lands of another person, see Owens-Osage Co. vs. Long, 104 Okla. 242, 231 Pac. 296, or the escape of crude oil from a pipe line, see Behle vs. Shell Oil Pipe Line Corp., ___ Mo. A. ___, 17 S. W. (2d) 656.

[72] Bliss vs. Washoe Co., 186 Fed. 789. See, also, Mt. Copper Co. vs. U. S., 142 Fed. 625; injunction refused.

[73] Thompson vs. Pack, 219 Fed. 624; citing Pixley vs. Huggins, 15 Cal. 128.

[74] See Poulos vs. Lyman Co., 63 Mont. 567, 208 Pac. 599; see Vogel vs. Warsing, *supra* [26]; Bush vs. Pioneer Co., *supra* [66].

[75] King vs. Mullins, *supra* [40]; Harley vs. Montana Co., 27 Mont. 388, 71 Pac. 407; Butte Con. Co. vs. Frank, *supra* [40].

[76] Copper King Co. vs. Wabash Co., 114 Fed. 991. In this case it was held that a mining company which has lawfully appropriated the waters of a stream for mining purposes may enjoin another mining company from sinking a shaft for the purpose of developing its own claim, where such shaft will, or does, in fact, cut off and divert the waters of such stream.

[77] Martin vs. Danziger, *supra* [61]; Williams vs. Long, 129 Cal. 229, 61 Pac. 1087.

[78] St. Louis Co. vs. Montana Co., 58 Fed. 1289; Waskey vs. McNaught, *supra* [6]; Safford vs. Fleming, *supra* [39]; Chicago Co. vs. Ferrell, 20 Ida. 680, 119 Pac. 703; Montana Co. vs. Boston Co., 22 Mont. 159, 56 Pac. 120.

[79] Martin vs. Danziger, *supra* [61].

[80] Gemmell vs. Swain, 28 Mont. 331, 72 Pac. 662.

prevents the defendant from doing.[81] Where the defendant would suffer greater injury than the plaintiff by the wrong the injunction should not be granted.[82] A defendant can not be enjoined from working upon or extracting any ore from any vein having its top or apex in plaintiff's claim. This would call upon the defendant to ascertain what veins have their apex within the plaintiff's ground and the extent of such apex therein.[83] Cotenants in possession will not be enjoined from working a mining claim in the ordinary way.[84]

§ 402. Concealed Fraud.

Secret removal of ore from the property of an adjoining proprietor, without his knowledge or means of knowledge, is a fraud, conceals itself, may be proved without being pleaded, and prevents the statute of limitations running until the trespass is in fact discovered.[85] A con-

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[81] Van Zandt vs. Argentine Co., 48 Fed. 770; S. P. Mines vs. Hanchett, 93 Fed. 76; *but see* Twenty-One Co. vs. Original Sixteen Mine, 240 Fed. 106; Lloyd vs. Catlin, 210 Ill. 460, 71 N. E. 335; Ringling vs. Mahurin, 59 Mont. 38, 197 Pac. 829; see Strobel vs. Kerr Salt Co., *supra* [68]. In Van Zandt vs. Argentine Co., *supra*, the court said: "Where, as in this case, the evident purpose of the writ is to preserve the existing *status* of the property in litigation until a final adjudication can be had, it is a gross abuse of the process of the court for the complainant to disregard his own injunction, having by means thereof tied the hands of his adversary." See U. S. vs. Hurst, 2 Fed. (2d) 76.

In the case of Twenty-One Co. vs. Original Sixteen Mine, *supra*, the court, following Johnson vs. Hall, 83 Ga. 281, 9 S. E. 783, held that if the defendant under injunction desired to stop the plaintiff from working in the disputed territory that it could do so upon putting up a bond the same as the plaintiff had given; but, in the absence thereof, the plaintiff could work, but the defendant could *not;* because of the injunction.

[82] Lloyd vs. Catlin Co., *supra* [81]; Berkeley vs. Berwind-White Co., 220 Pa. St. 65, 69 Atl. 329. Where the stoppage of the operations of the property would be to the damage of both parties an injunction will be denied. U. S. vs. Dominion Oil Co., 241 Fed. 426. See *infra*, note 83.

For a discussion of the "balancing of conveniences" see Hulbert vs. Cal. Portland Cement Co., *supra* [67]; and see, also, 3 Lindl. Mines (3d ed.), p. 2075, § 842. Schwartz vs. Arata, and Crescent Co. vs. Silver King Co., both cited in § 399.

[83] St. Louis Co. vs. Montana Co., *supra* [78]; see Montana Co. vs. Boston Co., *supra* [78]; *but see* Clark-Montana Co. vs. Butte & S. Co., 233 Fed. 548; aff'd. 248 Fed. 609; aff'd. 249 U. S. 12. The defendant can not be restrained from entering upon or from "working" the property in dispute, provided he does not commit waste nor extract or remove ore therefrom. Williams vs. Long, *supra* [77]. An injunction should not prevent either party from doing whatever is reasonably necessary for the preservation of the property in controversy. See S. P. Mines vs. Hanchett, *supra* [81]; Safford vs. Fleming, *supra* [30].

[84] Silver King Co. vs. Conkling Co., *supra* [54]; Prairie Oil Co. vs. Allen, 2 Fed. (2d) 571, citing and quoting approvingly McCord vs. Oakland Co., 64 Cal. 134, 27 Pac. 863; Downing vs. Rademacher, 133 Cal. 220, 65 Pac. 385; Madar vs. Norman, 13 Ida. 585, 92 Pac. 573, overruling Hawkins vs. Spokane Co., 2 Ida. 970; 3 Ida. 241, 28 Pac. 433; Woods vs. Rolls, ___ Tex. C. A. ___ 268 S. W. 900. To the *contrary* see Zeigler vs. Brenneman, 237 Ill. 15, 86 N. E. 597 (probably because of an Illinois statute, see Murray vs. Haverty, 70 Ill. 320); Gulf Ref. Co. vs. Carrol, 145 La. 299, 82 So. 277; South Penn Co. vs. Haught, 71 W. Va. 720, 78 S. E. 759; Paxton vs. Benedum-Trees Co., 80 W. Va., 187; *but see* Binswanger vs. Henninger, 1 Alaska 509; Anaconda Co. vs. Butte & B. Co., 17 Mont. 519, 43 Pac. 926. As to proof of cotenancy, see Costello vs. Cunningham, 16 Ariz. 447, 147 Pac. 701.

A cotenant in possession is entitled to deduct from the rents or profits received the cost of all proper expenditures made in working the property and developing it, and protecting the common estate. Raun vs. Reynolds, 18 Cal. 275; McCord vs. Oakland Co., *supra;* Higgins vs. Eva, 204 Cal. 238, 267 Pac. 1081.

[85] Lightner Co. vs. Lane, *supra* [41]; Falls Branch Co. vs. Proctor Co., 203 Ky. 307, 262 S. W. 300; Lewey Co. vs. Frick Co., 166 Pa. St. 536, 31 Atl. 261; Kingston vs. Lehigh Valley Co., 241 Pa. St. 469, 88 Atl. 763; Petrelli vs. W. Virginia Co., 86 W. Va. 617, 104 S. E. 113; Knight vs. Chesapeake Co., 99 W. Va. 261, 128 S. E. 319. See, also, McWilliams vs. Excelsior Co., 298 Fed. 889. As to oil and gas unlawfully taken by trespasser, see Liles vs. Barnhart, 152 La. 419, 93 So. 490; Liles vs. Producers Oil Co., 155 La. 385, 99 So. 339. In Bulli Co. vs. Osborne, A. C. (Eng.) 351, P. C., the court said: "Now it has always been a principle of equity that no length of time is a bar to relief in the case of fraud, in the absence of laches on the part of the person defrauded. There is, therefore, no room for the application of the statute in the case of concealed fraud, so long as the party defrauded remains in ignorance without any fault of his own. The contention on behalf of the appellants that the

tinuing trespass may partly be barred and, also, partly be within the time limited by the statute of limitations.[86]

§ 403. Writ of Injunction.

As a general rule the writ should contain a concise description of the particular acts or things in respect to which the party is enjoined, so that there may be no misapprehension on the subject.[86a]

§ 404. Fraud.

Since fraud consists in intention, which is a fact which can not be presumed, it can not be relied on as a defense to an action to recover possession of mining ground unless averred.[87]

§ 405. Partition.

Mining claims are subject to partition,[88] although the paramount title thereto may be in the United States.[89] A suit in partition usually

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statute is a bar unless the wrong-doer is proved to have taken active measures in order to prevent detection, is opposed to common sense as well as to the principles of equity"; *but see* Williams vs. Pomeroy Co., 37 Ohio 583; Golden Eagle Co. vs. Imperator Co., 93 Wash. 692, 161 Pac. 848, in which case no distinction was made between the wrongful taking of ore below the surface and that of an ordinary fraud practiced in the open where detection might follow without delay, and it was held that the action was barred in the three years from the time the trespass was committed. The court also expressed its disapproval of the doctrine of Lightner Co. vs. Lane, *supra*. Principle followed in Lone Pine Co. vs. Insurgent Co., 93 Wash. 700, 161 Pac. 850.

[86] Himrod vs. Ft. Pitt Co., *supra* [67]. For statutory enactments preventing the statute of limitations from running until three years after the discovery of an underground trespass, see Montana, Rev. Codes, 1921, § 9033; Nevada, Rev. Laws, 1912, § 4967; New Mexico, Comp. Laws, 1897, §§ 2916, 2918; Utah Gen. Codes, 1910, § 11,224.

[86a] Whipple vs. Hutchison, Fed. Cas. 17,517; see Erhardt vs. Boaro, *supra* [61]; St. Louis Co. vs. Montana Co., *supra* [52].

[87] Hall vs. McKinnon, 193 Fed. 572. In Wetherly vs. Straus, 93 Cal. 283, 28 Pac. 1046, the court said: "Fraud is never to be presumed, and whenever it constitutes an element of a cause of action or of a defense which is of an affirmative nature, and invoked as conferring a right against the plaintiff, it must be alleged." In Muldoon vs. Brown, 21 Utah 121, 59 Pac. 720, the court said: "Fraud, when relied upon as a defense, must be specifically pleaded in an answer as well as in a compiaint; and the facts and circumstances relied upon should be set out, in order that the court may know whether there was such a fraud as will be of avail to the pleader, and also that the party charged with the fraud may know the nature of the charge, and be prepared to meet it."

[88] Aspen Co. vs. Rucker, *supra* [5]; Hughes vs. Devlin, *supra* [2]; Brown vs. Challis, 23 Colo. 145, 46 Pac. 679; see Manly vs. Boone, 159 Fed. 633; Zeigler vs. Brenneman, 237 Ill. 15, 86 N. E. 597; Smith vs. Jones, 21 Utah 270, 60 Pac. 1104.

See Nevada Rev. Laws 1912, §§ 5576, 5582.

[89] Aspen Co. vs. Rucker, *supra* [5]; Hughes vs. Devlin, *supra* [2]; Spencer vs. Winselman, 42 Cal. 482; Filmore vs. Reithman, 6 Colo. 120.

[90] Royston vs. Miller, 76 Fed. 50; Brown vs. Challis, *supra* [88]; see Mitchell vs. Cline, 84 Cal. 409, 24 Pac. 164; Ryan vs. Egan, 26 Utah 241, 72 Pac. 933; Hall vs. Vernon, 47 W. Va. 295, 34 S. E. 764; Dall vs. Confidence Co., 3 Nev. 531; Lenfers vs. Henke, 73 Ill. 405. Mining property from its very nature is not susceptible of partition. The ores are unevenly distributed, while the values are purely conjectural until tested by extended development and careful tests, which can only be obtained as the result of a vast expenditure of money and time; so that it is known in advance of bringing the suit for partition that the only feasible relief that can be awarded is a decree for the sale of the property. Brown vs. Challis, *supra*; see Hall vs. Vernon, *supra*. The authorities are not uniform as to whether or not a placer mining location may be divided by a surface partition or a sale should be ordered. Musick Oil Co. vs. Chandler, 158 Cal. 13, 109 Pac. 613. See, also, Dangerfield vs. Caldwell, 151 Fed. 554; Manley vs. Boone, *supra* [85]; Spencer vs. Winselman, 42 Cal. 479. A bill of partition can not be made the means of trying a disputed title. Clark vs. Roller, 199 U. S. 541. See Arizona Co. vs. Iron Cap Co., 236 Mass. 185, 128 N. E. 7. In § 1390, 3 Pom. Eq. Jur., the question is discussed at some length, and it is there said: "As between a sale and a partition, however, the courts will favor a partition, as not disturbing the existing form of the inheritance."

Partition of oil and gas owned by coowners separate from the surface can not be decreed except by sale and division of the proceeds. A judicial partition thereof by assignment of the oil and gas under sections of the surface is void. Hall vs. Vernon, 47 W. Va. 297, 34 S. E. 764, cited and followed in Preston vs. White, 57 W. Va. 278, 50 S. E. 236.

results in a decree for the sale of the property.[90] The property may be partitioned by agreement between the parties.[91]

§.406. Effect of Partition.

The effect of the partition of an unpatented mining location, although creating separate and independent claims, does not disturb the integrity of the location in so far as the federal mining law is concerned; but the partition destroys the tenancy in common theretofore existing between the parties. It follows that the annual expenditure must be made upon some one of the several parts and portions so held by each party in severalty, without right of contribution; or the entire location will become subject to adverse relocation.[92]

§ 407. Mining Right.

A bare "mining right" is usufructuary in character and is not in its nature capable of partition.[93]

§ 408. Arbitration.

The question of title to a mining claim is not subject to arbitration.[94]

§ 408a. Equitable Title.

An action to quiet title will not lie in favor of the holder of an equitable title as against the owner of the legal title.[95]

§ 409. Jury.

A trial by jury is the absolute right of either the plaintiff or defendant, unless waived by consent of the parties expressed in such manner as is prescribed by law.[96] If the suit be in equity no right to other than an advisory jury exists.[97]

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[91] Four Twenty Co. vs. Bullion Co., Fed. Cas. 4989; Emery vs. League, 31 Tex. C. A. 474, 72 S. W. 603; see Tonopah Co. vs. Tonopah Co., 125 Fed. 400; Empire State Co. vs. Bunker Hill Co., 131 Fed. 591; Mullins vs. Butte Co., 25 Mont. 525, 65 Pac. 1004.

[92] In Royston vs. Miller, *supra* [90], it is said: "Where one tenant in common with others brings a suit asking for a partition of property, it is immaterial whether he shows that he has a legal title in common with the defendants, or only an equitable title, and that in either case he is substantially entitled to the same relief." Citing Crosier vs. McLaughlin, 1 Nev. 3. In Conn vs. Oberto, 32 Colo. 313, 76 Pac. 369, the court said: "The argument advanced by appellants that, as they were in possession of a portion of the claim under color of title, the territory was not open to location under the mining laws is not sound. The possession of the appellants under a conveyance from the original locator of the claim could not ripen into a perfect title unless the original locator secured title from the government. Theirs was only a right of possession during the time the locator, or those to whom he had sold with notice, remained in possession by virtue of the rights conferred upon locators of mining claims under the law, and their title would ripen into a perfect title whenever patent issued, but when the locator of the mining claim abandoned it all the land embraced within the original location became public land and open to entry, and the right of the grantees of the locator to occupy a portion of the land terminated." See Oberto vs. Smith, 37 Col. 21, 86 Pac. 86. Costigan Min. Law, p. 299; *but see* Merced Oil Co. vs. Patterson, 153 Cal. 624, 96 Pac. 90. *Id*, 162 Cal 358, 122 Pac. 950.

[93] Smith vs. Cooley, 65 Cal. 46, 2 Pac. 880; Musick Co. vs. Chandler, *supra* [90]; Chandler vs. Hart, 161 Cal. 405, 119 Pac. 516.

[94] Spencer vs. Winselman, 12 Cal. 482.

[95] Buchner vs. Malloy, 155 Cal. 253, 92 Pac. 1029, *but see* Bourn vs. Kidd, 203 Cal. 450, 264 Pac. 1099; Ferbrache vs. Potter, 90 Cal. A. 584, 266 Pac. 324.

[96] Whitehead vs. Shattuck, 138 U. S. 151; Montana Co. vs. Boston Co., 27 Mont. 236, 71 Pac. 1005; Solberg vs. Sunburst Co., 70 Mont. 177, 225 Pac. 612. In Donahue vs. Meister, 88 Cal. 121, 25 Pac. 1096, an action was brought under the provisions of the Code of Civil Procedure of California to quiet title to a certain quartz lode mining claim, showing the plaintiff to be in possession. The answer set up in defense that the defendant was rightfully in possession, and was by the plaintiff ousted therefrom before the commencement of the action. It was held that, under such issues the defendant was entitled to a jury trial. Hughes vs. Dunlap, 94 Cal. 465, 29 Pac. 771; Landregan vs. Peppin, 91 Cal. 385, 27 Pac. 642; S. P. Land Co. vs. Dickerson, 188 Cal. 113, 204 Pac. 576; Rocha vs. Rocha, 197 Cal. 396, 240 Pac. 1010. Trial by jury may be waived when objection is not made in the trial court. El Dora Oil Co. vs. U. S. 229 Fed. 946.

[97] Where the issue joined by the pleadings clearly is of equitable jurisdiction, the right to a jury trial does not exist as a matter of right. In such cases it is not error to deny the application for a jury. Pomeroy vs. Collins, 198 Cal. 46, 243 Pac. 657.

§ 410. Judgment.

The general rule is that a judgment involving the right to possession of real property must sufficiently describe it to enable an officer charged with the duty of executing a writ of possession to go upon the ground, and, without exercising judicial functions ascertain the locality of the lines as fixed by the judgment.[98] If the judgment does not accomplish that result it is of no avail and should be set aside on appeal.[99]

§ 411. Judgment Liens.

A mining claim is subject to a judgment [100] lien which continues for the period fixed by local statute [101] and is not disturbed by the issuance of patent.[102]

§ 412. Stay of Proceedings.

While a contest is pending in the land department a court should not interfere with nor proceed to the determination of a cause involving the property, but should either dismiss the case or stay proceedings there until the matter is concluded in the department [103]; unless there exists the necessity of preserving the peace or of determining controversies arising out of temporary right in public land [104] or to prevent waste which will result in a serious injury to the land.[105]

§ 413. Receivers.

A receiver may be appointed to take possession of property and operate the same pending litigation,[106] or to the end that the annual

[98] Hill vs. Barner, 8 Cal. A. 58, 96 Pac. 111; Hedrick vs. Lee, 39 Ida. 42, 227 Pac. 27. In an action to determine the ownership and possession of a certain vein or lode, a judgment awarding the property to the plaintiff is not conclusive in a subsequent suit by the same plaintiff against the lessee of the defendant in the original action, where such lessee took possession of the property long prior to the institution of the original suit. Doctor Jack Pot Co. vs. Marsh, 216 Fed. 261; see, also, Jack Harvard Co. vs. Continental Co., 106 Mo. A. 66, 80 S. W. 12.

[99] Wilhelm vs. Bauman, 63 Tex. C. A. 146, 133 S. W. 292. See Twist vs. Prairie Co., 274 U. S. 684, rev'g. 2 Fed. (2d) 347, where a suit was brought in a state court joining a cause of action at law and one for equitable relief; thereafter removing into a federal court and treated as a suit in equity resulting in an equitable decree and appealed as an equitable suit. Held that it was error for the appellate court to treat such an action as one at law and affirm the decree of the lower court without considering the assignments of error.

[100] 5 U. S. Comp. St., p. 5665, § 4631; Bradford vs. Morrison, 212 U. S. 389, aff'g. 10 Ariz. 214, 86 Pac. 6; dist'g. Black vs Elkhorn Co., *supra* [5]; Butte Co. vs. Frank, 25 Mont. 344, 65 Pac. 1; see Union Oil Co. vs. Norton-Morgan Co., 23 Ariz. 240, 202 Pac. 1078; *but see* Phoenix Co. vs. Scott, 20 Wash. 48, 54 Pac. 777. In Bradford vs. Morrison, *supra*, it is said: "Title to a mining claim acquired by sale under a lien of judgment is subject to forfeiture if conditions subsequent, such as the doing of necessary work, is not performed." Huffman vs. Allen Co., 118 Wash. 546, 204 Pac. 197.

[101] See McGrath vs. Kaelin, 66 Cal. A. 41, 225 Pac. 34.

[102] Rev. St., § 2332; see Butte Co. vs. Frank, *supra* [46]. A lien may be waived. Bowen vs. Aubrey, 22 Cal. 566, or lost by the effluxion of time. Burns vs. White Swan Co., 35 Or. 305, 57 Pac. 637. Waiver of lien must be both pleaded and proved. Reynolds vs. York, 20 Cal. A. 797., 130 Pac. 184.

[103] Cosmos Co. vs. Gray Eagle Co., 190 U. S. 301, aff'g. 112 Fed. 4, aff'g. 104 Fed. 20; Humbird vs. Avery, 110 Fed. 465, aff'd. 195 U. S. 480; Ripinsky vs. Hinchman, *supra* [4]; U. S. vs. Devil's Den Co., *supra* [4]; U. S. vs. Record Oil Co., 242 Fed. 748; Warnekros vs. Cowan, 13 Ariz. 42, 108 Pac. 238; see Lightner Co. vs. Superior Court, 14 Cal. A. 642, 112 Pac. 909. In Humbird vs. Avery, *supra*, it is said: "It is just as improper for a federal court as for a state court to adjudicate and determine the rights and equities of contesting claimants for public lands while the matter still is pending before the land department." See, also, Marquez vs. Frisbie, 101 U. S. 475; Sullivan vs. Mammoth Oil Co., 22 Fed. (2d) 663; Isaacs vs. DeHon, 11 Fed. (2d) 944; Sacre vs. Chalupnik, 188 Cal. 386, 205 Pac. 449.

[104] Warnekros vs. Cowan, *supra* [103]; U. S. vs. Devils Den Co., *supra* [4]; El Dora Oil Co., vs. U. S., *supra* [87].

[105] Humbird vs. Avery, *supra* [103].

[106] Hendrie Co. vs. Parry, 37 Colo. 359, 86 Pac. 113; Folk vs. U. S., 233 Fed. 177; see Thornases vs. Melsing, 109 Fed. 775; c. c. 180 U. S. 536; Harrington vs. Union Oil Co.,

work may be performed for the benefit of the party who may ultimately prevail in the action, and to prevent the extraction and disposition of the mineral therein.[107] Any loss occasioned by the appointment of a receiver may be charged to the party securing his appointment.[108] A receiver's compensation is payable out of the fund chargeable against the losing party.[109]

§ 414. Specific Performance.

The want of mutuality of right to a specific performance of a contract, which sometimes precludes its enforcement in equity, has no application to an option contract to sell mining properties.[110]

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144 Fed. 235; Ames vs. Goldfield Co., 227 Fed. 292. A receiver in charge of the property has no authority to carry on the business of the owner unless he be so authorized and directed by the court. Dalliba vs. Riggs, 11 Ida. 364, 82 Pac. 107. See International Co. vs. Decker Bros., 152 Fed. 78. In such case his power to incur obligations for supplies and materials incidental to the business is a necessary incident to the office. Cake vs. Mohun, 164 U. S. 311; Byrnes vs. Missouri Bank, 7 Fed. (2d) 980; Holmes Co., 19 Fed. (2d) 241. In Midland Oil Co. vs. Turner, 179 Fed. 74, the court said: "The properties for some time and now are being operated by a receiver. * * * If he has used or now is using any tools, appliances, or equipment belonging to the defendants, he should be required to account to the owner for the fair value of such use, and for the value of such parts thereof, if any, which have been consumed, destroyed or worn out by him, and the defendants should not be charged with any part of the compensation or expenses of the receiver, or the costs of these suits." U. S. vs. Midway Northern Oil Co., 232 Fed. 619. See U. S. vs. Devil's Den Co., *supra* (4).

[107] Nevada Sierra Oil Co. vs. Home Oil Co., 98 Fed. 673; see Cosmos Co. vs. Gray Eagle Co., 104 Fed. 20; Childers vs. Neely, 47 W. Va., 70, 34 S. E. 828. It is settled that where the question of title is pending in the land department that the courts may not take up the adjudication of the pending claims, but must await the decision of the land officers, and the issue of patent in regular course. There is, however, a related jurisdiction which the courts may exercise pending the final action of those officers; they may protect a possession lawfully acquired or restore one wrongfully interrupted, for that is a matter which is not confided to the Land Department, and may be dealt with by the courts in the exercise of their general jurisdiction. N. P. R. Co. vs. McComas, 250 U. S. 292.

[108] Harrington vs. Union Oil Co., 144 Fed. 235; Hendrie Co. vs. Parry, 37 Colo. 359, 86 Pac. 113, and cases cited therein; Folk vs. U. S., *supra* (97). It has been ruled that a plaintiff who improperly secures the appointment of a receiver, and not the defendant whose property is wrongfully taken from him, is liable for the legitimate expenses of such receivership, and that a plaintiff may be held, when the appointment is proper, if the fund seized is inadequate therefor. Rude vs. Wagman, 75 Colo. 12, 223 Pac. 746.

[109] Doddridge Oil Co. vs. Smith, 173 Fed. 386. A receiver can not be authorized to pay himself and his attorney out of the funds of a receivership derived from the operation and depletion of a mine, when the averments of the complaint show insufficient facts to authorize the appointment of a receiver. Rude vs. Wagman, *supra*.(99) See s. c. 71 Colo. 499, 207 Pac. 992. The general rule is that allowances to a receiver for the expenses of the receivership should be made to the receiver himself, and not to those who furnish supplies to, or perform labor for him. Stuart vs. Bulware, 133 U. S. 78.

[110] "The purchaser of an option to buy or sell land pays for the privilege of his election. It is that very privilege which the other party to the contract sells. In the absence of an agreement to the contrary, each party to a contract to buy and sell land may have it specifically enforced against the other, but the very purpose of an optional contract of this nature is to extinguish the mutuality of the right and vest in one of the parties the privilege of determining whether the contract shall be vitalized and enforced. An option to buy and sell land more than any other form of contract contemplates a specific performance of its terms * * *." Watts vs. Keller, 56 Fed. 4. In Hunter vs. Sutton, 45 Nev. 450, 205 Pac. 785, the court said: "A court of equity in actions for the specific performance of optional contracts to lease or convey lands (in this case mining lands) will enforce the covenant although the remedy is not mutual, provided it is shown to have been made upon a fair consideration, and where it forms part of a contract, lease or agreement that may be the true consideration for it."

"An option agreement, supported by sufficient consideration, is an enforceable contract, notwithstanding its unilateral character and the question of want of mutuality of remedy does not affect it. 'If mutuality in a broad sense were held to be an essential element in every valid contract to the extent that both contracting parties could sue on it, there could be no such thing as a valid unilateral or option contract or a contract evidenced by a subscription paper—or a contract to enforce an offer, or a guaranty, or in many other instances readily put in ordinary business affairs * * *. An option supported by a consideration furnishes another illustration of a contract which is valid notwithstanding the lack of mutuality * * *. It is no objection to the validiy of the conract that the holder of the option is under no obligation to exercise it.'" 6 R. C. L., p. 687. Feisthamel vs. Campbell, 55 Cal. A. 774, 205 Pac. 25. It is now well settled that if an owner of property gives another a written option on it for a valuable consideration, agreeing to sell it to him at a

fixed price, if accepted within a specified time, it is binding upon the owner, and is equally binding upon those who purchase from the owner with a knowledge of such agreement. In a proper case the courts will not hesitate to enforce an option as readily as they enforce other contracts. Marthinson vs. King, 150 Fed. 51, 50 A. L. R. 1316; Hoogendorn vs. Daniel, 178 Fed. 765; Baker vs. Mulrooney, 265 Fed. 534. The election of the optionee to accept and exercise the option within the time limited therein is sufficient to bind him and to remove any objection to the enforcement of the contract on the ground of want of mutuality. Smith vs. Bangham, 156 Cal. 359, 104 Pac. 689; Braselton vs. Vokal, 53 Cal. A. 585, 200 Pac. 670; 25 R. C. L. 37. In Zelleken vs. Lynch, 80 Kas. 746, 104 Pac. 563, it is said: "The owner of mining lots made an oral agreement to lease them for a long term of years, the lessee to work and mine the lots continuously, in good faith and in a miner-like manner. The lessee was put in possession and for three years carried out in good faith the terms of the contract. Meantime the lessee installed machinery, erected improvements, sunk shafts, ran drifts, and otherwise developed the property until it became very valuable, and in so doing expended the sum of thirty thousand dollars. After repeated demands, the lessor refused to execute a lease for the agreed period. It was held that as against a claim of want of mutuality in the obligation and remedy of the parties, specific performance of the oral agreement should be decreed." See, also, Argueldo vs. Edinger, 10 Cal. 150; Hambly vs. Wise, 181 Cal. 290, 184 Pac. 9; Laughton vs. McDonald, 61 Cal. A. 681, 215 Pac. 707; see Schubert vs. Lowe, 193 Cal. 291, 223 Pac. 550. In Kinsell vs. Thomas, 18 Cal. A. 683, 124 Pac. 220, the court said: "The doctrine that verbal contracts for the sale of land, if part performed by the party seeking the remedy may be specifically enforced, is an elementary principle in equity jurisprudence and of universal application throughout the American states."

In the case of Stanton vs. Singleton, 126 Cal. 657, 54 Pac. 587, where an option was given to plaintiff to purchase a one-half interest in a mine at any time within six months from the date of the agreement, the option to be exercised within thirty days, with the understanding that plaintiff was to spend ten thousand dollars in opening and developing the mine and was to erect a quartz mill thereon. Time was made the essence of the agreement, and it was stipulated that if active operations were not commenced within the thirty days the contract was void. The plaintiff agreed that if he failed to carry out the contract all the moneys expended by him should be forfeited. While there were three owners mentioned in the agreement, only two signed with the plaintiff. The foregoing constituted the facts set forth in the bill for specific performance, plaintiff further alleging that he notified the defendants that he elected to perform his part of the contract immediately after its execution; the defendants delivering possession and plaintiff proceeding to develop the mine by expending two thousand dollars as a part performance. Then the defendants notified him they would not be bound by the contract, and repudiated it. A demurrer on the ground of insufficiency was sustained. In reversing this judgment, the court said: "Under the terms of the contract the plaintiff had the right to enter upon the mining claims for the purpose of working and developing them. It is evident that the ultimate object of the contract was to give him the right at any time within six months after its date to acquire an undivided one-half interest in the property for five hundred thousand dollars. In order that he might intelligently determine whether to exercise this option, he was to have an opportunity of testing the value of the property by an expenditure of money thereon, which, in case he failed to make the purchase, would inure to the benefit of the defendants. The consideration for the defendants' agreement to give him the option was his agreement to expend ten thousand dollars in opening and developing the property and building a quartz mill thereon; and for this purpose the right to enter upon the mining claims was necessarily implied. The allegation in the complaint that he was placed in possession of the mining claims by the defendants for the purpose of performing his part of the contract was a contemporary construction by them of its meaning; and the further allegation that immediately after its execution he notified them of his election to perform his part of the contract, and thereby acquire the undivided one-half interest in the mining claims as in said contract mentioned was an acceptance by him of what was previously an offer and created an enforceable obligation on his part to spend the said sum of ten thousand dollars. Whatever want of mutuality of obligation existed at the execution of the contract, was thus removed and the contract to this extent became binding upon all the parties thereto. Hall vs. Center, 40 Cal. 63; Thurber vs. Meves, 119 Cal. 35, 50 Pac. 1063 and 51 Pac. 536; Sayward vs. Houghton, 119 Cal. 545, 51 Pac. 853 and 52 Pac. 44. The subsequent refusal by the defendants to permit the plaintiff to perform this obligation is a sufficient excuse for its nonperformance and their repudiation of the contract prior to the expiration of the period of six months, and declaration that they would not execute him a deed for the one-half interest, released him from the necessity of tendering the five hundred thousand dollars as a condition of maintaining the action. It was not necessary to make Burcham (the third owner) defendant in the action. It does not appear that he participated in preventing the plaintiff from entering upon the property or performing his part of the contract. Shepler vs. Green, 96 Cal. 218, 31 Pac. 42.

The Stanton Singleton case again came before the Supreme Court in 126 Cal. 657, 59 Pac. 146. It was an action brought to compel the specific performance of an option, which is set out in full in the opinion of the court. The court said: "Now, in the case at bar the property to which the contract relates consists of a large number of mining claims of different kinds—quartz and placer—and a provision for 'opening and developing said property' is certainly too general and indefinite to be specifically enforced by an equity decree. Moreover, the provision for 'erecting a ten-stamp mill,' etc., does not provide where it is to be erected, not even that it shall be on 'said property, but, assuming its meaning to be that the mill shall be on some part of one

of the large number of mining claims described in the contract, still, with that meaning, it is widely uncertain and indefinite as to the place where it is to be erected; and the place of the location of the mill would probably be a matter of very great importance. Again, there is no provision as to the limit within which the ten thousand dollars should be expended in developing the mine, or within which the mill should be erected. The only provision touching that subject is that the appellant should 'commence active operations'—whatever that may mean—within thirty days. In all these respects the contract is too loose and vague to justify a decree of specific performance." See, also, Los Angeles Oil Co. vs. Occidental Oil Co., 144 Cal. 528, 78 Pac. 85; Watson vs. Fisher, 79 Cal. A. 621, 250 Pac. 577. In the latter case Chief Justice Beatty specially concurring in the judgment of affirmance, said, in part, "But the contract, which is annexed to the complaint as an exhibit, does not bear the construction which the plaintiff has placed upon it. The terms of this instrument are so obscure and ambiguous that no one can assert with much confidence that he has discovered the real and exact intention of the parties; but I think Justice Harrison, in his opinion delivered in department (54 Pac. 587) correctly held that the plaintiff by expending ten thousand dollars and building a mill, would only have secured an option to purchase a half interest for five hundred thousand dollars. Plaintiff has, therefore, never offered to perform the contract according to its true construction, and subject to its stipulated conditions, but only according to his erroneous construction, and subject to conditions which he has no right to impose; and such being the case, it can not be said that the remedy of specific performance became mutual."

B and wife, owners of certain lands, entered into a contract with a corporation which by its terms granted to the corporation in consideration of one dollar and the agreements of the company, the privilege of entering upon the land for a term of ten years and boring gas or oil wells, etc., and in the event of the discovery of oil or gas in paying quantities conveyed the title to such products for a specified royalty. The company agreed to complete a well within two years or to pay a rental of twenty-five cents per acre until a well should be completed on said premises. The contract also provided that the term might be extended indefinitely by the discovery of oil or gas on the premises, or so long as either should be produced in paying quantities and the rental be paid thereon. Also that the company had the right to surrender the contract at any time and be thereby discharged from all liability for the nonfulfillment thereof. The court held that such contract was not a lease, but a sale by B and wife to the company of an option to exercise or not to exercise the privilege granted as the company might choose, and when the so-called lessors refused to accept certain rent, for the reason that "said pretended lease by the terms thereof is merely an option, which can be revoked at any time at the election of either party thereto, and that upon such election, the same ceases to be of any validity and is no longer binding upon either party thereto," the court said: "To this contention we can not assent. It may be conceded that it is an option contract, yet it does not follow that it can be revoked at pleasure by either party thereto. It is of the very essence of an option contract that one party has the choice of concluding or not concluding the proposed transaction while the other party has no choice. He undertakes for a certain consideration to do a certain thing within a certain time on the demand of the other. This right of choice is what the other pays for. It is urged that there is no mutuality in this contract; that it is unilateral. It is well said in 9 Cyc. 334, 'Where there is an agreement founded on a consideration it is not invalid for want of mutuality because one party has an option and the other not; or, in other words, because it is obligatory on one and optional on the other. So want of mutuality can not be set up as a defense by the party who has received the benefit simply because it was left optional with the other as to whether he would enforce his right.'" Pittsburg Co. vs. Bailey, 76 Kas. 42, 90 Pac. 803. See Guffey vs. Smith, 237 U. S. 116, rev'g. 202 Fed. 106.

"The action was in the nature of a bill for specific performance of a contract for the sale and purchase of land. If the contract is construed as making it the duty of Crowther to tender the abstract, yet his failure to do so did not dispense with performance or the offer to perform on the part of the complainants. His failure to furnish the abstract might have justified the complainants in declaring themselves off from the contract, and might have formed a successful defense to an action for damages brought by Crowther. But if they wished to specifically enforce the contract it was necessary for the complainants themselves to tender performance. To entitle themselves to a decree for a specific performance of a contract to sell land, it has always been held necessary that the purchasers should tender the purchase money. This is the rule in the ordinary case of a mutual contract for the sale and purchase of land. And the rule is still more stringently applied in the case of an option or sale, like the present one, where time is of the essence of the contract, and where Crowther could not have enforced specific performance. In such a case if the vendee wishes to compel the other to fulfill the contract, he must make his part of the agreement precedent, and can not proceed against the other without actual performance of the agreement on his part or a tender and refusal. Bank vs. Hagner, 1 Pet. 464; Marble Co. vs. Ripley, 10 Wall. 359."

Kelsey vs. Crowther, 162 U. S. 404, aff'g. 7 Utah 519, 27 Pac. 695. In this case there was a contract of sale of real estate wherein the purchasers were to have 30 days from date of contract to examine the title, and if the title was approved by their attorneys were to complete the contract, and to have a return of their part payment if their attorneys disapproved. Vendors did not furnish the abstract. Specific performance was denied by the lower court. Kelsey vs. Crowther, *supra*. Judgment affirmed by U. S. Supreme Court as above.

§ 415. What Must Be Shown.

In an action for specific performance it is necessary for the plaintiff to show that as to defendant the contract was just and reasonable, and that the defendant received an adequate consideration.[111] If the

[111] Goodyear Co. vs. Miller, 14 Fed. (2d) 779; Prince vs. Lamb, 128 Cal. 120, 60 Pac. 689 (grub stake contract); Hobbs vs. Davis, 168 Cal. 556, 143 Pac. 733 (mining stock. Salisbury vs. Yawger, 184 Cal. 795, 195 Pac. 682; Erhart vs. Mahoney, 43 Cal. A. 448, 184 Pac. 1010; Koblich vs. Larson, 57 Cal. A. 462, 307 Pac. 929; Walker vs. Clark, 80 Cal. A. 523, 252 Pac. 334; Laguna Land Co. vs. Greenwood, 92 Cal. A. 573, 268 Pac. 699; Chandler vs. Hollingsworth, 96 Cal. A. 475, 274 Pac. 581; McKee vs. Higbee, 180 Mo. 263, 79 S. W. 407. In Dalzell vs. Deuber Mfg. Co., 149 U. S. 325, Justice Gray said: "From the time of Lord Hardwicke it has been the established rule that a court of chancery will not decree specific performance unless the agreement is 'certain, fair and just in all its parts.' Buxton vs. Lister, 3 Atk. 383, 385; Underwood vs. Hitchcock, 1 Ves. Sr. 279; Franks vs. Martin, 1 Eden, 309, 323. * * * So this court has said that chancery will not decree specific performance 'if it be doubtful whether an agreement has been concluded, or is a mere negation' nor 'unless the proof is clear and satisfactory both as to the existence of the agreement and as to the terms.' Carr vs. Duval, 14 Peters, 79, 83; Nickerson vs. Nickerson, 127 U. S. 668, 676; Hennessy vs. Woolworth, 128 U. S. 442." See, also, Buckmaster vs. Bertram, 186 Cal. 673, 200 Pac. 610; Altman vs. Blewett, 93 Cal. A. 516, 269 Pac. 751.

While the granting of the equitable remedy for the specific performance of a contract to convey or lease property is a matter of discretion, yet this means sound discretion controlled by established principles of equity; and when the contract is in writing, is certain in its terms, is fair and just and capable of being enforced, without hardship, the remedy should be granted as a matter of course." Suppl. 5 (25 R. C. L.), 1315; Bennett vs. Moon, 194 M. W. 802. In Salisbury vs. Yawger, *supra*, the court said: "The complaint contains an allegation that the contract is just and reasonable, but there is no allegation as to the actual value of the land and no other circumstances alleged showing that it was just and reasonable or that the consideration was adequate. This is clearly insufficient. The facts showing that it was just and reasonable should have been alleged. (White vs. Sage, 149 Cal. 613, 187 Pac. 193; Herzog vs. Atchison, etc. Co., 153 Cal. 496, 17 L. R. A. N. S. 428, 95 Pac. 898; Young vs. Matthew Turner Co., 168 Cal. 671, 675, 143 Pac. 1029.)" See, also, Hupp vs. Lawler, ___ Cal. A. ___, 288 Pac. 801.

Marks vs. Gates, 154 Fed. 481, aff'g. 2 Alaska 519, was a suit for the specific performance of a contract wherein the defendant for an expressed consideration of one dollar agreed to convey to the complainant, a one-fifth interest in any and all property which he should thereafter acquire in the territory of Alaska, either by location, purchase, or otherwise. The complainant claimed in his bill that the real consideration was the cancellation of twelve thousand dollar indebtedness due him from defendant, and that the defendant had acquired property including mining claims, of the value of seven hundred and fifty thousand dollars and asked specific performance as to him. In affirming the decision of the lower court, the circuit court of appeals said: "The enforcement of a contract by a decree for its specific performance rests in the sound discretion of the court, a judicial discretion to be exercised in accordance with established principles of equity. A contract may be valid in law, and not subject to cancellation, in equity, and yet the terms thereof, the attendant circumstances, and in some cases the subsequent events, may be such as to require the court to deny specific performance. In Pomeroy, § 400, it is said, 'He who seeks equity must do equity. The doctrine thus applied means that the party asking the equitable aid of the court must stand in conscientious relations toward his adversary; that the transaction from which his claim arises must be fair and just, and that the relief itself need not be harsh and oppressive upon the defendant.' * * * The contract in the present case had, at the time when it was made, no reference to any property then owned by the contracting parties or even to property then in existence. It does not obligate the appellee even to go to Alaska or to acquire property there. It bound him during his lifetime to transfer to the appellant a one-fifth interest in all property of every description that he might acquire in Alaska by whatever means, whether by location, purchase, devise, gift or inheritance—property of which neither party could know even approximately the value. It was a bargain made in the dark." See Gabrielson vs. Hagan, 298 Fed. 722; Clark vs. Aiken, 276 Fed. 21; Federal Oil Co. vs. Western Oil Co., 112 Fed. 573.

Meehan vs. Nelson, 137 Fed. 731, was a suit to decree specific performance of a contract to convey a half interest in a certain mining claim situate in Alaska, in consideration of the plaintiffs sinking three holes to bedrock, and the relief was granted as the plaintiffs were found to have fully complied with the terms as to them, even though the property had increased greatly in value in the meanwhile. Judge Hawley said: "It is true that specific performance, as claimed by appellants, is not a matter of absolute right, but rests entirely in judicial discretion to be exercised according to the settled principles of equity so as to reach the ends of justice. As is said in 26 Am. & Eng. Ency. Law (2d ed.) 67: 'It must appear that the contract is fair, just and equitable in all its parts. If, therefore, a decree of specific performance would work hardship or injustice upon the defendant, or operate oppressively upon him, a court of equity will decline to interfere.' The contract was fair and just between the parties, and the record herein does not show that its enforcement would work hardship or injustice upon the defendants."

See Prince vs. Lamb, *supra;* Wood vs. Anderson, 199 Cal. 440, 249 Pac. 862; Morgan vs. Dibble, 43 Cal. A. 121, 184 Pac. 704; Boulenger vs. Morison, 88 Cal. A. 670, 264 Pac. 256.

agreement be deficient in fairness, justice, or certainty, its specific execution will not be decreed.[112]

[112] "A greater amount or degree of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is the basis of an action at law for damages. An action at law is founded upon a mere nonperformance by a defendant and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of nonperformance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite and precise understanding of all its terms; they must be exactly ascertained before the performance can be enforced." Pomeroy on Contracts, § 159.

In the case of Howitz vs. Kreuzer, 40 Md. 419, 117 Atl. 561, where the bill asking specific performance of a contract to convey land, failed to allege the plaintiff's ability to perform, and failed to include certain papers alleged to have been executed as a part of the contract, the same was held insufficient. The court said: "The failure to include among the pleadings and in the record certain of the papers alleged to have been executed, is a failure which under the numerous decisions of this court is necessarily fatal to the maintenance of such a bill * * *. It is noticed that nowhere in the bill does Mr. Howitz allege his ability to carry out the terms of the contract made by him with Myerberg. This, too, is an allegation always necessary to sustain such a bill. He does allege his readiness and willingness to carry it out, but stops there, and the ability of performance is just as important as is a willingness to do so. Mr. Miller in his volume on Equity, Secs. 656, 659, lays down the rule that the plaintiff must make it appear that he is able and willing to perform his part of the contract. The bill is also deficient in that there is no allegation as to the length of the extension of time for the performance of the contract * * * and in that respect the bill is deficient." Uncertainty in price as in any of the other terms of the contract is undoubtedly a reason for refusing specific performance. McKibbin vs. Brown, 14 N. J. Eq. 13, aff'g. 15 N. J. Eq. 198; Davila vs. United Co., 88 N. J. Eq. 602, 103 Atl. 519.

In McClurg vs. Crawford, 209 Fed. 340, a suit for specific performance of a contract to convey mining property, the appellate court in reversing the court below for dismissing the bill said: "The contract which the parties have made may be gathered from letters which have passed in correspondence between them. It is not necessary that every paper should contain all the necessary elements of the contract which may be authenticated and established through the medium of letters and separate writings and documents, provided they refer to each other and to the same persons and things and manifestly relate to the same contract and transaction."

In Berry vs. Woodburn, 107 Cal. 504, 40 Pac. 802, the defendant contracted to pay plaintiff "big wages" while employed in procuring for him a "paying" mine and operating the same, and, in case he did secure such a mine, to convey to him "an interest" in the mine, and, on his failure to secure a paying mine, to pay him reasonable wages. It was held that specific performance of defendant's agreement to convey "an interest" in the mine, plaintiff having procured for him a paying one, could not be specifically enforced, owing to the uncertainty as to the quantum of interest to be conveyed. See, also, Berry vs. Moulié, 180 Cal. 137, 179 Pac. 686.

In Clark vs. Rosario Co., 176 Fed. 180, it appeared that the complainant, which was the owner of a mine, and defendants, who had been developing and operating the mine under prior contracts, entered into a contract by which the defendants offered four hundred thousand dollars for the mine, the contract to remain open and subject to acceptance by the plaintiff at any time during one year. Defendant was to operate the mine for the year unless possession was sooner demanded by plaintiff and was to make extensive improvements within ninety days, retaining eighty per cent of the output during the year to apply on the cost; after which plaintiff during the remainder of the year, any profit above operating expenses was to go to complainant. Defendant was given an option to purchase the mine at the end of the year for six hundred thousand dollars, provided plaintiff had not previously sold it, which it reserved the right to do, giving defendant a preferred right to purchase at the price offered, and that if it was sold for more than six hundred thousand dollars, defendant should receive the excess up to fifty thousand dollars to reimburse him for improvements made. It was also provided that in case plaintiff took possession at the end of the year, or before, it should pay defendant for supplies on hand. At the end of the year complainant accepted defendant's offer, but he refused to complete the purchase. In refusing to decree specific performance, the court said: "It is difficult to conceive of a much more one-sided contract. It is one that we do not think any court of equity should decree the performance of. 'To stay the arm of a court of equity from enforcing a contract,' said the Supreme Court in Pope Mfg. Co. vs. Gormully, 144 U. S. 236, * * * 'it is by no means necessary to prove that it is invalid. From time immemorial it has been the recognized duty of such courts to exercise a discretion, to refuse their aid in the enforcement of unconscionable, oppressive or iniquitous contracts, and to turn the party claiming the benefit over to a court of law.'" Suit dismissed at the complainant's cost.

It is incumbent on the plaintiff in an action for specific performance to state such facts as will enable the court to decide whether the contract is of such a character that it would not be inequitable to enforce it. One of these facts, and a most important one, is the value of the property to be conveyed as compared with the value of the consideration to be given therefor. Baker vs. Miller, 190 Cal. 263, 212 Pac. 11; Williams vs. Foss, 69 Cal. A. 707, 231 Pac. 766; Walker vs. Clark, *supra* [111]. See Wolf vs. Donahue, 206 Cal. 213, 273 Pac. 547.

Nowhere in the authorities on the subject of specific performance is it held that the consideration must be measured by exact quality in dollars and cents. In 23 Cal. Jur. at page 442, the general doctrine is announced as follows: "An adequate

§ 416. Time Essential.

Time becomes essential where the value of the subject matter necessarily fluctuates and changes with the lapse of time,[113] as of mines likely to change rapidly in value.[114] Any default will defeat the right to a specific performance,[115] unless waived.[116]

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consideration does not necessarily mean a price measuring fully to value of the property. Thus it is not necessary that the value of real property, as found by the court to exist at the time of the contract to convey, shall exactly, or even substantially, equal the price fixed by the contract, for such value can rarely, if ever, be determined with precision." Behler vs. Kunde, 100 Cal. A. 734, 281 Pac. 76.

[113] 4 Pom. Eq. Jur., § 1408, note 2.

[114] "In Taylor vs. Longworth, 14 Pet. 172, 174, the principle was recognized that time may become of the essence of a contract for the sale of property not only by the express stipulation of the parties, but from the very nature of the property itself. This principle is peculiarly applicable where the property is of such character that it will likely undergo sudden, frequent or great fluctuations in value. In respect to mineral property it has been said that it requires—and of all properties, perhaps, the most requires—the parties interested in it to be vigilant and active in asserting their rights." Waterman vs. Banks, 144 U. S. 394. "The decisions concur in holding that in an option contract because of its one-sided nature, time is of the essence in equity as well as at law, whether expressly so stipulated or not, and that threfore the failure of the optionee to exercise his right of election within the time stipulated in the option, or implied by law, ends his option rights. This rule is especially applicable to mining property." G. S. Johnson Co. vs. Nevada Packard Co., 272 Fed. 291 (an optional contract relative to a mining stock). James on Option Contracts, §§ 862, 920; Waterman vs. Banks, *supra;* Gaines vs. Chew, 167 Fed. 630, 835.

In an oil and gas lease giving the lessee the right to drill within one year, otherwise the lease to terminate, a provision that on payment of a stated sum within the year, the time for drilling would be extended for six months, such conditions in the lease were held to give the lessee an option of which time was of the essence, and on failure to exercise the option within the year, the lessee's rights terminated. This termination was not a forfeiture, but a termination of the lease by its very terms. The court said: "It is well settled by the decisions of those courts (Texas) that such an instrument confers on the so-called lessee a privilege for the specified time, with the option to secure the extension of the privilege for an additional period upon complying with the prescribed condition, and that time is of the essence of such a provision * * *. The equitable rule as to relieving against forfeitures had no application to the case of a failure of a holder of an option to do, within the time fixed, what is required to acquire the thing which is the subject of the option. Equity does not undertake to dispense with compliance with what is made a condition precedent to the acquisition of a right * * *. The contract states the terms on which appellees agreed that a termination * * * of the privilege of drilling or exploring for oil or other minerals could be prevented. It conferred no right to prevent such termination, otherwise than by a compliance with those terms." Gillespie vs. Bobo, 271 Fed. 644.

In Clarno vs. Grayson, 30 Or. 111, 46 Pac. 426, the plaintiff who was the owner and lessor of a mine, which was rightfully in the possession of the lessee who held the option to purchase it under a condition precedent that he should pay forty-five thousand dollars on or before a certain day, wrongfully took the posession of the mine from the lessee before the time to make the payment under the option expired. But the court held that this wrongful taking did not consummate the contract of sale or an acceptance of the option and that the payment of the forty-five thousand dollars by the holder of the option within the time prescribed was indispensable to accomplish the result. See Craucer vs. Lareau, 1 Fed. (2d) 121.

[115] Waterman vs. Banks, 144 U. S. 394; Rickards vs. Taylor, 122 Fed. 931. "If time is not originally made by the parties of the essence of the contract yet it may become so by notice, if the other party is guilty of improper delays in completing the purchase." Coyle vs. Kierski, 10 Del. Ch. 229, 89 Atl. 598.

"The failure of the optionee to elect and to give notice of his election within the time limited by his contract, if there be stipulations as to time, and within a reasonable time implied by law in the absence of stipulation, ends his option rights." Campbell vs. Fetty, 271 Fed. 671; Hughes vs. Holliday, 149 Ga. 147, 99 S. E. 301.

"Even though time of performance be not essential, still where the vendee fails to perform on the day provided for performance by him, and the vendor notifies the vendee that unless he performs his part within a reasonable time stated in the notice, the contract will be terminated, then upon the failure of the vendee to perform within such specified time, the vendor may then terminate the contract and the vendee's rights thereunder be ended. 3 Pomeroy's Equity Jurisprudence, Sec. 1408, note and cases cited * * *. The principle is thus stated by Story: Under a lease of real estate with an option to the lessee to buy, and providing expressly that on its failure to notify lessor to the contrary, in sixty days before expiration of the term 'it will thereby become obligated to make such purchase and pay the consideration,' a letter written some time before by the lessee stating that it expected to give formal notice of its election not to purchase, was not equivalent to such notice, and a notice given some six days subsequent to the date when actual notice should have been given was held insufficient. The court said: "Notice of rejection of an irrevocable offer like notice of acceptance of an offer, must be unequivocal and unambiguous. The reason and object are the same in both, viz: so that both parties are bound or both free or neither is, so that subsequently neither can escape obligation of the contract or impose its obligation on the other by belated construction or doubtful

§ 417. Forfeiture Clause.

Where it is provided in a contract that if payment is not made at the day all payments previously made shall be forfeited and the contract terminated, the courts, generally, are loath to enforce the forfeiture where time is not of the essence.[117]

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language. To say the writer expects to give formal notice or refusal to purchase, deprives the letter of all quality of the required notice, and advises that the writer has reason to consider it likely such notice will be given. It appears but tentative and for negotiation prior to the vital time, the day of decision." Mackey Wall Plaster Co. vs. U. S. Gypsum Co., 244 Fed. 275, aff'd. 252 Fed. 397.

Where there was an option to purchase on the condition precedent that the prospective purchaser should pay the price within ninety days and within the ninety days he gave notice that he accepted the offer and would pay within the time, it was held that the notice was ineffectual and that nothing but the payment of the money within the ninety days would consummate a contract of purchase. Trogden vs. Williams, 144 S. C. 192, 56 S. E. 865.

Where the written memorandum of an oral contract of sale of mining property is not certain as to the time when the first payment is to be made, it is insufficient to take the contract out of the statute of frauds, time being of the essence of contracts relating to such properties. Snow vs. Nelson, 113 Fed. 353.

[116] King vs. Wilson, 6 Beav. 126; Raymond vs. San Gabriel Co., 53 Fed. 883, following Wilcoxson vs. Stitt, 65 Cal. 596, 4 Pac. 629; Smith vs. Mohn, 87 Cal. 489, 25 Pac. 696; Newton vs. Hull, 90 Cal. 487, 27 Pac. 429.

Time is not the essence of an option to purchase land, so as to render it essential to a judgment for specific performance that a tender of the purchase price be made within the time limit fixed by the option, where such offer is prevented or delayed by the act of the vendor, under section 1511 Cal. Civ. Code. Connolly vs. Lake County Co., 95 Cal. A. 768, 273 Pac. 611.

[117] Glock vs. Howard, 123 Cal. 1, 55 Pac. 713; Collins vs. Eksoozian, 61 Cal. A. 184, 214 Pac. 670. The rule is stated in Pom. Eq. Jur. (2d ed.), § 455, as follows: "It is well settled that where the parties have so stipulated as to make the time of payment of the essence of the contract, within the view of equity as well as of the law, a court of equity can not relieve a vendee who has made default."

In Edgerton vs. Peckham, 11 Paige Ch. 351, 356, 357, the court said it would not enforce the forfeiture clause, as time was not of the essence. The vice chancellor said the forfeiture cases were those where the contract is executory, and that the authorities generally in equity in England and the United States would not allow a forfeiture where the contract was executed in part. A forfeiture in such cases as these, said the vice chancellor, is "too monstrous a proposition to be maintained in the nineteenth century."

In Zeimatz vs. Blake, 39 Wash. 6, 80 Pac. 823, the court held that the vendor must do some affirmative act to create a forfeiture on the vendee's default.

An option for a purchase of a mine providing for certain payments and certain work at specified times by the purchaser, and that if he shall not comply with any of the covenants or conditions, the contract shall terminate and end and all installments or other sums which may have been paid by the purchaser shall be forfeited and become liquidated damages, limits the damages when the contract is forfeited to work done and payments made. K. P. Mining Co. vs. Jacobson, 30 Utah 115, 83 Pac. 728.

Leak vs. Colburn, 55 Cal. A. 784, 204 Pac. 249, was an action on the part of a vendor to declare forfeited an agreement to sell real property where the agreement contained a forfeiture clause on default, set forth in the opinion, the court said with reference thereto: "The effect to be given such terms in a contract is stated in section 816 of Pomeroy's Equitable Remedies (2d ed.) as follows: 'Contracts often contain clauses that if payments are not made at the day, the defaulting vendee shall forfeit all payments previously made and lose his right to the land. The courts of equity in England and most American jurisdictions deal with such a forfeiture clause on the principle that equity abhors a forfeiture and will relieve from it * * *. In a few American jurisdictions, on the other hand, it is held that since the parties have deliberately stipulated for a clause of forfeiture, equity has no power to make a new contract for them, and can not relieve the party in default, however severe the forfeiture may be. Illinois, Iowa, Oregon, Indiana and California are among the minority which compel the vendee in default to lose his bargain and all his payments previously made in strict accordance with the agreement. But California enforces a forfeiture only when time is of the essence of the contract.' The California decisions fully support the rule as stated by the learned author * * *. That facts may be shown which would justify a court in relieving a vendee from a forfeiture even where time is of the essence of the contract is not doubted, but the facts of this case are not such."

In the case of Mathews Co. vs. New Empire Co., 122 Fed. 972, there was a lease of land containing slate quarries, which also contained an agreement by the lessor to sell and convey the premises to the lessee on the payment of a specified amount on or before three years from date. It was held that the contract of lease and the option to buy were separate and independent agreements, and that the right of the lessee to exercise the option to purchase was not defeated by the service on him by the lessor of a notice terminating the lease for breach of its conditions even if such termination was justified and effective. The court said: "Courts of equity will not search with extreme diligence for technicalities upon which to base a forfeiture of a fair and equitable contract. Indeed, forfeitures are not specially favored in law, although no court should hesitate to declare a forfeiture when one has actually occurred. This contract and agreement was fair and equitable in all its terms and

provisions and based upon a good consideration. The complainant has subsequently complied with all the terms and conditions of such contract and agreement, and in so far as there was not strict performance the defendant has waived the same. There has been no failure of consideration and the complainant is entitled to a decree for the specific performance of the agreement to convey the premises."

Plaintiff agreed with defendant to convey to him by "good and sufficient title" certain mining claims and in consideration defendant agreed to pay fifteen hundred dollars on a certain date and to transfer other property to plaintiff, and further agreed in the event of his failure to pay the fifteen hundred dollars, at the stated time, to forfeit to plaintiff five hundred dollars as liquidated damages. When defendant failed to pay the fifteen hundred dollars, as stated, it was held that plaintiff was entitled to the five hundred dollars as a forfeit, though he did not tender to defendant a good and sufficient title to the mining claims or any title at all. Donovan vs. Hanauer, 32 Utah, 317, 90 Pac. 569.

In the case of Amanda Co. vs. Peoples Co., 28 Colo. 251, 64 Pac. 218, reversing the lower court, it appeared there were two conflicting lode mining claims. Application for patent was made by the owners of Bogart, and protested by the owners of the Amanda. Thereafter in order to settle their differences the parties entered into an agreement whereby the protest was withdrawn; in consideration thereof the owners of the claim for which patent was applied for agreed within ten days after the issuance of the patent to convey to the Amanda Mining Co., in equal proportions or jointly, as they preferred, the surface within the conflict, saving and excluding therefrom the Bogart ledge where it passed through or across the conflicting surface, conveyances to be drawn to protect this right. There was a forfeiture provided in the contract whereby if the owners of the Bogart failed to make the conveyance they would forfeit to the owners of the Amanda and pay one thousand dollars in full satisfaction of the agreement. The defendants (successors in interest of the original owners of the Bogart claim) refused to do either of these things, whereupon the grantee of the Amanda and of all rights under the contract brought the suit to compel the making of the conveyance.

The defendants answered, and by failure to deny admitted the execution of the contract, but denied any assignment had been made to the plaintiff or that any demand had been made for a conveyance or that any development work had been done. They controverted the right of plaintiff to any relief, but did not assert their option to pay. It was maintained by the defendants that the contract was in the alternative and gave them the option either to make the conveyance or if they chose otherwise to pay the one thousand dollars and be discharged from further liability. Or, as the court said: "In other words, the clause providing for the payment of the fixed sum of one thousand dollars is by the plaintiff said to be a penalty and by the defendants liquidated damages; the general rule being that in the former case equity will, and in the latter will not, decree specific performance. As stated by Mr. Waterman in his work on Specific Performance of Contracts, at Sec. 23, 'If the agreement be construed as giving to the party the option to do the act or pay a certain sum, equity will not interfere.' It leaves the other party to whom the promise is made to his action at law. In determining the question, however, the court looks to the entire agreement, and not merely to the language expressing the sum. It may thus ascertain the real intention of the parties; and, if it clearly appears that the contract is to perform one of the alternatives, this will be specifically enforced, notwithstanding the contract be alternative in its form. But when the contract stipulates for one or two things in the alternative—the doing of a certain act, or the payment of a certain sum of money in lieu thereof as already stated, 'equity will not interfere to decree a specific performance of the first alternative, but will leave the injured party to his remedy of damages at law.' 1 Pom. Eq. Jur. (2d ed.), § 447; Fry Spec. Perf., § 86, *et seq.* Yet where a person has agreed to do a certain act, and has added a penalty for the purpose of securing its performance, if the contract is otherwise one which calls for its interposition, equity will compel the party specifically to perform." Pom. Spec. Perf. (2d ed.), § 50.

In Brunson vs. Carter Oil Co., 259 Fed. 656, where a lessee in an 'unless' oil and gas lease, which paid a consideration for an optional right of exploration with right of renewal each year thereafter for five years by paying a yearly rental in advance, and which paid the rental for the first renewal, and also for the second in due time, but through inadvertence and mistake made the second payment to the original lessor as shown by its system of records relied upon by it for such purpose, although notified of the transfer of the land, yet under the laws of Oklahoma providing for relief against forfeiture or a loss in the nature of a forfeiture occurring without gross negligence or fraud, upon a suit to cancel the lease, said lessee was held entitled to equitable relief.

In the case of Anderson vs. Morse, 110 Or. 39, 222 Pac. 1083, where deeds were delivered in escrow under a contract for the sale of land upon certain payments to be made thereunder, said deed to be given to the purchaser on compliance with the terms of the contract, and the purchasers made default in payments, but subsequently agreed with vendor to a modification of the contract, but again defaulted, it was held that equity could not relieve the purchaser of a forfeiture, time being of the essence of the contract, the court said: "By the terms of the contract all payments heretofore made were forfeited in case the terms of the contract were not fully performed by them. Equity can not under the circumstances relieve them of that forfeiture."

As to necessity for diligence in prosecuting a right to equitable relief relative to mining rights, see Johnson vs. Standard Co., 148 U. S. 360; Stevens vs. McChrystal, 150 Fed. 85; Sturm vs. Weiss, 273 Fed. 457; Taylor vs. Salt Creek Oil Co., 285 Fed. 532; Gill vs. Colton, 12 Fed. (2d) 457.

See § 385.

§ 418. Personal Services.

An agreement to prospect for minerals constitutes an agreement to render personal service and will not be specifically enforced.[118]

§ 419. Venue.

Wood vs. Thompson[119] was an action brought to compel the specific performance of a contract to convey an undivided interest in a certain mining claim. The court said: "The purpose of the action is not to recover possession of, quiet title to, or enforce a lien upon, 'King Solomon's Mines.' It is to enforce the specific performance of a contract. If the court should determine that the plaintiff is entitled to a specific performance by a conveyance of an undivided one-eighth interest, that of itself would not entitle the plaintiff to the possession of the real estate." And the superior court of a county other than that in which the mines are situated has jurisdiction.

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[118] Cooper vs. Pena, 21 Cal. 403; Sturgis vs. Galindo, 59 Cal. 28, Los Angeles Co. vs. Occidental Oil Co., *supra* (110); Poultry Producers vs. Barlow, 189 Cal. 278, 208 Pac. 93; O'Brien vs. O'Brien, 197 Cal. 589, 241 Pac. 861; Hill vs. Waiting Co., 83 Cal. A. 18, 261 Pac. 1115. For a discussion of the bases of the rule see H. W. Gossard Co. vs. Crosby, 6 L. R. A. (N. S.) 1125.

In Roy vs. Pos, 183 Cal. 364, 191 Pac. 542, the court quotes from 5 Pom. Eq. Jur., § 2181, as follows: "It is a familiar rule that contracts for personal services, where the full performance rests upon the personal will of the contracting party, will not be specifically enforced against him. It is also generally true that they will not be enforced where the plaintiff is the one who has contracted to render the services and there has been no full performance on his part, since mutuality in the equitable remedy is then lacking. That this is the law in California is evidenced by §§ 3386 and 3390, subdivision 1, of the Civil Code."

[119] 5 Cal. A. 247, 90 Pac. 39, dist'd. in State vs. Royal Co., 187 Cal. 350, 202 Pac. 133. "Suits for specific performance are actions *in personam*, and if the court has acquired jurisdiction of the person, it is not necessary that the property should be within the territorial jurisdiction of the court." Lack vs. Robineau, 9 Fed. (2d) 407. In Pennoyer vs. Neff, 95 U. S. 723, it was said: "The state, through its tribunals, may compel persons domiciled within its limits to execute in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title so far as such formalities can be complied with."

"Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary according to the *lex loci rei sitae*, which he could do voluntarily to give full effect to the decree against him." Phelps vs. McDonald, 99 U. S. 298, 308.

"Owing to the fact that courts of equity act *in personam* rather than in *rem* the rules relating to the venue of local actions at law do not apply with their full rigidity to suits in equity. Thus where the exercise of an equitable power is sought, suit may be maintained in any jurisdiction wherein the defendants can be found, although lands not within the territorial jurisdiction of the court will be affected. This is because the decree made will not of itself necessarily be binding on the lands, but will take effect only through the action which the parties to the suit are compelled to take." 27 R. C. L., Sec. 18, p. 798; see Gotter vs. McCulley, 292 Fed. 382.

In Jamestown vs. Penn Gas Co., 1 Fed. (2d) 878, the court said: "The present suit is one arising out of contract. In all cases of contract the suit may be brought in the district where the defendant may be found. In Massie vs. Watts, 6 Cranch. 148, 3 L. Ed. 181, a suit was brought by a citizen of Virginia against a citizen of Kentucky in the circuit court for the district of Kentucky, to compel the defendant to convey one thousand acres of land in Ohio in accordance with a contractual agreement. Chief Justice Marshall, writing for the court said: 'That in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person may be found, although lands not within the jurisdiction of that court may be affected by the decree.' This settled the law for the federal courts and settled it as it was settled in England, in the celebrated case of Penn vs. Lord Baltimore, 1 Vesey Sr. 444. The doctrine of Massie vs. Watts has never been overruled by the Supreme Court and when mentioned is always referred to with respect."

§ 420. Estoppel.

The essence of estoppel is action or inaction to one's detriment, by reason of the act or omission of the other party upon which the plea of estoppel is based.[120]

§ 421. Record of Location Operates as an Estoppel.

The original locator of a mining claim after location notice or certificate is filed and recorded, is estopped to deny the validity of the original location.[121]

§ 422. Coowner Not Estopped.

Where one of several joint owners of a mining claim upon a common understanding relocated the claim in his own name and thereafter asserted exclusive title thereto and made application for patent therefor, the excluded joint owners are not estopped from claiming their interest therein, although they filed no adverse claim or protest in the patent proceedings.[122]

§ 423. Landlord and Tenant.

Where plaintiff occupied a mining claim under a lease from the owner, paying a royalty therefor, and as a further consideration for said lease agreed to procure at his own expense a patent for such mining claim in the name of the lessor, he is estopped from denying the right of the latter to the ground covered by the lease.[123]

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[120] U. S. vs. Haar, 19 Fed. (2d) 404. See Lake vs. O'Brien, 54 Cal. A. 543, 202 Pac. 158; Chowchilla Bank vs. Nilmeier, 53 Cal. A. 208, 256 Pac. 298.

Estoppel is not favored, and it is incumbent upon one who advances it to prove its dominant essentials, leaving nothing to surmise or questionable inference. General Motors Corp. vs. Gandy, 200 Cal. 284, 253 Pac. 137; Lorentz vs. Rousseau, 85 Cal. A. 1, 258 Pac. 690.

There is a well defined distinction between ratification of an agreement and facts constituting an estoppel of the parties thereto to deny its validity. Blair vs. Brown-Stone Oil Co., 168 Cal. 632, 143 Pac. 1022. See, generally, 50 A. L. R. 668, *et seq.*

[121] Speed vs. McCarthy, 181 U. S. 275, dism'g. 12 S. Dak. 7, 80 N. W. 135; see, also, Belcher Co. vs. Defarrari, 62 Cal. 162; Stinchfield vs. Gillis, 96 Cal. 36, 30 Pac. 839; see 159 U. S. 658.

[122] Hunt vs. Patchin, 35 Fed. 820. The provision of the mining law that if no adverse claim shall have been filed, it shall be assumed that the applicant is entitled to a patent, does not prevent a party from maintaining a bill in equity to have a patentee declared a trustee for the use of the plaintiff. Turner vs. Sawyer, 150 U. S. 578; Dueie vs. Ford, 138 U. S. 587, aff'g. 8 Mont. 233, 19 Pac. 414; Mery vs. Brodt, 121 Cal. 332, 53 Pac. 818; Fisher vs. Seymour, 23 Colo. 542, 49 Pac. 30. See, also, Davidson vs. Fraser, 36 Colo. 1, 84 Pac. 695; Allen vs. Blanche Co., 46 Colo. 199, 102 Pac. 1072; Thatcher vs. Darr, 27 Wyo. 452, 199 Pac. 933. When a complaint alleges that the plaintiff and his coowners as tenants in common are in possession and entitled to the possession of a certain claim, the action is for the benefit of all the cotenants. Nesbitt vs. Delmar's Co., 24 Nev. 273, 52 Pac. 609, 53 Pac. 178.

Where one of the cotenants of a mining claim owning an undivided one-half interest conveys the entire property to a stranger, and the other cotenant, having no knowledge thereof and not making any representations to the grantee respecting the character of his title, is not estopped to ass rt the same. Faubel vs. McFarland, 144 Cal. 717, 78 Pac. 261. See, also, Ellis vs. Treat, 236 Fed. 120.

[123] Bunker Hill Co. vs. Pascoe, 24 Utah 60, 66 Pac. 574; see c. c. 24 Utah 219, 66 Pac. 1064. A party who takes a lease of a mine of which a tunnel is claimed and held as a part, and under that lease enters into possession of both mine and tunnel, is estopped to deny the title of his lessors to the tunnel; and his assignee of the lease is equally estopped. Byrnes vs. Douglass, 23 Nev. 83, 42 Pac. 798. See Id. 83 Fed. 45.

For unauthorized lease of certain tailings deposits by the superintendent of a corporation and estoppel of latter to abrogate lease, see Bicknell vs. Austin Co., 62 Fed. 432.

In Lakin vs. Roberts, 54 Fed. 461, aff'g. 53 Fed. 333, it is said that in an action of ejectment by the patentee of a mining claim, where it appears from a stipulation agreed upon by both parties that certain defendants, after the date of the patent, paid a small sum as rent for the privilege of occupying the premises, and it does not appear under what circumstances, nor for what premises, nor for what time such payment was made, the relation of landlord and tenant is not established so as to estop defendants from denying the patentee's title.

§ 424. Sale and Transfer.

A locator of a mining claim, after a sale and transfer thereof, is estopped from denying that he was the owner of and entitled to the possession of such claim when transferred to his grantee, and he is also estopped from denying that he had located the claim in accordance with law.[121]

§ 425. Pleading Estoppel.

It is certain that estoppel by record and by deed must, in order to make them binding, be pleaded, if there be an opportunity, otherwise the party omitting to plead it waives the estoppel, and leaves the cause at large, on which the jury may find according to the truth.[125]

If a defendant relies on an estoppel *in pais* as a defense to the plaintiff's action, the facts constituting the estoppel must be specially pleaded.[126]

§ 426. Proof.

As a rule an equitable estoppel must be proved by oral testimony, hence the rule that certainty is essential to all estoppels *in pais*. The estoppel must be so established as to leave nothing to surmise or questionable inference. In other words, the representation, whether express or implied from the conduct of the party against whom the estoppel is sought to be invoked, must be such as to justify a prudent man in acting upon it, and must be plain and not doubtful.[127]

§ 427. Burden of Proof.

The burden of proving all the facts which constitute the essential ingredients of an equitable estoppel rests upon the party who sets it up.[128]

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[121] Belcher Co. vs. Defarrari, *supra* (120); Stinchfield vs. Gillis, *supra* (120); McDermott Co. vs. McDermott, 27 Mont. 143, 69 Pac. 715. As to effect of a quit claim deed see Ketchum Co. vs. Pleasant Valley Co., 257 Fed. 274; Biaggi vs. Ramont, 189 Cal. 675, 209 Pac. 892; see, also, 44 A. L. R. 1266, note.

"There is no statute, law, rule or regulation which prevents locators of mining claims from relocating their own claim, and including additional vacant ground, unclaimed by other parties, under a different name, and conveying it by the designation of the last name. In Weill vs. Lucerne Co., 11 Nev. 200, 210, where the facts were in some respects similar to the case in hand, there were two locations made by the same parties, known, respectively, as the 'Boston' and the 'Lucerne.' The Boston was located prior and the Lucerne subsequent to the location of the Waller's Defeat, owned by the plaintiff. The question was whether the defendant obtained any title to the Boston ground under a deed conveying the same by the name of the 'Lucerne Company's Claims.' The court said: 'If the Boston notice and the Lucerne notice were posted upon and claimed the same lode, a conveyance of his interest in the lode necessarily conveyed his interest in both locations, and it was immaterial by what particular name he designated it. Phillpotts vs. Blasdel, 8 Nev. 61.'" See, also, Lebanon Co. vs. Con. Republican Co., 6 Colo. 371.

The grantor of a water right is estopped to deny his title at time of grant. Roberts vs. Krafts, 141 Cal. 27, 74 Pac. 281.

[125] Freeman vs. Cooke, 2 Exch. 662, 154 Reprint 652, 11 E. R. C. 82; Mayhood vs. Letender, 4 Alaska 226; Blood vs. Mareuse, 38 Cal. 590; Chowchilla Bank vs. Nilmeier, *supra* (120); Christian vs. Eugene, 49 Or. 170, 89 Pac. 419.

[126] Harper vs. Hill, 159 Cal. 250, 113 Pac. 162; Wienke vs. Smith, 179 Cal. 220, 176 Pac. 42; Chowchilla Bank vs. Nilmeier, *supra*(120); *but see* Welland Co. vs. Hathaway, 8 Wend. 481; Krekeler vs. Ritter, 62 N. Y. 372; see, generally, 21 Cyc. 1242 and notes. Estoppel *in pais* does not constitute an element of abandonment, nor is it one of the circumstances from which an abandonment may be found. Marquart vs. Bradford, 43 Cal. 529.

[127] General Motors Corp. vs. Gandy, 200 Cal. 284, 253 Pac. 137.

[128] Id. Bliss vs. Waterbury, 27 S. Dak. 429, 131 N. W. 731.

CHAPTER XX.

ABANDONMENT.

§ 428. Abandonment.

Abandonment is a question of fact and intent[1] to be determined from all the evidence and circumstances of each case.[2] It must be proved by competent evidence before that fact can be found to exist,[3] unless conclusively presumed under the doctrine of laches.[3a] The burden of proof of the intent to abandon rests upon him who asserts it and

[1] Doe vs. Waterloo Co., 70 Fed. 458, aff'g. 55 Fed. 11; Justice Co. vs. Barclay, 82 Fed. 559; Ritter vs. Lynch, 123 Fed. 930; Peachy vs. Frisco Co., 204 Fed. 668; Peachy vs. Gaddis, 14 Ariz., 214, 127 Pac. 739; Wood vs. Ettiwanda Co., 147 Cal. 233, 81 Pac. 512; Daman vs. Hunt, 47 Cal. A. 286, 191 Pac. 376; Herbert vs. Graham, 72 Cal. A. 314, 237 Pac. 58; U. S. Borax Co. vs. Death Valley Co., 92 Cal. A. 724, 268 Pac. 937; Cohn vs. San Pedro Co., 103 Cal. A. 496, 284 Pac. 1051; Peoria Co. vs. Turner, 20 Colo. A. 474, 79 Pac. 915; Emerson vs. Akin, 26 Colo. A. 40, 140 Pac. 481; Seaboard Oil Co. vs. Commonwealth, 192 Ky., 620, 237 S. W. 48, and cases therein cited; Thomas vs. Bell, 66 Mont. 161, 213 Pac. 599; Tripp vs. Silver Dyke Co., 70 Mont. 120, 224 Pac. 274; Richen vs. Davis, 76 Or. 311, 148 Pac. 1130. See Utt vs. Frey, 106 Cal. 398, 39 Pac. 809, as to what will and will not constitute abandonment.

For an interesting statement of what constitutes abandonment and its historical application to early mining cases in California, see Inez Co. vs. Kinney, 46 Fed. 832. The decisions are uniform in holding that abandonment is a question of intention and that abandonment may be proved by the acts and conduct of the party alleged to have abandoned the property in controversy; Thornton vs. Phelan, 65 Cal. A. 480, 224 Pac. 259; Hulst vs. Doerstler, 11 S. Dak. 21, 75 NW. 270. See, also, U. S. vs. Brown, 15 Fed. (2d) 565, even against his express declarations to the contrary. Myers vs. Spooner, 55 Cal. 260.

If tools or implements are left upon the ground, this fact would be a circumstance negativing the idea of abandonment. Morenhaut vs. Wilson, 52 Cal. 267. The employment of a watchman, although his salary might not be considered in the computation of annual labor, may be evidence to negative abandonment and establish possession. Justice Co. vs. Barclay, *supra*, wherein it also is said: "The presence of the watchman shows or tends to show, the actual possession of the ground by the complainant, and that such possession was open and notorious." Lapse of time, absence from the ground, or failure to work it for any definite period, unaccompanied by other circumstances, are not evidence of abandonment. Valcalda vs. S. P. Mines, 86 Fed. 95, aff'g. 79 Fed. 886; Buffalo Zinc Co. vs. Crump, 70 Ark. 525, 69 SW. 576; Partridge vs. McKinney, 10 Cal. 183; McCarthy vs. Speed, 11 S. Dak. 362, 77 NW. 593, s. c. 181 U. S. 269.

Where upon surveying their claim locators discovered that their statutory location work was upon prior existing claim, and posted a notice that they abandoned such work, and then posted a new location notice stating in terms that the claim was relocated to better describe the *locus* of said lode claim, it was held there was no intention to abandon their rights under the prior location. Ford vs. Campbell, 29 Nev. 59, 92 Pac. 210.

[2] Crary vs. Dye, 208 U. S. 515; aff'g. 12 N. M. 460, 85 Pac. 1038; Lakin vs. Sierra Buttes Co., 25 Fed. 337; McCann vs. McMillan, 129 Cal. 350, 62 Pac. 31; Omar vs. Soper, 11 Colo. 380, 18 Pac. 443; Buckeye Co. vs. Powers, 43 Ida. 532, 257 Pac. 833; Weill vs. Lucerne Co., 11 Nev. 212; Marshall vs. Harney Peak Co., 1 S. Dak. 350, 47 N. W. 290; Myers vs. Spooner, *supra* (1); Peoria Co. vs. Turner, *supra* (1); McCarthy vs. Speed, *supra*.(1) The range of inquiry upon questions of abandonment of mining claims is very wide, for it generally is only from facts and circumstances that the truth is to be discovered, and both parties should be allowed to prove any fact or circumstances from which any aid for the solution of the question can be derived. Fortuna Co. vs. Miller, 29 Ariz. 104, 239 Pac. 792; Bell vs. Bed Rock Co., 36 Cal. 218.

In Crary vs. Dye, *supra*, it is said that acquiescence by a mine owner to an invalid judicial sale of his property does not constitute an abandonment by him and an election to accept the sale as a disposition of his property. There is no basis for the application of the doctrine of estoppel in such a case. For cases bearing upon this principle see Boggs vs. Merced Co., 14 Cal. 279, 367, 368; Staniford vs. Trombly, 181 Cal. 372, 186 Pac. 599; Jones vs. Coulter, 75 Cal. A. 550, 243 Pac. 487; 50 A. L. R. 717, note 1; 21 C. J. 126.

[3] Walton vs. Wild Goose Co., 123 Fed. 219; McCulloch vs. Murphy, 125 Fed. 150; Wailes vs. Davies, 158 Fed. 669.

[3a] Pioneer Co. vs. Pacific Co., 4 Alaska 463, and cases therein cited; Emerson vs. Kennedy Co., 169 Cal. 718, 147 Pac. 939.

the proof must be clear and convincing.[4] The courts are not agreed, however, as to whether or not abandonment may be proved in the absence of an allegation thereof.[5]

§ 429. Surrender of Rights.

Abandonment is a surrender of the claimant's right to the exclusive possession given him by the mining act[6] but, like forfeiture, (which, however, depends upon lapse of time[7]), it is not complete until another has appropriated the property.[8] To illustrate; the claimant's rights

[4] Wailes vs. Davies, *supra*(3); Loeser vs. Gardiner, 1 Alaska 641; Copper Co. vs. Kidder, 20 Ariz. 224, 179 Pac. 646; Buffalo Zinc Co. vs. Crump, *supra* (1); Coleman vs. Clements, 23 Cal. 245; Thornton vs. Phelan, *supra*(1); Nichols vs. McIntosh, 19 Colo. 22, 34 Pac. 278; Little Dorrit Co. vs. Arapahoe Co., 30 Colo. 431, 71 Pac. 389; Tripp vs. Silver Dyke Co., *supra* (1); Axiom Co. vs. White, 10 S. Dak. 198, 72 NW. 462; Sherlock vs. Leighton, 9 Wyo. 297, 63 Pac. 580; see Zerres vs. Vanina, 134 Fed. 610, aff'd. 150 Fed. 564; Cunningham vs. Pirrung, 9 Ariz. 288, 80 Pac. 329; Copper Queen Co. vs. Stratton, 17 Ariz. 127, 149 Pac. 389. For a qualification of the rule see Big Three Co. vs. Hamilton, 157 Cal. 130, 107 Pac. 301. For shifting of burden of proof see Little Dorrit and Sherlock-Leighton Cases, *supra*.

[5] See Cache Creek Co. vs. Brahenberg, 217 Fed. 240; Coleman vs. Clements, *supra* (4); Contreras vs. Merck, 131 Cal. 211, 63 Pac. 336; Harper vs. Hill, 159 Cal. 250, 113 Pac. 162; Hector Co. vs. Valley View Co., 28 Colo. 315, 64 Pac. 205; Duncan vs. Eagle Rock Co., 48 Colo. 569, 111 Pac. 588; Atkins vs. Hendree, 1 Ida. 95; Renshaw vs. Switzer, 6 Mont. 464, 13 Pac. 127; Bishop vs. Baisley, 28 Or. 119, 41 Pac. 936; Merchants Bank vs. McKeown, 60 Or. 325, 119 Pac. 334; see Johnson vs. Young, 18 Colo. 629, 34 Pac. 173. "In California the rule seems to be that an abandonment by plaintiff may be shown by defendant under a general denial, but that a forfeiture must specially be pleaded." Costigan Min. Law, p. 308, § 93, citing Willson vs. Cleaveland, 30 Cal. 192; Morenhaut vs. Wilson, 52 Cal. 263; Bell vs. Bed Rock Co., *supra* (2); Treyaskis vs. Peard, 111 Cal. 599, 44 Pac. 246.

[6] Black vs. Elkhorn Co., 163 U. S. 451, wherein the court said: "It can not be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had." U. S. vs. California Midway Oil Co., 259 Fed. 343. See U. S. Borax Co. vs. Death Valley Co., *supra* (1).

[7] Inez Co. vs. Kinney, *supra* (1); Valcalda vs. S. P. Mines, *supra* (1); Moon vs. Rollins, 36 Cal. 333; McCarthy vs. Speed, *supra* (2). It is immaterial to the question whether the annual expenditure has been made or not. Farrell vs. Lockhart, 210 U. S. 142, rev'g. 31 Utah 155, 86 Pac. 1077; Street vs. Delta Co., 42 Mont. 371, 112 Pac. 701. A location may be abandoned before it becomes subject to forfeiture. Navajo Indian Res. 30 L. D. 515; see Marshall vs. Harney Peak Co., 1 S. Dak. 365, 47 NW. 290.

In St. John vs. Kidd, 26 Cal. 271, the court said: "The term 'forfeiture' as used in our mining customs and codes, means the loss of a right to mine a particular piece of ground, previously acquired, by neglect or failure to comply with the rules and regulations of the bar or diggings in which the ground is situated, prescribing the acts which must be done in order to continue and keep alive that right after it has once been acquired. As a defense it is entirely distinct and separate from that of abandonment. It involves no question of intent, but rests entirely upon the mining rules and regulations, and involves only the question whether, in point of fact, those rules and regulations have been observed by the party seeking to maintain or perpetuate the right, regardless of what his intentions may have been; whereas the principal question involved in the defense of abandonment is one of intention. Was the ground left by the locator without any intention of returning, or making any future use of it? If so an abandonment has taken place upon common law principles independent of any mining rule or regulation, and the ground has become once more *publici juris* and open to the occupation of the next comer." See, also, McKay vs. McDougall, 25 Mont. 262, 64 Pac. 670.

In Power vs. Sla, 24 Mont. 252, 61 Pac. 471, it is said: "The plea of forfeiture is in the nature of a confession and avoidance. It admits a prior right in the plaintiff, which would have continued but for the entry and location by the defendant, which under the mining law has terminated it. * * * One who relies upon such a plea must set forth the facts upon which he relies to overturn the prior right of his adversary, and establish them by clear and convincing proof. * * * He assumes the burden of pleading and proving that the prior owner has done none of the acts which, under the statute, he may do to preserve his right." In a suit to determine an adverse claim to a mining location, it is sufficient in pleading a forfeiture of the rights of the plaintiff to aver that "all of the plaintiff's right to and in said claim became forfeited and the said claim and all of it became a part of the public domain, subject to location according to law as mineral land," and especially in connection with the further averment that the plaintiff had not performed the annual assessment work for a period of one year or more. Cache Creek Co. vs. Brahenberg, *supra*.[5]

[8] McCarty vs. Speed, *supra*(2); see McCormick vs. Baldwin, 104 Cal. 227, 37 Pac. 903; Emerson vs. McWhirter, 133 Cal. 510, 65 Pac. 1038, in error *sub nom.* Yosemite Co. vs. Emerson, 208 U. S. 21; Little Gunnell Co. vs. Kimber, Fed. Cas. 628; Florence-Rae Co. vs. Iowa Co., 105 Wash. 503, 178 Pac. 462. See, generally, U. S. vs. West, 30 Fed. (2d) 745, aff'd. 280 U. S. 306

may be preserved by a "resumption of labor" or, as a general rule, by relocation before adverse relocation,[9] except in Alaska.[10] Where a mining claim is embraced within governmental reserves, withdrawn lands or lands covered by the "Leasing Act" which have been created subsequent to the making of a valid mining location,[11] the law in relation to the resumption of labor is applicable.[12]

§ 430. What Constitutes Abandonment.

A mining claim may be abandoned by failure to do the required assessment work.[13] Abandonment becomes effective instantly [14] where there is a leaving of the claim without any intention of returning or making any further use of it;[15] and a subsequent purchaser of the claim acquires no title against a relocator.[16] Abandonment may be

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[9] Belk vs. Meagher, 104 U. S. 279; Justice Co. vs. Barclay, *supra* [1]; Fee vs. Durham, 121 Fed. 468; Willitt vs. Baker, 133 Fed. 937; Worthen vs. Sidway, 72 Ark. 215, 79 SW. 777; Belcher Co. vs. Defarrari, 62 Cal. 162; McCormick vs. Baldwin, *supra* [8]; Temescal Co. vs. Salcido, 137 Cal. 214, 69 Pac. 1010; Rohn vs. Iron Chief Co., 186 Cal. 703, 200 Pac. 648. Florence-Rae Co. vs. Kimbel, 85 Wash. 162, 147 Pac. 881; McCarthy vs. Speed, *supra* [2]; Warnock vs. DeWitt, 11 Utah 324, 40 Pac. 205, dis. In McDonald vs. McDonald, 16 Ariz. 103, 144 Pac. 950, it was held that assessment work performed upon mining claims after the expiration of the year for which the work was done, and after the claims had been relocated, is ineffective to restore the rights of the original locators.

The several California cases cited in this note dealing with the right to relocate locations made anterior to the enactment in the year 1909 of § 1426*s* of the California Civil Code, which, of course, is not retroactive and its force is not disturbed by the doctrine of those cases. That section reads as follows: "The failure or neglect of any locator of a mining claim to perform development work of the character, in the manner and within the time required by the laws of the United States, shall disqualify such locators from relocating the ground embraced in the original location or mining claim or any part thereof under the mining laws, within three years after the date of his original location and any attempted relocation thereof by any of the original locators shall render such location void." See, also, Montana Stats., 1907, p. 22. In Perley vs. Goar, 22 Ariz. 146, 195 Pac. 532, wherein relocation made by stepson of locator after failure of latter to do assessment work and transferred to him for one dollar was held valid. Honaker vs. Martin, 11 Mont. 91, 27 Pac. 397; see Golden Giant Co. vs. Hill, 27 N. M. 124, 198 Pac. 283.

[10] Thatcher vs. Brown, 190 Fed. 708; Ebner Co. vs. Alaska Co., 210 Fed. 599; see, also Chichagoff Co. vs. Alaska Handy Co., 45 Fed. (2d) 553.

[11] See Work vs. Braffet, 276 U. S. 560. U. S. vs. West, *supra* [8]; Navajo Indian Res., *supra* [7]; Kinney, 44 L. D. 580; Interstate Oil Corp., 50 L. D. 262; Krushnic, on rehearing, 52 L. D. 295; Metson vs. O'Connell, 52 L. D. 313; see, also, Hodgson vs. Midwest Oil Co., 17 Fed. (2d) 71, aff'g. 297 Fed. 273, distg'd. in U. S. vs. West, *supra*.[8]

[12] U. S. vs. West, *supra* [8].

[13] Donnelly vs. U. S., 228 U. S. 267; rehearing denied *Id.* 708; see Chambers vs. Harrington, 111 U. S. 353, aff'g. 3 Utah 94, 1 Pac. 362; Black vs. Elkhorn Co., *supra* [6]; Bradford vs. Morrison, 212 U. S. 394, aff'g. 10 Ariz. 214, 86 Pac. 6; U. S. vs. Hurst, 2 Fed. (2d) 73; Northmore vs. Simmons, 97 Fed. 386; Bell vs. Bed Rock Co., *supra* [2]; see Original Co. vs. Winthrop, 60 Cal. 631.

[14] Brown vs. Gurney, 201 U. S. 192, aff'g. 32 Colo. 472, 133 Pac. 357; Trevaskis vs. Peard, *supra* [5]; Root vs. Conlin, 65 Cal. A. 241, 223 Pac. 1023; Street vs. Delta Co., 42 Mont. 371, 112 Pac. 701; see McKay vs. McDougall, *supra* [7]; National Co. vs. Piccolo, 54 Wash. 617, 104 Pac. 129. Upon abandonment the ground immediately reverts to the public domain and may be located by another at once. Conn vs. Oberto, 32 Colo. 313, 76 Pac. 369; Oberto vs. Smith, 37 Colo. 21, 86, Pac. 86; Tripp vs. Silver Dyke Co., *supra*.[1]

[15] Harkrader vs. Carroll, 76 Fed. 474; Ritter vs. Lynch, *supra* [1]; Shank vs. Holmes, 15 Ariz. 229, 137 Pac. 871; Moffatt vs. Blue River Co., 33 Colo. 142, 80 Pac. 139; McKay vs. McDougall, *supra* [7]; Miller vs. Hamley, 31 Colo. 495, 74 Pac. 982; Street vs. Delta Co., *supra* [7]; Tripp vs. Silver Dyke Co., *supra* [1]; Davis vs. Dennis, 43 Wash. 54, 85 Pac. 1080. National Co. vs. Piccolo, *supra* [14]. When a miner gives up his claim and goes away from it without any intention of returning, and regardless of what may become of it, or who may appropriate it, an abandonment takes place. Farrell vs. Lockhart, *supra* [7]. See Goodrich vs. Mortimer, 44 Cal. A. 576, 186 Pac. 844. Where the appearance of a mining claim unmistakably indicates an abandonment of the premises for many years and no stakes or other monuments mark the boundaries, such evidence warrants the assumption that all possessory rights thereto have been relinquished and authorizes another location thereon. Strickland vs. Commercial Co., 55 Or. 48, 104 Pac. 965.

[16] Harkrader vs. Carroll, *supra* [15]; Badger Co. vs. Stockton Co., 139 Fed. 841; Bell vs. Bed Rock Co., *supra* [2]; Derry vs. Ross, 5 Colo. 295.

effected by verbal permission to relocate the claim in whole or in part [17] or by a written relinquishment of all rights to the location.[18]

§ 431. Transfer of Rights.

A conveyance, either before or after discovery within the claim, does not operate as an abandonment of the property.[19] However, it is well settled that until discovery the location of mining ground gives to the locator no rights against the government [20]; but, while the claimant complies with the law, federal, state and the local rules and regulations, he has the valuable right of possession against all intruders, and this right he can convey to another.[21] When the locator transfers his right of possession to another the land thereupon becomes subject to location by the latter, if he is qualified to make a location.[22] This right of possession without discovery is maintained only by a *bona fide* effort to make discovery and by actual possession.[23]

§ 432. Loss of Inchoate Rights.

If the occupancy be relaxed, or be merely incidental to something other than a diligent search for mineral, and another person enters peaceably, and not fraudulently nor clandestinely, and makes a mineral discovery the adverse location so made is valid and must be respected accordingly [24] as a complete possessory title vests as of the date of discovery.[25] As a general rule a husband may convey or abandon an unpatented mining claim free from dower right in the wife.[26]

§ 433. Abandonment May Be Partial or Entire.

An abandonment may be as to the whole or a part of the claim.[27] It

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[17] Conn vs. Oberto, *supra* (14); Oberto vs. Smith, *supra* (14); see Tyler Co. vs. Sweeney, 54 Fed. 284.

[18] Brown vs. Gurney, *supra* (14); Miller vs. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, aff'd. 197 U. S. 313.

[19] Union Oil Co. vs. Smith, 249 U. S. 347, aff'g. 166 Cal. 217, 135 Pac. 966; U. S. vs. Hurst, *supra* (13); Hodgson vs. Midwest Oil Co., *supra* (11); Richardson vs. McNulty, 24 Cal. 339; Miller vs. Chrisman, *supra* (18); Weed vs. Snook, 144 Cal. 439, 77 Pac. 1023; Merced Co. vs. Patterson, 153 Cal. 624, 122 Pac. 950; Id. 162 Cal. 358, 122 Pac. 950. See, generally, Butte Co. vs. Frank, 25 Mont. 344, 65 Pac. 1; see Sharkey vs. Candiani, 48 Or. 112, 85 Pac. 219; Conn vs. Oberto, *supra* (14); McAllister vs. Hutchinson, 12 N. M. 111, 75 Pac. 41; Black vs. Elkhorn Co., *supra*.(6) The rights of an owner of a mining claim are wholly divested by abandonment, and he has nothing thereafter to convey. Badger Co. vs. Stockton Co., *supra* (16); Harkrader vs. Carroll, *supra* (5); Bell vs. Bed Rock Co., *supra* (2); Derry vs. Ross, 5 Colo. 295; Mallett vs. Uncle Sam Co., 1 Nev. 118.

[20] U. S. vs. Rock Oil Co., 257 Fed. 333.

[21] St. Louis Co. vs. Kemp, 104 U. S. 651; St. Louis Co. vs. Montana Co. 171 U. S. 655; Union Oil Co. vs. Smith, *supra* (19); Rooney vs. Barnette, 200 Fed. 710; Con. Mutual Oil Co. vs. U. S., 245 Fed. 525; U. S. vs. Hurst, *supra* (19); Hodgson vs. Midwest Oil Co., *supra* (11); see Swanson vs. Kettler, 17 Ida. 321, 105 Pac. 1059, aff'd. 224 U. S. 180.

[22] Black vs. Elkhorn Co., *supra* (6); U. S. vs. Rock Oil Co., *supra*.(20)

[23] Erhardt vs. Boaro, 113 U. S. 527; Union Oil Co. vs. Smith, *supra* (19); Cole vs. Ralph, 252 US 294, rev'g. 249 Fed. 81; Rooney vs. Barnette, *supra* (21); Con. Mutual Oil Co. vs. U. S., *supra* (21); Hodgson vs. Midwest Oil Co., *supra* (11); Swanson vs. Kettler, *supra* (21); Weed vs. Snook, *supra* (19); Jose vs. Utley, 185 Cal. 656, 199 Pac. 1040; Sparks vs. Mount, 29 Wyo. 1, 207 Pac. 1099. See U. S. vs. Ruddock, 52. L. D. 313.

[24] Union Oil Co., vs. Smith, *supra* (19); Cole vs. Ralph, *supra* (23).

[25] See *supra*, note 23; Butte & S. Co., vs. Clark-Montana Co., 249 U. S. 12; aff'g. 248 Fed. 609, aff'g. 233 Fed. 547, *certiorari* denied, 247 U. S. 516.

[26] Black vs. Elkhorn Co., *supra* (6); McAllister vs. Hutchinson, *supra* (19).

[27] Black vs. Elkhorn Co., *supra* (6); Brown vs. Gurney, *supra* (14); Tyler Co. vs. Sweeney, *supra* (17); Last Chance Co. vs. Tyler, 61 Fed. 557; Dufresne vs. Northern Light Co., 2 Alaska 593; Murley vs. Ennis, 2 Colo. 300; Walsh vs. Kleinschmidt, 55 Mont. 57, 173 Pac. 549; Florence-Rae Co. vs. Iowa Co., *supra* (5); see, also, Trevaskis vs. Peard, *supra* (5); Harkrader vs. Carroll, *supra* (15).

may be made by all or one of the joint locators or owners[28] either by failure to perform the assessment work,[29] or to contribute thereto.[30]

§ 434. What Is Not Abandonment.

The relocation of an invalid location is not an abandonment nor forfeiture of the former location, even though attempted in the interest of the original locator.[31] Mere absence from the claim is not an abandonment where the claimant always asserted a right to the ground, and where there is no evidence of an intention to abandon the claim,[32] but the leaving being established, it is competent for the opposing party to show any acts explanatory of the leaving which tend to establish that it was not accompanied with an intent to return.[33] Failure to work the claim for any definite period, if unaccompanied by other circumstances, or mere lapse of time, do not constitute an abandonment. They merely are circumstances that may be considered in determining the question of abandonment.[34] Permitting other persons to complete a location for the benefit of all of them does not operate as an abandonment of any right of the original claimant.[35] An amended location is

[28] Badger Co. vs. Stockton Co., *supra* (16); Peachy vs. Frisco Co., *supra* (1); Dufresne vs. Northern Light Co., *supra* (27); Kinney vs. Fleming, *supra* (1); see, also, Sharkey vs. Candiani, *supra* (19). It has been held that an abandonment of an undivided interest in a mining claim by a joint owner is where he leaves the claim free to location by the next comer; that such an abandonment does not operate to transfer his interest to the other owners. Badger Co. vs. Stockton Co., *supra*. Worthen vs. Sidway, *supra* (9); Oroville Co. vs. Rayburn, 104 Wash. 137, 176 Pac. 15. It also has been held that such an abandonment does not work the destruction of the claim. Miller vs. Chrisman, *supra* (18). In still another case it was held that where a mining claim was located and possession held by one of the partners for the firm, the abandonment of the claim by the locating partner necessarily terminates the constructive possession of the other partner and leaves the ground open to adverse relocation. Lockhart vs. Johnson, 181 U. S. 529, aff'g. 9 N. M. 344, 50 Pac. 318. One cotenant can not abandon a mining claim, because he can not by any course of conduct destroy the interest of his coterant so that the claim reverts to the United States nor can his conduct inure to the benefit of the other cotenant. O'Hanlon vs. Ruby Gulch Co., 46 Mont. 65, 135 Pac. 913; 64 Mont. 318, 209 Pac. 1062. Where part of cotenants of mining claims abandoned them by relocating other claims covering the same ground, such abandonment did not affect the rights of the other cotenants whose interests remained unaffected by the abandonment; the former locations remaining valid and subsisting locations and relocations void. Lehman vs. Sutter, 60 Mont. 97, 198 Pac. 1100. It has also been held that such an abandonment does not work the destruction of the claim: Miller vs. Chrisman, supra.

[29] Little Gunnell Co. vs. Kimber, *supra* (8); Johnson vs. Young, *supra* (5); Miller vs. Chrisman, *supra* (18).

[30] The interest of a coowner who neglects or refuses to perform or contribute his proportion of the cost of the assessment work will become the property of his coowners when they make the required statutory expenditure and have "advertised out" such delinquent. Elder vs. Horseshoe Co., 194 U. S. 248, aff'g. 9 S. Dak. 636, 79 NW. 1060; Miller vs. Chrisman *supra* (18); see Guerin vs. American Co. 28 Ariz. 160; 236 Pac. 687; Badger Co. vs. Stockton Co., *supra* (16); Van Sice vs. Ibex Co. 173 Fed. 895; dis. 223 U. S. 712, *certiorari* denied, 215 U. S. 607; Faubel vs. McFarland, 144 Cal. 717, 78 Pac. 261.

[31] Berquist vs. W. Virginia Co., 18 Wyo. 253, 106 Pac. 673; see Peachy vs. Gaddis, *supra* (1); see Temescal Oil Co. vs. Salcido, *supra* (9); Weill vs. Lucerne Co., *supra* (2). See *supra* note 1.

[32] Justice Co. vs. Barclay, *supra* (1); Garrard vs. S. P. Mines, 82 Fed. 591, aff'd. 94 Fed. 983. The *animus revertendi* is the simple test. Valcalda vs. S. P. Mines, *supra* (1); Stone vs. Geyser Co., 52 Cal. 318.

[33] Bell vs. Bed Rock Co., *supra* (2); Keene vs. Cannovan, 21 Cal. 291; see Sweeney vs. Reilly, 42 Cal. 402.

[34] Valcalda vs. S. P. Mines, *supra* (1); Snyder vs. Colorado Co., 181 Fed. 68; Daman vs. Hunt, *supra* (1); McCarthy vs. Speed, *supra* (2). Harkrader vs. Carroll, *supra* (15), holds that a voluntary absence of nine years from a mining claim and without the exercise of any acts of ownership over it constitutes an abandonment. See Trevaskis vs. Peard, *supra*.(5) It does not involve an estoppel. Marquart vs. Bradford, 43 Cal. 526.

[35] Doe vs. Waterloo Co., *supra* (1). A vested title can not ordinarily be lost by abandonment unless there is satisfactory proof of an intention to abandon. Fisher vs. Crescent Co., ___ Tex. C. A. ___, 178 S. W. 905; Wisconsin Texas Co. vs. Clutter, ___ Tex. C. A. ___ 258 S.W. 265

not an abandonment of all rights under the original location.[36] One coowner attempting to exclude another coowner from the claim by a relocation does not thereby abandon the claim.[37] A part of a location intentionally excluded from an application for patent is not abandoned if the claimant retains possession of such part and makes the annual expenditure thereon[38]; nor does error in excluding a part of a claim from such an application operate as an abandonment thereof. It may be included in an amendment or resurvey.[39] Failure to file an adverse claim because of ignorance of an application for patent for an overlap is not evidence of intent to abandon the remainder of the claim.[40]

§ 435. Presumptions.

Where the appearance of a mining claim unmistakably indicates an abandonment of the premises for many years and no stakes or other monuments mark the boundaries such evidence warrants the assumption that all possessory rights thereto have been relinquished and authorizes another location.[41] The circumstances must be very strong to presume that the owner of the location has abandoned the title.[42] But the mere fact that a senior location had been made and that the statutory period for performing the annual assessment work had not expired when the second location was made would not conclusively establish that the location was a valid and subsisting one, nor prevent the initiation of rights in the ground by another locator, if, at the time of such location, there had been an actual abandonment of the senior location.[43] The presumption is that all ore bodies beneath the surface of an abandoned mining claim belong to the owner of the claim.[44]

§ 436. The Lavagnino Case.

The case of Lavagnino vs. Uhlig[45] was one of adverse proceedings against an applicant for patent. The question for decision was "Where

[36] Empire State Co. vs. Bunker Hill Co., 131 Fed. 603; dis. 200 U. S. 613; Thompson vs. Spray, 72 Cal. 528, 14 Pac. 182; Morrison vs. Regan, 8 Ida. 291, 67 Pac. 955. An amended location of a lode mining claim made for the purpose of correcting an error in the course of the vein, and in consequence of which the original side lines become end lines, does not operate as an abandoment of all rights under the original location, where such amended location expressly states that such is not the intention. If such new end lines do not entirely coincide with the original side lines, a court may treat as abandoned only so much of the original claim with its planes extended as lay outside the extended end-line planes of the amended location. Empire State Co. vs. Bunker Hill Co., *supra*; Hallack vs. Traber, 23 Colo. 14, 46 Pac. 110; Duncan vs. Fulton, 15 Colo. A. 140, 61 Pac. 244.

[37] Hulst vs. Doerstler, *supra* [1]; see Worthen vs. Sidway, *supra* [9]; Weill vs. Lucerne Co., *supra* [2]; Ford vs. Campbell, *supra* [1]. *Compare* Omar vs. Soper, *supra* [2].

[38] Miller vs. Hamley, 31 Colo. 495, 74 Pac. 980. Where the owners of a mining claim, after the ruling of the General Land Office holding for cancellation a portion of their claim, attempted to avoid the effect of such ruling, and failing, abandoned their application for a patent and elected to rely on their grant from the government under their location, complying with annual labor requirements and performing additional work on a portion of the claim for several years preceding a subsequent location, such conduct negatived any intention to abandon or surrender their claim to the public domain subjecting it to relocation. Peoria Co. vs. Turner, *supra* [1].

[39] Basin Co. vs. White, 22 Mont. 147, 55 Pac. 1049.

[40] Bingham Co. vs. Ute Co., 181 Fed. 748.

[41] Strickland vs. Commercial Co., *supra* [15]; *but see* Tripp vs. Silver Dyke Co., *supra* [1].

[42] Trotman vs. May, 33 Pa. St. 455. It is a general rule that abandonment will not be presumed. Tripp vs. Silver Dyke Co., *supra* [1]. See, also, Daman vs. Hunt, *supra* [1], and see *supra*, notes [1] and [3a].

[43] Farrell vs. Lockhart, *supra* [7].

[44] Stewart vs. Bourne, 218 Fed. 329, aff'd. 237 U. S. 350. See Utah Co. vs. Utah Co., 285 Fed. 250, *certiorari* denied, 261 U. S. 617.

[45] 198 U. S. 433, aff'g. 26 Utah 1, 71 Pac. 72.

there was a conflict of boundaries between a senior and junior location, and the senior location has been forfeited, has the person who made the relocation of such forfeited claim the right in adverse proceedings, to assail the title of the junior locator in respect to the conflict area which had previously existed between that location and the abandoned or forfeited claim.'' This question the court in the opinion answers in the negative. This ruling was ''qualified'' in the case of Farrell vs. Lockhart [46]; since which time the doctrine of the Lavagnino Case has not been regarded as an authority on the essential and vital proposition of the case.[47]

§ 437. Tunnel Locations.

Tunnel locators must use reasonable diligence in the prosecution of the tunnel work and a failure to prosecute the work thereon for six months will be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.[48]

§ 438. Test of Abandonment.

The question of abandonment can never arise except where there has been possession, and then the *animus revertendi* is the simple test. The inducement which keeps alive the purpose to return can not affect the decision of the question of abandonment.[49]

§ 439. Oil and Gas Leases.

Abandonment will be more readily found in cases of oil and gas leases than in most other instances.[50]

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[46] 210 U. S. 142. The Lavagnino Case was criticized in Montague vs. Labay, 2 Alaska 575; denied in Dufresne vs. Northern Light Co., *supra* (25); and explained in Swanson vs. Kettler, *supra* (21); see, also, Brown vs. Gurney, *supra* (14); Farrell vs. Lockhart, *supra* (7); Street vs. Delta Co., *supra*.(7)

[47] Swanson vs. Sears, 224 U. S. 180, aff'g. 17 Ida. 321, 105 Pac. 1059. See Costigan Min. Law, p. 312, § 95, note 60; Morrison's Mining Rights, (15th ed) p. 133; Nash vs. McNamara, 30 Nev. 140, 93 Pac. 405.

[48] 5 U. S. Comp. St., p. 5518, § 4619; Enterprise Co. vs. Rico-Aspen Co., 66 Fed. 206; David, C. M. L. 121; Fissure Co vs. Old Susan Co., 22 Utah 438, 63 Pac. 587; see Hunter, C. M. L. 222.

[49] Stone vs. Geyser Co., *supra* (32); Davis vs. Dennis, *supra* (15).

The question of abandonment is one of fact to be determined by the jury or the court, if the issues of fact are tried by the court, and the burden is upon the plaintiff to show that there was an intention to abandon the property. Latham vs. City of Los Angeles, 87 Cal. 518, 25 Pac. 673.

[50] Hall vs. Augur, 82 Cal. A. 594, 256 Pac. 232; Harris vs. Riggs, 63 Ind. A. 201, 112 N. E. 36, and cases therein cited.

See Forfeiture.

CHAPTER XXI.

ADVERSE CLAIMS.

§ 440. Character of Adverse Claim.

An adverse claim is a verified written statement showing the nature, boundaries, and extent of [1] the conflict with the premises sought to be patented by another person.

§ 441. Purpose of Adverse Claims.

The intention of the law in providing for adverse claims is to give an opportunity, where there is a possibility of conflicting claims, to have the controversy decided by a judicial tribunal before the rights of either party are foreclosed by the issuance of a patent.[2]

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[1] Rev. St. § 2326; 2 Mason's U. S. Code, p. 2237 § 30. See Conkling Co. vs. Silver King Co., 230 Fed. 559.

The publication of notice of an application for a patent for a mining claim is in the nature of a summons. It brings all adverse claimants into court though no supposed adversary is named in the notice; and on failure to assert their claims it is conclusively presumed that none exists. Gwillim vs. Donnellan, 115 U. S. 45; Deffeback vs. Hawke, 115 U. S. 405; Wight vs. Dubois, 21 Fed. 693; Hamilton vs. Southern Nevada Co., 33 Fed. 565; Golden Reward Co. vs. Buxton Co., 79 Fed. 873; U. S. vs. Devil's Den Oil Co., 236 Fed. 976, modified in 251 Fed. 548; see South End Co. vs. Tinney, 22 Nev. 19, 35 Pac. 89; 22 Nev. 221, 38 Pac. 401, aff'g. 134 Fed. 769.

In other words, if default is made by them, all adverse claims will be cut off, both valid and invalid. Lawson vs. U. S. Co., 207, U. S. 1.

But a protest or objection still may be filed in the land department. Wight vs. Dubois, *supra;* Poore vs. Kaufman, 44 Mont. 255, 119 Pac. 785.

"The statute as has been said, makes any and every person claiming an adverse interest a party to the proceeding for a patent and provides for ample notice. The notice so provided for is the equivalent of a summons in a judicial proceeding and he who fails to heed it, has no right to complain that his rights are concluded by his default and the issuance of the patent in pursuance of the application." Bunker Hill Co. vs. Empire State Co., 109 Fed. 546. In U. S. vs. Devil's Den Co., *supra*, it was said: "The notice required by statute of an application for a patent to a mining claim is intended and designed to cut off the rights of private claimants and not the government of the United States. It is given in order that all persons having adverse claims may be heard in opposition to the issuance of the patent. But (section 2325 RS) 'if no adverse claim shall have been filed it shall be presumed that no adverse claim exists, and thereafter no objection from third persons to the issuance of patent shall be heard except it be determined that the applicant has failed to comply with the terms of this chapter.'"

See § 457.

[2] Richmond Co. vs. Rose, 114 U. S. 584, aff'g. 17 Nev. 25, 27 Pac. 1195; Iron Co. vs. Campbell, 135 U. S. 286, rev'g. 17 Colo. 267, 29 Pac. 513; Creede Co. vs. Uinta Co., 196 U. S. 337, aff'g. 119, Fed. 164. "The purpose of the statute seems to be, that where there are two claimants to the same mine, neither of whom has yet acquired the title from the government, they shall bring their respective claims to the same property, in the manner prescribed in the statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the land department in determining which of these claimants shall have the patent, the final evidence of title, from the government." Iron Co. vs. Campbell, *supra*; Alaska Co. vs. Cincinnati-Alaska Co., 45 L. D. 333, 45 L. D. 344.

"There is no doubt that the object of these provisions of the act of congress is to require the conflicting claims of all parties to be adjusted before the patent issues, so far as that can be justly done at the time the application for patent is made. The proceedings are judicial in their character and bring all parties who have known existing adverse claims into court. If such parties stand by and in the absence of fraud or mistake permit the statutory time for filing claims to run without presenting their claims, their right so far as they might have been determined in such proceedings are forever lost." Enterprise Co. vs. Rico-Aspen Co., 66 Fed. 208, aff'd. 167 U. S. 108; Golden Reward Co. vs. Buxton, *supra*.[1]

An adverse claimant's rights to the premises in controversy must be limited to those existing at the time of filing his adverse. If he had no claim then, he will not be heard to assert a right to the premises in dispute by virtue of one brought into existence thereafter; otherwise, he would be permitted to assert title to the premises in controversy by virtue of rights other than those upon which his adverse is based. Healey vs. Rupp, 37 Colo. 25, 86 Pac. 1015. See, also, Chichagoff vs. Alaska Handy Co., 45 Fed. (2d) 553.

§ 442. Preliminary to Suit.

The filing of the adverse claim is the first step to be taken and the adverse claimant must stand or fall by the rights which he asserts therein, as the adverse suit must be based upon such asserted rights.[3] But neither the mining act nor public policy prevents a compromise and settlement of the dispute in any manner satisfactory to the parties even to granting to the adverse claimant an interest in or the right to all of the claim in dispute.[4]

§ 443. Absence of Adverse Claim.

If no adverse claim is filed during the sixty days period of newspaper publication the law assumes that the applicant is entitled to a patent, and third parties can not object except, to show that the applicant has not complied with the law.[5] In other words, by failure to adverse and assert his claim, an adverse claimant loses his title as against the United States.[6]

§ 444. Rights and Claims Not Waived.

Where an adverse claimant during the pendency of the adverse suit files an amended application for patent and obtains a patent thereunder for adjoining land, the obtaining of the patent does not operate as a waiver of his adverse claim.[7] An abandonment by the owner of the disputed territory subsequent to filing his adverse claim is not a waiver of such claim. The only party who can waive an adverse claim is the one who makes it.[8] The failure to file an adverse claim does not estop a tenant in common from maintaining an action to quiet his title to an undivided interest in such claim.[9] His interest also may be protected by a protest filed in the land office at any time before the issuance of patent,[10] or, after patent has issued by a suit to enforce a trust,[11] unless barred by laches.[12] Where an agent, trustee, or other person holding

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[3] Marshall Co. vs. Kirtley, 12 Colo. 414; 21 Pac. 518; Lancaster vs. Coale, 27 Colo. A. 495, 150 Pac. 821; Lily Co. vs. Kellogg, 27 Utah 115, 21 Pac. 518; see Chichagoff Co. vs. Alaska Handy Co., *supra* (2); Healy vs. Rupp, 38 L. D., 387; Wessler vs. Brankman, 64 Colo. 29, 170 Pac. 189.

[4] St. Louis Co. vs. Montana Co. 171 U. S. 655, aff'g. 20 Mont. 394, 51 Pac. 824; see Ducie vs. Ford, 138 U. S. 587, aff'g. 8 Mont. 233, 19 Pac. 414. Stevens vs. McChrystal, 150 Fed. 85; Montana Co. vs. St. Louis Co., 168 Fed. 514, and Montana Co. vs. St. Louis Co. 183 Fed. 51; *certiorari* denied 220 U. S. 611; Murray vs. White, 42 Mont. 423, 113 Pac. 754.

Where the owners of conflicting or over-lapping claims have compromised and settled all such conflicts and have agreed upon their several lines, in a subsequent application for a patent by one of the claimants, the other is not bound to file an adverse claim or contest his right in a judicial proceeding, but may rely upon his contract of compromise, and he, or his grantees or assigns, may enforce the rights conceded by such compromise agreement. St. Louis Co. vs. Montana Co. *supra*.

[5] Gwillim vs. Donnellan, *supra* (1); Del Monte Co. vs. Last Chance Co., 171 U. S. 72; see, also, Lavagnino vs. Uhlig, 198 U. S. 433, see § 436; International Co., 45 L. D. 162; Healey vs. Rupp, 37 Colo. 25, 86 Pac. 1015.

Although the applicant is a subsequent locator, if the prior locator does not file an adverse claim and litigate it in the proper court, the law directs that patent shall issue to the applicant. A protest filed in the land office by the prior locator would be ignored. Clark-Montana Co. vs. Butte & S. Co., 233 Fed. 556, aff'd. 248 Fed. 609, aff'd. 249 U. S. 12; *certiorari* denied 247 U. S. 516.

[6] Gwillim vs. Donnellan, *supra* (1); Dahl vs. Raunheim, 132 U. S. 260, aff'g. 6 Mont. 167, 9 Pac. 892; see Neilson vs. Champagne Co., 119 Fed. 125.

[7] Mackay vs. Fox, 121 Fed. 487; dis'g. Last Chance Co. vs. Tyler Co., 157 U. S. 683, rev'g. 61 Fed. 557.

[8] See *supra*, note 7. Thomas vs. Elling, 25 L. D. 495; 26 L. D. 220; Coleman vs. Homestake Co., 30 L. D. 364; Ritter, 37 L. D. 417.

[9] Butte Co. vs. Cobban, 13 Mont. 351, 34 Pac. 24.

[10] Jurisdiction, 35 L. D. 565; see U. S. vs. Smith, 181 Fed. 545.

[11] Turner vs. Sawyer, 150 U. S. 587; Malaby vs. Rice, 15 Colo. A. 464, 62 Pac. 228; Brundy vs. Mayfield, 15 Mont. 201, 38 Pac. 1067; O'Hanlon vs. Ruby Gulch Co., 46 Mont. 65, 135 Pac. 913, 64 Mont. 318, 209 Pac. 1062.

[12] Patterson vs. Hewitt, 195 U. S. 309; see, also, Gildensleeve vs. New Mexico Co., 161 U. S. 573; Mason vs. McFadden, 298 Fed. 384; Akley vs. Bassett, 189 Cal. 625, 209 Pac. 576. See, generally, Taylor Co. vs. Salt Creek Oil Co., 285 Fed. 532.

a confidential relation with the locator or owner of a mining claim, attempts in violation of such relation, to relocate and obtain patent for such claim, the locator or his grantee is not required to adverse the proceedings, but may after patent issues assert his rights in a court of justice.[13] An applicant for patent is not required, in order to preserve his rights, to file an adverse claim against a subsequent applicant for the same ground while his own application is pending in the land office.[14] An owner in fee need not file an adverse claim nor commence suit theron.[15].

§ 445. Adverse Claims Limited.

An adverse claim is limited to the determination of surface conflicts arising from independent conflicting locations of the same ground by adverse mineral claimants and does not cover controversies between coowners and persons claiming under the same location.[16] Hence, an adverse claim should not be filed as to conflicts between mineral and non-mineral claimants.[17] It has been held, however, that a mill-site[18] or a town lot[19] conflicting with a mining claim may be made the subject of adversary proceedings.

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[13] Turner vs. Sawyer, *supra* (11); Lockhart vs. Johnson, 181 U. S. 530, aff'g. 9 N. M. 344, 50 Pac. 318; see Lockhart vs. Leeds, 195 U. S. 433; rev'g. 10 N. M. 568, 63 Pac. 48; Lakin vs. Sierra Buttes Co., 25 Fed. 337; Hunt vs. Patchin, 35 Fed. 815; Stevens vs. Grand Central Co., 133 Fed. 28, Nowell vs. McBride, 162 Fed. 432; *certiorari* denied 215 U. S. 602; Mills vs. Hart, 24 Colo. 508, 62 Pac. 680; Ballard vs. Golob, 34 Colo. 417, 83 Pac. 376.

[14] Rose vs. Richmond Co., 17 Nev. 67, 27 Pac 1105, aff'd. 114 U. S. 584; Owers vs. Killoran, 29 L. D. 160; Steel vs. Gold Lead Co., 18 Nev. 88, 1 Pac. 448.

[15] Bennett vs. Harkrader, 158 U. S. 441, aff'g. 1 Alaska 785; Iron Co. vs. Campbell, *supra* (2); see *infra* note 25.

[16] Turner vs. Sawyer, *supra* (11); Creede Co. vs. Uinta Co., *supra* (2); Lawson vs. U. S. Co., *supra* (1); Stevens vs. Grand Central Co., 133 Fed. 31, dis. 178 Fed. 1004; Low vs. Katalla Co., 40 L. D. 534; Providence Co. vs. Burke, 6 Ariz. 323, 57 Pac. 641; Champion Co. vs. Con. Wyoming Co., 75 Cal. 78, 16 Pac. 513; see Con. Wyoming Co. vs. Champion Co., 63 Fed. 540. Swanson vs. Kettler, 17 Ida. 321, 105 Pac. 1059, aff'd., 224 U. S. 180. Hickey vs. Anaconda Co., 33 Mont. 46, 81 Pac. 811. The conflict must exist during the period of publication. Enterprise Co. vs. Rico-Aspen Co., 167 U. S. 108, aff'g. 66 Fed. 200; Healey vs. Rupp, *supra* (3); Poore vs. Kaufman, *supra* (1). An adverse claim must allege a surface conflict. New York Co. vs. Rocky Bar Co., 6 L. D. 318; Champion Co. vs. Con. Wyoming Co., *supra*. "Questions as to the character of the land, whether mineral or not, can not be raised by the filing of an adverse claim or proceedings thereon, as the question in dispute on an adverse claim must always be tried by the courts, and the land office has the exclusive right to determine the character of the land owned by the government." Citing 27 Cyc. 604 (b); Wright vs. Hartville, 13 Wyo. 497, 81 Pac. 649; Steel vs. St. Louis Co., 106 U. S. 447; see, also, South End Co. vs. Tinney, *supra* (1); Iba vs. Central Ass'n., 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20. See, also, Nevada Ex. Co. vs. Spriggs, 41 Utah 171, 124 Pac. 770; *but see* San Francisco Co. vs. Duffield, 201 Fed. 834, see 205 Fed. 480.

"The principle of the Lawson Case is that, if to a patent application there is not filed and in court tried and determined, an adverse claim, the patent proceedings decide nothing save that the applicant is entitled to a patent for the surface area applied for. That is the decision, though the court proceeded to fortify it by elaboration that might confuse. The land department does not determine nor try priorities. It has no jurisdiction to do so farther than that entry made and patent issued by it is an implied if not express, conclusive determination that to the surface area entered and patented, the patentee has priority." Clark-Montana Co. vs. Butte & S. Co., *supra* (5). To same effect, Last Chance Co. vs. Tyler Co., 61 Fed. 565, aff'd. 157 U. S. 683; Star Co. vs. Federal Co., 265 Fed. 881; *certiorari* denied, 254 U. S. 651.

Possibly an adverse will lie where the same land is claimed by different parties under different laws. Wight vs. Dubois, *supra* (1).

[17] Richmond Co. vs. Rose, *supra* (1); Iron Silver Co. vs. Campbell, *supra* (2); Creede Co. vs. Uinta Co., *supra* (2); Powell vs. Ferguson, 23 L. D. 173; Ryan vs. Granite Hill Co., 29 L. D. 522; Grand Canyon Co. vs. Cameron, 35 L. D. 495, criticizing Bonner vs. Meikle, 82 Fed. 697, and Young vs. Goldsteen, 97 Fed. 303; Helena Co. vs. Dailey, 36 L. D. 144.

[18] Durgan vs. Redding, 103 Fed. 914; Ebner Co. vs. Hallum, 47 L. D. 32. Cleary vs. Skiffich, 28 Colo. 362, 65 Pac. 59. That a protest filed in the land-office is sufficient, see Helena Co. vs. Dailey, *supra* (18); Low vs. Katalla Co., *supra* (16); see Snyder vs. Waller, 25 L. D. 7.

[19] Young vs. Goldsteen, *supra* (17); see Bonner vs. Meikle, *supra* (17); see Behrends vs. Goldstein, 1 Alaska 518.

§ 446. Subsurface Rights.

The intersection of veins or lodes does not give rise to an adverse claim within the meaning of that term as employed in the public land laws.[20] A possible union of veins or lodes underneath the surface can not be foreshadowed at the time an application for patent is made, and such subsequent arising conditions must be adjusted by reference to surface apex ownership and priority of location not involving surface conflict.[21] A mere inchoate right or a purely speculative matter as to whether a vein or lode would be discovered in a tunnel and thereby delay the surface owner from securing a patent, upon a mere possibility which might never ripen into a fact are not proper subjects of an adverse claim.[22]

§ 447. What Claims Should Not Adverse.

An adverse claim should not be filed to settle the character of the land as to whether it be mineral or not mineral, as that question naturally, but not exclusively, is within the jurisdiction of the land department,[23] nor to controversies between coowners,[24] nor as against an agent, trustee or other person holding a confidential relationship with the owner of a mining claim, who, in violation of such relationship, attempts to obtain a patent for such claim.[25] The interest of the coowner or of the trustor may be either protected by a protest filed in the land office before the issuance of patent [26] or, after patent issues, by asserting his rights in a

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[20] Lee vs. Stahl, 13 Colo. 174, 22 Pac. 436, aff'g. 9 Colo. 406, 11 Pac. 77; Hickey vs. Anaconda Co., *supra* (16); see Champion Co. vs. Con. Wyoming Co., *supra*.(16)

[21] Lawson vs. U. S. Co., *supra* (1); Keely vs. Ophir Co., 169 Fed. 601; Clark-Montana Co., vs. Butte & S. Co., *supra* (5); Star Co. vs. Federal Co., *supra* (16); Last Chance Co. vs. Tyler Co., *supra*.(16)

[22] Enterprise Co. vs. Rico-Aspen Co., *supra*.(16) In Creede Co. vs. Uinta Co., *supra* (2) the court with reference to whether or not the owner of a tunnel running directly through the ground of the applicant for lode patent was called upon to adverse said: "Whatever might be the propriety or advantage of such action, the statute does not require it," and distinguishes the case of Enterprise Co. vs. Rico-Aspen Co., *supra*, and, after reviewing the authorities, further said: "It would seem that whatever the propriety or advantage of an adverse suit, one can not be adjudged necessary when congress has not specifically required it. Until the discovery of a lode or vein within the tunnel, its owner has only a possibility. He is like an explorer on the surface. Adverse proceedings are called for only when one mineral claimant contests the right of another mineral claimant."

See § 1139.

[23] Burke vs. S. P. R. Co., 234 U. S. 669; *compare* Dunbar Co. vs. Utah Co., 17 Fed. (2d) 351; Cameron vs. U. S., 252 U. S. 450, aff'g. 250 Fed. 943. See U. S. vs. Schultz, 31 Fed. (2d) 764; Wight vs. Dubois, *supra* (1); Bunker Hill vs. Empire State Co., *supra* (1); see Batterton vs. Douglas Co., 20 Ida. 763, 120 Pac. 827; *but see* San Francisco Co. vs. Duffield, 201 Fed. 834, overruling in effect Duffield vs. San Francisco Co., 198 Fed. 942; approved in Duffield vs. San Francisco Co., 205 Fed. 480; Cragie vs. Roberts, 6 Cal. A. 309, 92 Pac. 47.

[24] Stevens vs. Grand Central Co., 133 Fed. 28; Ritter, *supra* (9); Low vs. Katalla Co., *supra* (16); Mills vs. Hart, *supra* (13); Brundy vs. Mayhew, *supra* (11); Malaby vs. Rice, *supra* (11); O'Hanlon vs. Ruby Gulch Co., 64 Mont. 318, 209 Pac. 1062.

The undivided interest of a coowner in a mining location is not an adverse claim as contemplated by the mining law and the coowner is not required to file an adverse claim in case of an application by the other coowners for patent for the entire claim. If a patent is issued to the remaining coowners they will hold the title in trust for such unrepresented coowner. Turner vs. Sawyer, *supra*.(11)

[25] Turner vs. Sawyer, *supra* (11); see Lakin vs. Sierra Buttes Co., *supra* (13); Hunt vs. Patchin, *supra* (13); Thompson vs. Burke, 2 Alaska 253; O'Hanlon vs. Ruby Gulch Co., *supra* (11); Argentine Co. vs. Benedict, 18 Utah, 183, 55 Pac. 559. See Nowell vs. McBride, *supra*.(13)

[26] Min. Regs. par. 53; see O'Hanlon vs. Ruby Gulch Co., *supra*.(11) That no *equitable* right is lost by failure to file an "adverse" see Turner vs. Sawyer, *supra* (11); Merv vs. Brodt, 121 Cal. 322, 53 Pac. 818; Rockwell vs. Graham, 9 Colo. 36, 10 Pac. 284; Butte Co. vs. Frank, 25 Mont. 344, 65 Pac. 1; and see Grand Canyon Co. vs. Cameron, 35 L. D. 495; Ritter, *supra*.(10) That a coowner may adverse but need not do so, see Turner vs. Sawyer, *supra* (11); Butte Co. vs. Cobban, 18 Mont. 351, 34 Pac. 24; Davidson vs. Fraser, 36 Colo. 1, 84 Pac. 695; *but see* Malaby vs. Rice, *supra*.(11)

court of justice.[27] An adverse claim need not be filed by a mineral claimant whose application has been duly allowed as against any subsequent application for the land so entered and a failure to do so forfeits no rights,[28] nor where the party owns the fee in a mining claim,[29] nor by a claimant of a valid mining claim against an application for patent for a townsite,[30] nor by a tunnel-site claimant when his rights at the time of the application for patent are contingent and intangible,[31] nor where the conflicting and overlapping claimants have previously compromised and settled their conflicting rights,[32] nor can conflicting adverse rights be set up to defeat an application for patent in the absence of an alleged surface conflict.[33] An adverse claim need not be filed by a lien claimant,[34] a mortgagee[35] or a judgment creditor,[36] and should not be filed by one having merely an easement over a mining claim, as, for instance, an extralateral right.[37]

§ 448. Time of Filing.

The adverse claim must be filed in the local land office within the sixty days period of newspaper publication[38] or it is assumed that none exists.[39]

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[27] See *supra*, note 25; see, also, Butterfield vs. Nogales Co., 12 Ariz. 55, 95 Pac. 182; Sussenbach vs. Bank, 5 Dak. 477, 41 N. W. 662, dis. 149 U. S. 787. McCarthy vs. Speed, 11 S. Dak. 269; 77 N. W. 590, 12 S. Dak. 7; 80 N. W. 135; dis. 181 U. S. 269. That the right to maintain the action may be lost by laches, see O'Hanlon vs. Ruby Gulch Co., *supra*.[(24)]

[28] Owers vs. Killoran, *supra*[(14)]; see Iron Co. vs. Campbell, *supra*.[(2)]

[29] See *supra*, note 15.

[30] Silver Bow Co. vs. Clark, 5 Mont. 417, 5 Pac. 570; see Iron Co. vs. Campbell, *supra*[(2)]; Low vs. Katalla Co., *supra*[(16)]; see, generally, Bonner vs. Meikle, *supra*[(17)]; Young vs. Goldsteen, *supra*[(19)]; Smoke House Lode, 4 L. D. 555; Butte City Smoke House Lode Cases, 6 Mont. 197, 12 Pac. 858, dis. 140 U. S. 700.

[31] Creede Co. vs. Uinta Co., *supra*[(2)]; see Enterprise Co. vs. Rico-Aspen Co., *supra*[(2)]; see, also, Back vs. Sierra Nevada Co., 2 Ida. 420, 17 Pac. 83; Hope Co. vs. Brown, 11 Mont. 370, 28 Pac. 732.

[32] See *supra*, note 1. Specific performance of such an agreement will be enforced by the courts. St. Louis Co. vs. Montana Co., *supra*[(11)]; Lawson vs. U. S. Co., *supra*.[(1)]

[33] See *supra*, note 21. The omission of a "known lode" from an application for a placer patent negatives the necessity of an adverse claim. Noyes vs. Mantle, 127 U. S. 348; Reynolds vs. Iron Co., 116 U. S. 687; Iron Co. vs. Mike & Starr Co., U. S. 430.

[34] Butte Co. vs. Frank, *supra*.[(26)] See Hamilton vs. Southern Nevada Co., *supra*[(1)]; *but see* Turner vs. Sawyer, *supra*.[(11)]

[35] See Rev. St. § 2332.

[36] Butte Co. vs. Frank, *supra*.[(26)]

[37] New York Co. vs. Rocky Bar Co., *supra*.[(10)] See Lawson vs. U. S. Co., *supra*.[(1)]

[38] South End Co. vs. Piney, *supra*.[(1)]

[39] See *supra*, notes 1 and 5. Within thirty days after filing the adverse claim, the adverse claimant must commence his suit in a court of competent jurisdiction to determine the rights asserted in his adverse claim. Such suit must be prosecuted with reasonable diligence to final judgment; and a failure to do so shall be a waiver of the adverse claim. El Paso Co. vs. McKnight, 233 U. S. 256, rev'g. 16 N. M. 721; 120 Pac. 694; Mason vs. Washington-Butte Co., 214 Fed. 35; Petit vs. Buffalo Co., 9 L. D. 565; Bradstreet vs. Rehm, 21 L. D. 30; Dufresne vs. Northern Light Co., 2 Alaska 596. Where a suit is not entered on an adverse claim within the prescribed time, such claim is by force of the statute waived and is not longer effective to stay the patent proceedings, and this waiver becomes operative immediately upon the expiration of the thirtieth day, and any proceedings thereafter upon the adverse claim are without authority of law and can not affect the rights of the applicant for patent. Chichagoff Co. vs. Alaska Handy Co., *supra*[(2)]. Madison Placer Claim, 35 L. D. 552; Gypsum Placer, 37 L. D. 484; International Co., *supra*[(5)]; Corning Tunnel Co., 4 Colo. 507. See Steves vs. Carson, 42 Fed. 821; Round Mt. Co. vs. Round Mt. Co., 36 Nev., 543; 138 Pac. 71, rev'g. 35 Nev. 392, 129 Pac. 308. Where a suit is not commenced within the time required the application for patent will be taken up for final action in its regular order in the land department as though no adverse claim had been filed. Nettie Lode vs. Texas Lode, 14 L. D. 184; Catron vs. Lewisohn, 23 L. D. 23. See El Paso Co. vs. McKnight, *supra*. Failure to prosecute an adverse claim or in other manner assert a right against a known pending application is conclusive as against the existence of such right. Nichols vs. Becker, 11 L. D. 8.

§ 449. Alaskan Provision.

In Alaska the time to file an adverse claim is extended to eight months after the period of publication within which to file the adverse claim and to sixty days after such filing within which to commence the adverse suit.[40]

§ 450. Computation of Time.

In computing time for a published notice of intention to apply for a patent the first day of publication should be excluded and the last day included.[41] If the sixtieth day falls upon either a Sunday or a holiday, an adverse claim may be filed on the next succeeding business day.[42] An adverse claim or other paper can not be received nor accepted by the local land officers outside of the office nor after office hours (4:30 p.m.), even upon the sixtieth day.[43] Though publication of notice of application for patent in a weekly newspaper must cover sixty-three days, an adverse claim must be filed during the first sixty days thereof.[44]

§ 451. No Enlargement of Time.

The time for filing is not enlarged by the fact of excessive newspaper publication [45]; not by a misstatement therein as to the termination of such period.[46] The land department has no authority to extend the period of publication [47] and the receipt by the local land officers of an adverse claim after the time fixed by law is without legal effect.[48]

§ 452. Effect of Filing Adverse Claim.

When the adverse claim is filed within the statutory period, it suspends all proceedings in the land office except the newspaper publication, the posting upon the claim and the filing of proof of both thereof in such office.[49] This suspension continues until the contro-

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[40] 5 U. S. Comp. St. p. 6025, § 5053.

[41] Bonesell vs. McNider, 13 L. D. 286. Ledger Lode, 16 L. D. 101.

[42] Rosseau, 47 L. D. 590; overruling Holman vs. Central Co., 34 L. D. 568, basing its action on authority of Monroe Co. vs. Becker, 147 U. S. 47, holding: "Where an act is to be performed within a certain number of days, and the last day falls on Sunday, the person charged with the performance of the act has the following day to comply with the obligation. Endlich on Statutes, § 393; Salter vs. Burt, 20 Wend. 205; Hammon vs. American Life Ins. Co., 10 Gray 306." See, also, Street vs. U. S., 133 U. S. 306, declaring that Sunday is a *dies non* and that "a power that may be exercised up to and including a given day of the month may, generally, when that happens to be a Sunday, be exercised on the succeeding day;" *but see* Waterhouse vs. Scott, 13 L. D. 718.

[43] Instructions, 49 L. D. 326.

[44] Ledger Lode, *supra* [42]; overruling Miner vs. Mariott, 2 L. D. 709. See *infra*, note 46.

[45] Draper vs. Wells, 25 L. D. 556.

[46] Bonesell vs. McNider, *supra*.[41] The fact that the expiration of the period of publication erroneously is stated in a footnote appended to the published notice of application for a mining patent, will not excuse an adverse claimant from filing his adverse within the period of sixty days fixed by statute. Draper vs. Wells, *supra* [45]; see *supra*, notes, 43 and 44.

[47] Nettie Lode vs. Texas Lode, *supra*.[39]

[48] Id., *but see* Tilden vs. Intervenor Co., 1 L. D. 572, holding that a temporary suspension of business within the local land office may, however, operate as an extension of the time.

See § 472.

[49] Richmond Co. vs. Rose, *supra*.[2]; Gwillim vs. Donnellan, *supra*.[1]; Enterprise Co. vs. Rico-Aspen Co., *supra*.[2]; Gillis vs. Downey, *supra*,[28]; Bunker Hill Co. vs. Empire Co., *supra* [1]; Tonopah Co. vs. Douglass, 123 Fed. 936; Marburg Lode, 30 L. D. 209; Davis vs. McDonald, 33 L. D. 641; Richardson vs. Seafoam Corp., 52 L. D. 476; Upton vs. Santa Rita Co., 14 N. M. 96, 89 Pac. 275; see Last Chance Co. vs. Tyler Co., *supra*.[C] See Mackay vs. Fox, *supra*.[C]

versy is determined by a court of competent jurisdiction or is adjusted between the parties thereto[50] or the adverse claim is waived[51] or dismissed.[52] The land office has no jurisdiction to issue a register's receipt to the applicant for patent during the pendency of the suit in support of an adverse claim.[53]

§ 453. Waiver of Adverse Claim.

Waiver of the adverse claim may be by failure to commence suit within the thirty day period required by law, or by documentary evidence of waiver or settlement filed in the proper land office.[54] If no adverse claim is filed it is conclusively presumed that none exists and that the applicant is entitled to a patent and deprives an adverse claimant of all remedies except those which a court of equity might allow to be urged against a judgment at law.[55] But this presumption has nothing to do with adverse claims initiated subsequently to the time and which could not therefore have been presented to the land office during the period of newspaper publication.[56]

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[50] Last Chance Co. vs. Tyler, *supra* (7); Warnekros vs. Cowan, 13 Ariz. 42, 108 Pac. 238.

[51] See *supra* note 49.

[52] Kannaugh vs. Quartette Co., 16 Colo. 341, 27 Pac. 245; Carnahan vs. Connolly, 17 Colo. A. 98, 68 Pac. 1126, dis. 187 U. S. 636; see, also, U. S. vs. Marshall Co., 129 U. S. 579; Doon vs. Tesh, 131 Cal. 406, 63 Pac. 764; Deno vs Griffin, 20 Nev. 249, 20 Pac. 308.

[53] Deno vs. Griffin, *supra* (52); Deeney vs. Mineral Creek Co., 11 N. M. 279, 67 Pac. 742.

[54] Richmond Co. vs. Rose, *supra* (2); Mackay vs. Fox, *supra*.(7)

Mr. Lindley, in his work on Mines, Vol. 3 (3d ed.), p. 1873, § 766, says:

"An adverse claim may be waived, (1) by failure to file it within the statutory period. (2) By a voluntary dismissal of it in the land-office prior to the commencement of the action. Secretary Lamar ruled that this might also be done after the commencement of the action and without entertaining a discontinuance in the court. (3) By a transfer to the applicant of the interests of the adverse claimant. (4) By a dismissal of the action instituted in support of it."

See Richmond Co. vs. Rose, *supra* (2); Woods vs. Holden, 26 L. D. 198; International Co., *supra* (5); Cuenin vs. Chloride Co., 57 Colo. 320; 141 Pac. 463. As to evidence of dismissal required by the land-office, see Min. Regs., pars. 85, 86, 87 and 88. In Star Co. vs. Federal Co., *supra*,(16) it was held that failure to file adverse proceedings against an application for patent for a lode mining claim by possessor of another conflicting claim with the surface of the former claim creates no presumption as to priority of discovery.

[55] Golden Reward Co. vs. Buxton Co., *supra* (1); Burnside vs. O'Connor, 30 L. D. 70; Lily Co. vs. Kellogg, *supra* (3); see Dahl vs. Raunheim, *supra* (6); Hamilton vs. Southern Nevada Co., *supra*.(1) The decision of the Secretary of the Interior that publication of application for mining patent was made in proper newspaper is one of mixed law and fact and binding in court in a suit to quiet title by one who had not advertised the application for patent. Murphy vs. Howard Co., 28 Ariz. 42, 253 Pac. 147. A failure to file an adverse claim within the time fixed by law operates as a waiver of all rights, that were the proper subject of such claim, and the issuance of a patent on a regular application after due notice is equivalent to a determination by the United States in an adversary proceeding, to which the owner of such adverse right is in contemplation of law a party. That the applicant's and patentee's rights were superior and those which might have been asserted by the holder of the adverse title were valueless; and, in the absence of such adverse claim, all matters which might have been tried under the adverse proceedings are treated as adjudicated in favor of the applicant, and all controversies touching the same are held as fully settled and disposed of as though judgment had been regularly rendered in an action on the adverse claim. Round Mt. Co. vs. Round Mt. Co., *supra*.(39)

[56] Chichagoff Co. vs. Alaska Handy Co., *supra* (2); Poore vs. Kaufman, *supra*.(1); Wolenberg (on rehearing), 29 L. D. 488; Cleveland vs. Eureka Co., 31 L. D. 69; see Hamilton vs. Southern Nevada Co., *supra* (1); Lily Co. vs. Kellogg, *supra* (3); Gillis vs. Downey, 85 Fed. 489. The fact that the sixty days prescribed for publication of notice expired before the filing of an adverse claim has no application to a case where the adverse claim did not arise until after the expiration of the sixty-day limit and where the application had lain dormant for a number of years and the applicant had neither paid the purchase money nor done the required work each year pending the application. Gillis vs. Downey, *supra*; see Enterprise Co. vs. Rico-Aspen Co., *supra*.(2)

§ 454. Rejection of Adverse Claim.

An appeal lies from the rejection of an adverse claim by the local land office.[57] The pendency of such an appeal does not enlarge the time for filing the adverse suit and a failure to do so constitutes a waiver of the adverse claim.[58]

§ 455. Parties.

Those only who have filed their adverse claims can properly be made parties to the suit[59] except where a party becomes vested with the title between the filing of the adverse claim and the commencement of suit thereon. In such a case he may maintain the suit in his own name[60] but the applicant for patent should be made a party defendant.[61] Where one of several cotenants alone files an adverse claim and brings suit thereon, his action will be deemed for the benefit of himself and of the several joint claimants.[62]

That the plaintiffs include parties who have parted with their interests in the claim[63] or that a party who has acquired an interest in the property after the commencement of the action is not joined as a party plaintiff does not subject the suit to dismissal.[64]

§ 456. Intervention.

It has been held that one who has not filed an adverse claim can not intervene in an action to determine adverse claims to a location, though he claims an interest in the mining ground adverse to both plaintiff and defendant.[65] This rule does not seem to apply to a municipal corporation.[66]

§ 457. Contents of Adverse Claim.

The adverse claim consists of a written statement verified by the person or persons making the claim[67] or by a duly authorized agent or attorney-in-fact cognizant of the facts stated therein.[68] The adverse

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[57] Waterhouse vs. Scott, *supra* [42]; see Crockford vs. Mallory, 39 L. D. 60; Quigley vs. Gillette, 101 Cal. 462, 35 Pac. 1040. It is not a valid reason for refusing to accept an adverse claim that proof of publication has not been received at the land office. Waterhouse vs. Scott, *supra*.[42]

[58] Scott vs. Maloney, 22 L. D. 274; Deniss vs. Sinnott, 35 L. D. 304; see McMasters 2 L. D. 706.

[59] Mont Blanc Co. vs. Debour, 61 Cal. 364. See Wesseler vs. Brankman, *supra* [3]; Shafer vs. Constans, 3 Mont. 369.

[60] Willitt vs. Baker, 133 Fed. 944.

[61] Blackburn vs. Portland Co., 175 U. S. 571; see Wolverton vs. Nichols, 119 U. S. 485.

[62] Van Sice Co. vs. Ibex Co., 173 Fed. 895; *certiorari* denied, 215 U. S. 607. Nesbitt vs. Delamar's Co., 24 Nev. 273, 53 Pac. 178; 52, 609, dis. 177 U. S. 523. Sussenbach vs. Bank, *supra* [25]; McCarthy vs. Speed, *supra*.[25]

[63] Mackay vs. Fox, *supra*.[5]

[64] Id.

[65] Nesbitt vs. Delamar's Co., *supra* [62]; Murray vs. Polglase, 23 Mont. 301, 43 Pac. 439; see Mont Blanc Co. vs. Debours, *supra* [59]; Poore vs. Kaufman, *supra* [1]; see, also, Nome and Sinook Co. vs. Simpson, 1 Alaska 580.

[66] Nome and Sinook Co. vs. Simpson, *supra* [65]; see Gavigan vs. Crary, 2 Alaska 378. Bechtol vs. Bechtol, 2 Alaska 397.

[67] 5 U. S. Comp. St. p. 5622, § 4623; Turner vs. Sawyer, *supra* [11]; Doe vs. Waterloo Co., 43 Fed. 219; Nesbitt vs. Delamar's Co., *supra* [62] Mattes vs. Treasury Co., 33 L. D. 553, on review, 34 L. D. 314, holds that the requirement that an adverse claim must be verified is not complied with by the attempt of the officer to administer the oath over the telephone to a person not in his presence or "before" him.

The sufficiency of the adverse claim is determined only by the land department. Brown vs. Bond, 11 L. D. 150; Waterhouse vs. Scott, *supra*.[42] A paper prepared as an adverse when not properly in the land office as such is often received and accepted as a protest, and is permitted to serve that purpose. Behrends vs. Goldsteen, *supra* [19]; see Grand Canyon Co. vs. Cameron, *supra*.[26]

[68] Brown vs. Bond, *supra*[67]; McFadden vs. Mt. View Co., 26 L. D. 530; Mattes vs. Treasury Co., *supra*.[67]

claim must fully show the nature, boundaries and extent of the interference or conflict[69] and be accompanied by a plat,[70] not necessarily made by a mineral or other surveyor.[71] This plat must show the claimant's entire claim and its relative situation or position with the one against which he claims and, also, the extent of the conflict, unless both are placer claims and are described by legal subdivisions, in which case neither survey nor plat is necessary.[72] An abstract of title or other evidence of the right of possession should be filed at the time of filing the adverse claim.[73] but a failure to do so is not necessarily fatal.[74]

§ 458. Affidavits.

The general rule is that all necessary affidavits in connection with the mining laws must be verified not only before an officer authorized to administer oaths within the land district wherein a mining claim is situate, but they actually should be verified within such district.[75]

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[69] Turner vs. Sawyer, *supra* (11); Doe vs. Waterloo Co., *supra* (67); Anchor vs. Howe, 50 Fed. 366; Mattes vs. Treasury Co., *supra* (67); Frank Hough Co. vs. Empire State Co., 42 L. D. 99. For an instance of the sufficiency of an adverse see Kinney vs. Van Bokern, 29 L. D. 460; Morrison's Mining Rights (15th ed.) 600; as to its insufficiency see McFadden vs. Mt. View Co., *supra*.

In Richardson vs. Seafoam Corp., *supra* (39), it is said: "the map or plat filed with the adverse claim did not, as required by the regulations, show the boundaries or extent of the claim. * * * Since suit has been instituted by the adverse claimant, exclusive jurisdiction to determine the questions raised by the motion as to sufficiency of location and alleged failure to show by map or plat or otherwise the nature, boundaries and extent of the adverse claim is in the court."

In Stark vs. Hoeft, 205 Cal. 102, 260 Pac. 319, the court said: "There is no mention in this section (2326 Rev. St. U. S.) which bears upon or has any relevancy to what constitutes or the different facts or right of title to be set forth as an adverse claim. Had no reference been made to the judgment mentioned in the respondents' supplemental complaint in any of the pleadings, the former judgment obtained by the plaintiffs would nevertheless have been admissible in evidence. "See Kipp vs. Reed, 183 Cal. 49, 190 Pac. 363. See, also, Iron Co. vs. Campbell, *supra* (2); Blackburn vs. Portland Co., *supra*.(61)

[70] McFadden vs. Mt. View Co., *supra* (39); *but see* Anchor vs. Howe, *supra* (69); see Hoffman vs. Beecher, 12 Mont. 489, 31 Pac. 92. In the case of Lockwood, 1 L. D. 593, it is said: "But, if the application for patent in any case should be made at a time when it is impossible to secure a survey of a claim adverse thereto, then as the law does not require impossibilities, the adverse claimant might show the nature, extent and boundaries of his claim as nearly as practicable from information within his reach, and present under oath his reasons for not following more clearly the regulations of your office, and submit whether, under all the circumstances, he had not properly presented an adverse claim." Cited approvingly in Hoffman vs. Beecher, *supra*.

[71] Anchor vs. Howe, *supra* (69); *but see* McFadden vs. Mt. View Co., *supra*,(69) revs'd. 27 L. D. 348, on the principle of Anchor vs. Howe, *supra* (69); Hoffman vs. Beecher, *supra*.(70)

[72] Min. Regs. par. 82; Mackie, 5 L. D. 199; Dickman vs. Good Return Co., 14 C. L. O. 237; see Argillite Co., 29 L. D. 585.

[73] Min. Regs. par. 81.

[74] Hawkeye Placer vs. Gray Eagle Placer, 15 L. D. 45; see Knight vs. U. S. Land Ass'n., 142 U. S. 161. See Min. Regs., pars. 42 and 81.

[75] Mattes vs. Treasury Co., *supra* (67); Home Ins. Co., 42 L. D. 526.

The adverse claim may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated. It is only by the rule of the land department that he is required to make affidavit that he is agent or attorney, and to accompany his affidavit with proof thereof. A failure to comply with the above rule will not defeat the suit brought in support of the advirse claim. Brown vs. Bond, *supra* (67). An affidavit authorized by the mining act can not be made before an officer authorized to administer oaths outside of the land district, though his jurisdiction extends over the land district within which the claim is situate. Mattes vs. Treasury Co., *supra;* Stock Oil Co., 40 L. D. 198, overruling El Paso Co., 37 L. D. 155. In the prevailing case it was said: "The mere fact that an application for patent for a mining claim, and the affidavit of posting notice upon the land were verified before a notary public who was one of the attorneys for the claimant in prosecuting the patent proceedings, does not render them absolutely null and void, but voidable only, and where there is no question as to the fact of notice they are subject to amendment; and when amended to conform to the requirements of the law and regulations, entry allowed upon the voidable affidavits may be permitted to stand."

§ 459. Exceptions to Rule.

Where a party resides beyond the limits of such district or is absent therefrom, an affidavit of citizenship,[76] or, to an adverse claim,[77] may be taken before any clerk of a court of record or before any notary public of any state or territory,[78] although such notary is an attorney in the proceedings.[79] The affidavit of publication may be made without the district where it happens that the newspaper "nearest the claim" is so published.[80] Where the antecedent steps have been duly taken, the affidavit in proof of posting the notice on the claim having been before an officer residing outside of such district, the irregularity may be cured by a further affidavit executed under the rule.[81]

§ 460. By Whom Made.

The adverse claim must be upon the oath of the person making it,[82] or by any duly authorized agent or attorney in fact of such person, natural or artificial, cognizant of the facts[83]; provided, the principal then is beyond the limits of the land district[84]; otherwise the entry is invalid.[85] A coowner may verify an adverse claim for himself and the joint claimants.[86]

§ 461. Corporation.

An adverse claim by a corporation verified by its executive officer outside of the land district where the claim is situated, and at the principal place of business of such corporation is the act of the corporation itself.[87] The act of an officer of a private corporation in the matter of the verification of an adverse claim is not an act of an agent as distinguished from that of the corporation itself, and the corporation in such matter may act through its officers.[88] A notary public who also is the secretary of but not a stockholder nor otherwise beneficially interested in a corporation, is not incapacitated from acting officially in proceedings wherein the corporation is a party.[89]

§ 462. Protest.

Publication of notice of intention to apply for a patent, being process bringing all adverse claimants into court[90] although not specifically named therein, their default concludes their claims, except that they still may assert their protest or objection filed with the land depart-

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[76] See 5 U. S. Comp. St. p. 5465, § 4616.
[77] 5 U. S. Comp. St. p. 5650, § 4624.
[78] Id.
[79] Stock Oil Co., *supra* (75); see Coalinga Oil Co., 40 L. D. 401; see *supra*, note 75.
[80] Instructions, 38 L. D. 131.
[81] El Paso Co. vs. McKnight, *supra* (39); Stock Oil Co., *supra*.(75)
[82] 5 U. S. Comp St. p. 5622 § 4623; Turner vs. Sawyer, *supra*.(11)
[83] Louisville Co. vs. Hayman Co., 42 L. D. 632; see Mattes vs. Treasury Co., *supra*.(67)
[84] Crosby Claims, 35 L. D. 434; see Drescher, 41 L. D. 614; Robbins, 42 L. D. 481.
[85] Id.
[86] Nesbitt vs. Delamar's Co., *supra*.(62)
[87] Frank Hough Co. vs. Empire Prince Co., *supra*.(63)
[88] Id.
[89] Milford Co., 35 L. D. 174.
[90] Wight vs. Dubois, *supra* (1); Bunker Hill Co. vs. Empire State Co., *supra* (1); see Hoffman vs. Venard, 14 L. D. 45; Juno Claims, 37 L. D. 365; Batterton vs. Douglas Co., *supra* (23). The notice of an application for a patent published for the prescribed period by the local land office is due process of law and all persons who may from any cause have any interest in the land are charged with such notice and are not permitted to say that he did not in fact, have notice. Golden Reward Co. vs. Buxton Co., *supra* (1); see, also, El Paso Co. vs. McKnight, *supra* (39); N. P. R. Co. vs. Cannon, 54 Fed. 256, dis. 17 Sup. Ct. Rep. 997; see *supra*, note 1.

ment.[91] A protest may be filed by any person, with or without interest in the property at any time before the actual issuance of the patent.[92] If the protestant has no substantial interest in the property, but merely directs the attention of the land department to a noncompliance with the law by either of the contending parties[93] he has no standing before that department as a litigant[94] and can not appeal therein as a matter of right.[95] An allegation of ownership of conflicting locations is sufficient to award to a protestant the status of a party in interest with right of appeal.[96] Although neither can be made the subject of the other, still a protest may some times have the effect of an "adverse."[97] No equitable right is lost by failure to file an adverse claim.[98]

§ 463. Grounds of Protest.

A protest may be based upon any ground tending to show that the applicant has failed to comply with the law in any manner essential to a valid entry under the patent proceedings,[99] as, for instance, that the annual assessment work has not been performed, that the necessary five hundred dollars has not been expended in labor and improvements upon the claim, that the application was not made by the proper party, that the claimant was guilty of laches in making entry, that the second publication and posting of notice was not preceded by the filing of a new application for patent.[100] A protest also may be based upon the fact that the protestant is a claimant of a present joint interest in the premises sought to be patented; that he is excluded from the applica-

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[91] Gwillim vs. Donnellan, *supra* [(1)]; Wright vs. Dubois, *supra* [(1)]; see Davidson vs. Eliza Co., 28 L. D. 550.

[92] Wight vs. Dubois, *supra* [(1)]; Neilson vs. Champagne Co., *supra* [(6)]; see Crown Point Co. vs. Buck, 97 Fed. 162; Contests and Protests, 39 L. D. 150; Parsons vs. Ellis (on review), 23 L. D. 504. See Rules of Practice, 51 L. D. 547. A failure to assert an adverse claim or right will not estop an adverse claimant from protesting and bringing to the notice of the land department facts that tend to show noncompliance by the applicant with the requirements of the law. Round Mt. Co. vs. Round Mt. Co., *supra*.[(39)]

[93] Min. Regs. par. 53; see Crown Point vs. Buck, *supra* [(92)]; Contests and Protests, *supra* [(92)]; see, also, Neilson vs. Champagne Co., *supra* [(6)]; Marburg Lode, *supra*.[(49)] A failure to assert an adverse claim or right will not estop an adverse claimant from protesting and bringing to the notice of the land department any facts that tend to show noncompliance by the applicant with the requirements of the law. Round Mt. Co. vs. Round Mt. Co., *supra*.[(39)] See Rules of Practice, 51 L. D. 547.

[94] Parsons vs. Ellis, *supra* [(92)]; Woodman vs. McGilvray, 39 L. D. 574; see Wight vs. Dubois, *supra* [(1)]; Neilson vs. Champagne Co., *supra*.[(6)]

[95] Smuggler Co. vs. Trueworthy Lode, 19 L. D. 356; Parsons vs. Ellis, *supra*.[(94)]

[96] Rupp vs. Healey, *supra* [(3)]; see Opie vs. Auburn Co., 29 L. D. 230.

[97] Wight vs. Dubois, *supra* [(1)]; North Star Lode, 28 L. D. 41; Cain vs. Addenda Co., 29 L. D. 62; Grand Canyon Co. vs. Cameron, *supra* [(26)]. One who has lost his right to file an adverse claim may still file a protest. Golden Reward Co. vs. Buxton Co., *supra* [(1)]; Whitman vs. Haltenhoff, 19 L. D. 245; see preceding note. See Min. Regs. par. 53. While the charge of noncompliance with the law against a mineral locator may form the basis for a hearing, yet the protestant in such a case is not entitled to set up his own claim to the land in the absence of an adverse claim. See Wight vs. Dubois, *supra* [(1)]; American Co. vs. DeWitt, 26 L. D. 580; Mutual Co. vs. Currency Co., 27 L. D. 191.

[98] See Turner vs. Sawyer, *supra* [(11)]; Mery vs. Brodt, *supra* [(26)]; Rockwell vs. Graham, *supra* [(26)]; Grand Canyon Co. vs. Cameron, *supra*.[(26)]

[99] Neilson vs. Champagne Co., *supra* [(6)]. A "protest" "covers the right to anybody to come in and enter his protest or objection; in other words, to say to the officers of the government that the applicant has not complied with the terms of the statute, and to insist that there shall be an examination by such officers to see if the terms have in fact been complied with. He does not appear as a party asserting his own rights; but if we may, so to speak, parallel these proceedings with those in a court, such an objector appears as an *amicus curiae*,—a friend of the court,—to suggest that there has been error, and that the proceedings be stayed until further examination can be had." Wight vs. Dubois, *supra* [(1)]. See Whitman vs. Haltenhoff, *supra* [(97)]; Beals vs. Cone, 27 Colo. 473, 62 Pac. 948, aff'd. 188 U. S. 184.

[100] Woodman vs. McGilvary, *supra*.[(94)]

tion to the prejudice of his rights therein.[101] Unless a protest is based upon the latter ground, a contract based upon a promise not to protest is illegal and void as against public policy.[102]

§ 464. Pleading.

A protest should allege the kind and character of the mineral and the general situation of the formation and all material and issuable facts should be alleged with sufficient particularity to apprise the challenged party of the definite nature of the case, and enable him to defend without danger of surprise by any fraudulent mental question.[103] Allegations as to the nondiscovery of mineral or as to labor and improvements are insufficient where they are made upon information and belief in either the protest or in the corroborative affidavits.[104] Where a protestant shows that he had no opportunity to file an adverse claim because the notice and plat were not posted upon the claim during the period of publication he is not barred from objecting to the issuance of patent and to assert his rights as an adverse claimant.[105] A protest is sufficient to authorize a hearing even while suit is pending on an adverse claim where the subject matter of the protest is not involved in such suit but relates solely to the applicant's noncompliance with the mining law.[106]

§ 465. Burden of Proof.

The burden of proof is upon a protestant to overcome the *prima facie* case made by an applicant as to the mineral character of the land in controversy.[107] He also must overcome the legal presumption that the mineral entry is regular and valid and he must establish by a preponderance of evidence that the applicant has failed to show compliance with the law.[108] Where affidavits are presented to the land department alleging a failure to comply with the mining law, and the evidence is such as to entitle it to credit and show that the law has not been complied with, a patent should not issue.[109]

§ 466. Uncorroborated Protest.

An uncorroborated protest will not be considered where the facts alleged and upon which a hearing is asked are not matters of record,

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[101] Id. See Golden and Cord Claims, 31 L. D. 178. A person interested in a mining claim whose rights are affected by an application for patent for the same or for a conflicting claim, who fails to file an adverse claim or fails to institute adverse proceedings after filing such a claim, or fails to protest in the land office against the issuance of a patent, can not, after the issuance of a patent to applicant, be heard to contest a question of fact upon which the patent is based. Round Mt. Co. vs. Round Mt. Co., *supra*.(39)

[102] Roy vs. Harney Peak Co., 21 S. Dak., 140, 110 N. W. 106; see, also, Crown Point Co. vs. Buck, *supra* (92); see Snow vs. Kimmer, 52 Cal. 624. The possessory rights of two mineral claimants to the same mineral land is a matter which is committed exclusively to the courts and has no proper place in a protest before the land department, and hence that feature of the protest must be disregarded. Bridges vs. Canyon Co., 47 L. D. 74.

[103] Yard vs. Cook, 37 L. D. 401; see Gypsum Placer, 37 L. D. 484. Mere matters of evidence need not be alleged in the protest; therefore the result of sampling or assaying or the possibility of securing a sufficiency of water supply to work the ground need not be included therein. Yard vs. Cook, *supra*. See, also, Rules of Practice, 51 L. D. 547, note 2.

[104] Mitchell vs. Brovo, 27 L. D. 41; see Gillis vs. Downey, 29 L. D. 83.

[105] Bright vs. Elkhorn Co., 8 L. D. 122.

[106] South End Co. vs. Tinney, *supra* (16); see Crown Point Co. vs. Buck, *supra*.(92)

[107] Hughes vs. Oehsner, 27 L. D. 396.

[108] Tangerman vs. Aurora Co., 9 L. D. 538.

[109] Weinstein vs. Granite Mt. Co., 14 L. D. 68; Nevada Lode, 16 L. D. 532.

but the corroboration of a protest is not a prerequisite to its recognition as a proper basis of inquiry where the facts charged are shown by records of which judicial notice must be taken by the officers of the land department.[110]

§ 467. Delayed Patent.

Where suit is brought in protection of an *equitable* interest in the property and the land department is advised thereof, the issuance of the patent will be delayed until the respective rights of the parties have been settled by the court.[111] In other cases proceedings under the protest are confined to the land department,[112] without, necessarily, the right of appeal.[113]

§ 468. Cancellation by Land Department.

Although the mining law provides that in the absence of an adverse claim it shall be assumed that the applicant for patent is entitled thereto [114] the land department is not thereby precluded from cancellation of the entry for defects in the proof [115]; as, for instance, that there is not a sufficient discovery shown [116] that the statutory patent expenditure has not been made [117] or that the affidavit of posting the notice of application upon the claim sought to be patented is defective in substance.[118] But no entry should be canceled without proper notice given why such action should not be taken.[119]

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[110] See Work Co. vs. Doctor Jack Pot Co., 194 Fed. 621, *certiorari* denied 226 U. S. 610, holding that land department upon issuing federal patents must take notice not alone of the acts of congress but of other laws and regulations. See, generally, Gowdy vs. Kismet Co., 25 L. D. 216; Hughes vs. Oschner, *supra* [30]; Gross vs. Hughes, 29 L. D. 467; Bunker Hill Co. vs. Shoshone Co., 33 L. D. 142; Rupp vs. Heirs, 38 L. D. 387.

[111] Wight vs. Dubois, *supra* [1]; Northwestern Co., 8 L. D. 437; Thomas vs. Elling, *supra*.[9]

[112] Wight vs. Dubois, *supra*.[1] A court can not determine the sufficiency of a protest. Cosmos Co. vs. Gray Eagle Co., 104 Fed. 20.

[113] Bright vs. Elkhorn Co., 8 L. D. 122; Dotson vs. Arnold, 8 L. D. 439; Earl vs. Henderson, 41 L. D. 136. Appeal attaches to a protest only where the protestant has a substantial interest in the property. Grand Canyon Co. vs. Cameron, *supra* [26]; see Wight vs. Dubois, *supra* [1]; Beals vs. Cone, *supra* [99]; *but see* Benjamin vs. S. & C. P. R. Cos., L. D. 387.

[114] 6 Fed. St. Ann. [2d. ed.], p. 563, §2326.

[115] Mineral Farm Co. vs. Barrick, 33 Colo. 410, 80 Pac. 1055. See Hawley vs. Diller, 178 U. S. 476, aff'g. 81 Fed. 651; Beals vs. Cone, 188 U. S. 184, aff'g. 27 Colo. 478. An irregularity in complying with a mere directory provision as to the proof which can be cured is not a fatal defect. El Paso Co. vs. McKnight, *supra*.[30] "The exercise of this power (of cancellation), is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be cancelled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department." Cornelius vs. Kessel, 128 U. S. 456.

[116] Trickey Placer, 7 L. D. 52, Oregon Basin Co. (on rehearing), 50 L. D. 253 dist'g. Castle vs. Womble, 19 L. D. 455. See Oregon Basin Co. vs. Work, 6 Fed. (2d) 676, aff'd. 273 U. S. 660. See U. S. vs. Bunker Hill Co., 48 L. D. 598; Independent Co. vs. Levelle, on rehearing, 50 L. D. 8.

[117] Tough Nut Claims, 36 L. D. 9; Aldebaran Co., 36 L. D. 551.

[118] Mojave Co. vs. Karma Co., 34 L. D. 583; El Paso Co., 37 L. D. 155; Juno Claims, 37 L. D. 369. See Hawley vs. Diller, *supra* [115]; Beals vs. Cone, *supra* [115]; Mineral Farm Co. vs. Barrick, *supra* [115]; *but see* Stock Oil Co., *supra*.[75] A mineral entry based upon an essentially defective notice is unauthorized and must be cancelled; nor can that entry be validated and sustained by a republication and reposting of notice of the patent application, but entry must be made anew, to afford a lawful basis for patent. Juno Claims, *supra*.

[119] San Juan Placer, 12 L. D. 125; Willey vs. N. P. R. Co., 22 L. D. 606; Romance Lode Claim, 31 L. D. 51; Rebecca Co. vs. Bryant, 31 Colo. 119, 71 Pac. 1110; See Hawley vs. Diller, *supra* [112]; McGowan vs. Alps Co., 23 L. D. 113; Babbitt, 35 L. D. 387; Stough, 41 L. D. 616. See, also, Guaranty Bank vs. Bladow, 176 U. S. 453.

An entry allowed prior to the final disposition of adverse proceedings must be canceled where the adverse claims are pending. Brown vs. Bond, 11 L. D. 82; Aspen Lode No. 1, 26 L. D. 576; see Richmond Co. vs. Rose, *supra* [2]; Southern Cross Co. vs. Sexton, 147 Cal. 758, 82 Pac. 424.

§ 469. Effect of Cancellation.

The authorities are not harmonious as to the effect of the cancellation or rejection of the application for patent by the land department upon the possessory right of the applicant.[120]

§ 470. When Cancellation Is Operative.

There is a lack of unanimity between the courts and the land department as to the date when the order of cancellation takes effect; that is to say, whether it is effective when noted in the local land office, or from the time of its notation,[121] or from the moment of its rendition.[122]

§ 471. Collateral Attack.

The certificate of final entry issued by the register is not subject to collateral attack.[123] It is as to third parties equivalent to patent issued.[124]

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[120] Clipper Co. vs. Eli Co., 194 U. S. 220; Cameron vs. U. S. 252, U. S. 463; aff'g. 250 Fed. 943; Cameron vs. Bass, 19 Ariz. 252, 168 Pac. 647; McGowan vs. Alps Co., *supra* (119); Clipper Co. vs. Eli Co., 33 L. D. 660; Shank vs. Holmes, 15 Ariz. 240, 137 Pac. 871 and cases therein cited; Rebecca Co. vs. Bryant, *supra* (119); Peoria Co. vs. Turner, 20 Colo. A. 474, 79 Pac. 915.

In Peoria Co. vs. Turner, *supra*, cited with approval in Shank vs. Holmes, *supra*, it is said: "The cancellation of the entry of the receiver's receipt is like its issuance, a mere incident in the proceedings prescribed for procuring title from the government. Although the receiver's receipt while it remains in force is evidence of compliance with preliminary patent conditions, yet its revocation, and nothing more of itself, does not evidence either a forfeiture or relinquishment of the location or claim by the applicant. It has no necessary connection either with the segregation of the land from the public domain or its restoration thereto."

[121] See Germania Co. vs. James, 89 Fed. 816; McKean vs. Gordon, 18 L. D. 558; Oettel vs. Dufur, 22 L. D. 77.

[122] Young vs. Peck, 32 L. D. 102; see, also, Holt vs. Murphy, 207 U. S. 407; aff'g. 15 Okla. 12, 79 Pac. 265; Mechaley, 51 L. D. 414; Batterton vs. Douglas Co., *supra* (23); Instructions, 40 L. D. 415. But no adverse right can be initiated until the time allowed for appeal has expired. Holt vs. Murphy, *supra*. See Byron vs. U. S., 259 Fed. 376. Farrell vs. Edward Rutledge Co., 271 Fed. 770; *but see* McDonald vs. Hartman, 18 L. D. 559.

[123] Brown vs. Gurney, 201 U. S. 193; aff'g. 32 Colo. 472, 133 Pac. 357; see Murray vs. Polglase, *supra* (65); Batterton vs. Douglas Co., *supra* (23); dist'g. Murray vs. Polglase, *supra*.

[124] Benson Co. vs. Alta Co., 145 U. S. 428; Bash vs. Cascade Co., 29 Wash. 60, 69 Pac. 404; in this case the court said: "It follows that the Cascade Mining Co. at the time it purchased the property from the United States and paid therefor, and received the proper receiver's certificates, was the fee-simple owner of the state. These certificates stood in the place of the patents and could be set aside only for the same reason, and in the same way, and in the same form, that patents could be set aside." See El Paso Co. vs. McKnight, *supra* (25); Silver King Co. vs. Conkling Co., 255 U. S. 162, rev'g. 230 Fed. 553; U. S. vs. Steenerson, 50 Fed. 504, see Cal. C. C. P. § 1925

CHAPTER XXII.

ANNUAL EXPENDITURE.

§ 472. Annual Expenditure.

The mining act prescribes the minimum amount of the annual expenditure and the maximum limit of the time within which it may be made.[1] It provides that at least one hundred dollars worth of labor,[2] that is, prospecting and excavating for the purpose of development, shall be done; or improvements,[3] that is, tangible and reasonably permanent additions for purpose of development, upon or for each lode and placer location,[4] until patent,[5] or its equivalent, that is, the "Register's Final Certificate of Mineral Entry" is issued.[6]

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[1] 5 U. S. Comp. St., p. 5525, § 4620; Northmore vs. Simmons, 97 Fed. 386. Mr. Justice Miller, in Chambers vs. Harrington, 111 U. S. 350, aff'g. 3 Utah 94, 1 Pac. 371, after explaining the reasons for the adoption of the federal statute requiring the one hundred dollars worth of labor or improvements to be made upon a mining claim, says: "Clearly the purpose was the same as in the matter of similar regulations by the miners, namely: to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger." Failure to make the required annual expenditure does not of itself operate as a forfeiture of the claim. It only permits a relocation. Bingham vs. Ute Co., 181 Fed. 748, dis. 190 Fed. 1022; Madison vs. Octave Oil Co., 151 Cal. 768, 99 Pac. 176; Beals vs. Cone, 27 Colo. 473, 62 Pac. 948. In other words, the law does not provide for a forfeiture merely because of such default. Knutson vs. Fredlund, 56 Wash. 634, 106 Pac. 200.

[2] 2 Mason's U. S. Code, p. 2235, § 28; Power vs. Sla, 24 Mont. 243, 61 Pac. 468.

[3] Id. St. Louis Co. vs. Kemp, 104 U. S. 636; Bishop vs. Baisley, 28 Or. 119, 41 Pac. 936; Fredericks vs. Klauser, 52 Or. 110, 96 Pac. 679.

[4] 5 U. S. Comp. St., p. 5525, § 4620; Carney vs. Arizona Co., 65 Cal. 40, 2 Pac. 734; Sweet vs. Webber, 7 Colo. 443, 4 Pac. 752; Love vs. Mt. Oddie Co., 43 Nev. 61, 184 Pac. 921. See Reeder vs. Mills, 62 Cal. A. 581, 217 Pac. 562. "Labor and improvements, within the meaning of the statute, are deemed to be done upon a mining claim or lode, whether it consists of one location or several locations, owned by the same party and contiguous to each other, when the labor is performed or improvements made for the purpose of working, prospecting, and developing the ground embraced within the location or locations. The running of a tunnel often is the best means of developing a lode or vein, and extracting the ore and mineral therefrom, and it is not of infrequent occurrence that such tunnels commence at the slope of a hill on the surface ground outside the surface location of a mining claim. Where such work is done for the avowed and express purpose of prospecting two or more claims held in common, the courts have always held that such work was to be credited to such claims. This always is deemed to be sufficient compliance with the provisions of the mining laws of the United States." Book vs. Justice Co., 58 Fed. 117; see, also, Rev. Stats. § 2324; act of February 11, 1875, 18 Stats. 315. Under this act a tunnel driven under the provisions of § 2323 of the Rev. Stats. for the development of lodes can be credited as an improvement common thereto, whether the purpose is to claim any blind veins discovered on the line of the tunnel or not. Dawson, 40 L. D. 20. In other words, in the light of assessment work there is no distinction between a tunnel claim under which a tunnel is run for the development of veins or lodes already located, and one pursuant to which a tunnel is projected for blind veins or lodes. Adams, 42 L. D. 457, 48 L. D. 600. The law does not require any particular character of labor, nor does it require that the work shall be wisely and judiciously done. It gives no direction as to how it shall be performed. If the necessary amount of labor in the nature of mining is performed upon the location, whether the same is beneficial or not, there could be no forfeiture. Wailes vs. Davies, 158 Fed. 670, aff'd. 164 Fed. 397; see, also, Walton vs. Wild Goose Co., 123 Fed. 217; *certiorari* denied, 194 U. S. 631; McCornick, 40 L. D. 503; see, generally, Chambers vs. Harrington, *supra* [1]; Jupiter Co. vs. Bodie Con. Co., 11 Fed. 666; Anderson vs. Caughey, 3 Cal. A. 22, 84 Pac. 223; Lockhart vs. Rollins, 2 Ida. 509, 21 Pac. 413; Eberle vs. Carmichael, 9 N. M. 169, 42 Pac. 95, dis. 177 U. S. 63; Sherlock vs. Leighton, 9 Wyo. 309, 63 Pac. 934. The law does not require that the labor shall benefit the claim in the sense of making the claim more valuable after the performance of the labor than before. Therefore any labor performed upon the claim, if sufficient in amount, will satisfy the law, if its tendency is to develop the claim as a mine. The digging of prospect holes, or the digging of a cut or cuts or drain ditch or ditches, the removal of brush, panning etc., and all things done necessary for the doing of assessment work, if sufficient in amount, will be in compliance with the law. Work done for the purpose of discovery of mineral whatever the particular form of deposit, also is work and improvement within the meaning of the statute. Walton vs. Wild Goose Co., *supra*. The construction of a wagon road or a trail outside of the boundaries of the

§ 473. When Work Must Be Done.

Under the provisions of the act of 1880,[7] the period within which the work required to be done annually on all unpatented mining claims commenced on the first day of January succeeding the date of the location of such claim. By the act of 1921,[8] this period was extended to and including the first day of July, 1921, so that work done or improvements made upon any mining claim in the United States or Alaska on or before that date had the same effect as if the same had been performed within the calendar year of 1920. By the act of 1921,[9] it was provided that the period within which the work required to be done on all unpatented claims located since May 10, 1872, including such claims in Alaska, shall commence at 12 o'clock meridian on the first day of July succeeding the date of the location of such claims, and that on all valid existing claims the annual period ending December 31, 1921, should be continued to 12 o'clock meridian July 1, 1922.[10] This does not preclude the commencement of work say, on the last day of the assessment year and diligently prosecuting the same to completion within the succeeding year nor does it prevent "resumption of work."

§ 474. Suspension of Annual Expenditure.

At various times since the year 1893,[11] congress has suspended the making of annual expenditure during a stated period. The obsolescence of these enactments deprives them of present interest with the possible exception of those affecting the years 1917 and 1920.[12] The filing of the notice of intention to hold the claim, as provided in such legislation, is deemed to be equivalent to making the annual expenditure and a

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claim may constitute assessment work or be acceptable in satisfaction of patent expenditure. Walton vs. Wild Goose Co., *supra*; Tacoma Co., 43 L. D. 128; Pacific Co., 50 L. D. 601; Big Three Co. vs. Hamilton, 157 Cal. 130, 107 Pac. 301; Ring vs. U. S. Gypsum Co., 62 Cal. A. 87, 216 Pac. 409; Doherty vs. Morris, 17 Colo. 105, 28 Pac. 85; Nevada Ex. Co. vs. Spriggs, 41 Utah 179, 124 Pac. 770; Sexton vs. Washington Co., 55 Wash. 389, 104 Pac. 614; St. Louis Co. vs. Kemp, *supra* [3]; see, also, U. S. vs. Iron Co., 128 U. S 673; Anderson vs. Robertson, 63 Or. 228, 126 Pac. 988, 127 Pac. 546; Florence-Rae Co. vs. Kimbel, 85 Wash. 162, 147 Pac. 881, 178 Pac. 462.

A location of a placer claim by an association of persons, embracing more than twenty acres, may undoubtedly be perpetuated by the same amount of labor required of an individual locator. Reeder vs. Mills, *supra*, citing McDonald vs. Montana Wood Co., 14 Mont. 88, 35 Pac. 668.

See, *infra*, Note 82.

[5] 5 U. S. Comp. St., p. 5525, § 4620.

[6] Benson Co. vs. Alta Co., 145 U. S. 428; Southern Cross Co. vs. Sexton, 147 Cal. 758, 82 Pac. 432; Batterton vs. Douglas Co., 20 Ida. 760, 120 Pac. 827; Murray vs. Polglase, 25 Mont. 401, 59 Pac. 440; Deno vs. Griffin, 20 Nev. 249, 20 Pac. 308.

[7] 21 Stat. 61.

[8] 42 Stats. 186.

[9] Id.

[10] Id.: In Banfield vs. Crispen, 111 Or. 388, 226 Pac. 237, it is said: "Based on the location of March 22, 1922, the plaintiffs were allowed during the year beginning July 1, 1922 and ending July 1, 1923, at meridian, within which to perform such annual labor. During that period their possession could not lawfully be disturbed by any one seeking to jump the claims. Consequently the defendants were without lawful right in going upon the property on December 30, 1922." Failure to do one year's work, but subsequent entry and performance before intervention prevents forfeiture. Debney vs. Iles, 3 Alaska 448. Work done upon a mining claim within one year in amount of excess required as assessment work can not be credited on the succeeding year. Merrill, 5 Copp's L. O. 5; Haynes, 7 Id. 130; *but see* Hale, 7 Id. 115.

[11] 2 Supp. U. S. Comp. St. pp. 1395, 1396, § § 4620*e*, *f*, *g* and *h*; see 1 Fed. St. Ann. 21; Peachy vs. Frisco Co., 204 Fed. 666.

[12] See Hughes vs. Ochsner, 26 L. D. 543; Nesbitt vs. Delamar's Co., 24 Nev. 283, 52 Pac. 609, dis. 177 U. S. 523; Field vs. Tanner, 32 Colo. 278, 75 Pac. 916. Where the owner of a fireclay mining claim in possession thereof, did work thereon in 1917, though it did not appear whether it was sufficient to meet the requirements of the law, and during that year the government took possession and worked the claim for war purposes, such claim was not subject to adverse location and a homestead entry thereof made in June 1917, by one who had knowledge of the mining operations but did not disclose this on his application was held invalid. Mesmer vs. Geith, 22 Fed. (2d) 690.

failure to file the same did not, necessarily, defeat the title to the claim.[13]

§ 475. Local Regulation.

A state statute or a local rule may properly increase the amount of the expenditure and require labor to be done upon a claim within the first calendar year of location under penalty of forfeiture.[14] A rule or custom of miners can not authorize a less annual expenditure on a mining claim than is required by the federal statute.[15]

§ 476. Until Entry Annual Expenditure Should Continue.

The annual expenditure should continue until payment of the purchase price is made to the government. Neither the pendency of the proceedings for patent prior to entry nor an action on an adverse claim will relieve the mineral claimant from the necessity of its performance.[16] The annual expenditure is not required to be made after the entry in the land office on the theory that the government parts with the property upon such entry, though the title remains in it until the patent is in fact issued. The right to the patent immediately arises upon payment of the price of the land and a mere delay in the administration of the land department will not defeat nor diminish the right of the purchaser.[17] The annual expenditure goes only to the right of possession and will not be decided by the land department.[18]

§ 477. Possible Loss of Claim.

After the cancellation of an entry, the right of possession of a mining claim depends wholly upon compliance with the law requiring the annual expenditure, and if not performed during any calendar year, the claim becomes subject to adverse relocation, unless work is before such relocation. If a new application for patent is made, notice of the application must be given in the same manner and for the same time as notice for the original application, subject to the same rights of adverse claimants.[19]

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[13] Cain vs. Addenda Co., 24 L. D. 18; Donohue vs. Tonopah Co., 45 Nev. 1010, 198 Pac. 553; see 15 A. L. R. 937 and 942; Hatch vs. Leighton, 24 Ariz. 300, 209 Pac. 300. In Donohue vs. Tonopah Co., *supra*, it was held that a failure to file in the proper office a notice of intention to take advantage of the congressional resolution suspending assessment work during the war because of uncertainty of the county line and advice of county officials that it should be filed in another county, where it was actually filed did not render the claim subject to relocation. See Mesmer vs. Geith, *supra*.[12]

[14] Northmore vs. Simmons, *supra* [1], dist'g. both Original Co. vs. Winthrop, 60 Cal. 631, and Sweet vs. Webber, 7 Colo. 443, 4 Pac. 752; see, also, Tacoma Co., *supra*.[4]

[15] Penn vs. Oldhauber, 24 Mont. 290, 61 Pac. 649; see Jackson vs. Roby, 109 U. S. 440; Chambers vs. Harrington, *supra* [1]; Sweet vs. Webber, *supra*.[14]

[16] Poore vs. Kaufman, 44 Mont. 253, 119 Pac. 785; South End Co. vs. Tinney, 22 Nev. 19, 35 Pac. 39, *but see* Marburg Lode, 30 L. D. 202; see 50 L. D. 530. The failure to do the annual assessment work does not forfeit the location. It requires the intervention of a third party and a relocation by him. Golden Giant Co. vs. Hill, 27 N. M. 124, 198 Pac. 276. See Geyman vs. Boulware, 47 Nev. 409, 224 Pac. 409.

[17] Deffeback vs. Hawke, 115 U. S. 392; Benson Co. vs. Alta Co., *supra* [6]; Brown vs. Gurney, 201 U. S. 184, aff'g. 32 Colo. 472, 77 Pac. 357; Aurora Hill Co. vs. Eighty Five Co., 34 Fed. 515; Neilson vs. Champagne Co., 111 Fed. 657; Cranes Gulch Co. vs. Scherrer, 134 Cal. 355, 66 Pac. 487, aff'd. 70 Pac. 1128; Southern Cross Co. vs. Sexton, 147 Cal. 758, 82 Pac. 423; Batterton vs. Douglas Co., *supra* [6].

[18] Gillis vs. Downey, 85 Fed. 483; Cain vs. Addenda Co., *supra* [13]; McEvoy vs. Megginson, 29 L. D. 165; Wolenberg, 29 L. D. 302, 489; Barklage vs. Russell, 29 L. D. 401; Gaffney vs. Turner, 29 L. D. 474; Neilson vs. Champagne Co., 29 L. D. 493; Beik vs. Nickerson, 29 L. D. 665; Marburg Lode, *supra*.[16]

[19] Gaffney vs. Turner, *supra*.[18]

§ 478. No Failure of Title.

A mining claim is not subject to forfeiture until the expiration of the time within which the annual expenditure must be made,[20] but where the annual expenditure was made for a certain year, the right to the mining claim revived, though chargeable with a previous default.[21] In other words, neither the failure of a locator or owner to occupy or to work his claim during a given year will *ipso facto* operate to divest him of the title and confer it upon another.[22] Necessarily, however, the retention of the benefit of his location is dependent upon his having performed, or at least resumed work thereon before an adverse relocation is made.[23]

§ 479. Alaskan Provision.

In Alaska the annual assessment work must be performed within each year, including the year of location, and there can be no "resumption of labor,"[24] and no relocation by the defaulting claimant, *but* in Chichagoff Co. vs. Alaska Handy Co.,[24a] it is held that "The statute seems by no reasonable inference to forbid a new location of a claim lapsed because of a failure to do work, provided the land is at the time open and unappropriated."

§ 480. Annual and Patent Expenditure.

Annual expenditure solely concerns adverse claimants of the same mineral land, goes to the right of possession and is determined by the

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[20] Street vs. Delta Co., 42 Mont. 371, 112 Pac. 701; see McKay vs. McDougall, 25 Mont. 258, 64 Pac. 669. Forcible or clandestine possession or threats in the face of a bona fide attempt to do the work are not sufficient to defeat the right of the mine owner. Slavonian Co. vs. Perasich, 7 Fed. 331; Ames vs. Sullivan, 235 Fed. 880; Becker-Franz Co. vs. Shannon Co., 256 Fed. 522; Mills vs. Fletcher, 100 Cal. 142, 34 Pac. 637; Trevaskis vs. Peard, 111 Cal. 599, 44 Pac. 246; Garvey vs. Elder, 21 S. Dak. 77, 109 N. W. 508; Utah Co. vs. Dickert Co., 6 Utah 183, 21 Pac. 1002. An adverse locator can not complain that the assessment work was not done by the original locator while he was in adverse possession. Madison vs. Octave Oil Co., 154 Cal. 768, 99 Pac. 176. But the claim of the prior claimant to the property will be lost if not sustained by an action in ejectment brought within the period allowed by the statute of limitations. Trevaskis vs. Peard, *supra*. In Fee vs. Durham, 121 Fed. 468, a locator commenced his assessment work on December 26, and his employees worked until the night of December 30, which was Saturday, when they quit until Monday morning, January 1, and then resumed work, in the meanwhile leaving their tools on the claim. They continued to work until five hundred dollars had been done but less than one hundred dollars was done Saturday night. Sunday night between 12 and 1 a.m. the claim was attempted to be adversely relocated. It was held that in contemplation of law the original locator was in actual possession from Saturday night until Monday morning, and that the relocators were trespassers and acquired no rights. See, also, Belk vs. Meagher, 104 U. S. 279; McCulloch vs. Murphy, 125 Fed. 147; Willitt vs. Baker, 133 Fed. 937; Malone vs. Jackson, 137 Fed. 878; Hanson vs. Craig, 161 Fed. 869; Rooney vs. Barnette, 200 Fed. 700; Emerson vs. McWhirter, 133 Cal. 510, 65 Pac. 1036, 149 Cal. 50, 85 Pac. 122, aff'd. 208 U. S. 25; Snowy Peak Co. vs. Tamarack Co., 17 Ida. 630, 107 Pac. 60; Thornton vs. Kaufman, 40 Mont. 282, 106 Pac. 361; Plough vs. Nelson, 49 Utah 35, 161 Pac. 1134; Florence-Rae Co. vs. Kimbel, *supra*.[(4)]

[21] Crown Point Co. vs. Crismon, 39 Or. 368, 65 Pac. 87; see Justice Co. vs. Barclay, 82 Fed. 554; Richen vs. Davis, 76 Or. 311, 148 Pac. 1130. This rule applies only in the absence of a "withdrawal." Hodgson vs. Midwest Oil Co., 17 Fed. (2d) 71, aff'g. 297 Fed. 273; see 269 U. S. 534; *but see* Wilbur vs. Krushnic, 280 U. S. 307, aff'g. 30 Fed. (2d) 319.

[22] Oscamp vs. Crystal River Co., 58 Fed. 296; Whitwell vs. Goodsell, ——Ariz. ——, 295 Pac. 318; Golden Giant Co. vs. Hill, *supra* [(16)]. See Hodgson vs. Midwest Oil Co., *supra*.[(21)]

[23] DuPrat vs. James, 65 Cal. 555, 4 Pac. 562; Golden Giant Co. vs. Hill, *supra*.[(16)] Winters vs. Burkland, 123 Or. 137, 260 Pac. 231. §34 Stats. 1243.

As to resumption of labor within withdrawn areas see Wilbur vs. Krushnic, *supra* [(21)].

[24] Thatcher vs. Brown, 190 Fed. 708; Ebner Co. vs. Alaska Co., 210 Fed. 599.

[24a] 45 Fed. (2d.) 553.

courts alone.[24a] The sufficiency of the expenditure of five hundred dollars as a condition precedent to the obtaining of a patent is wholly within the jurisdiction of the land department.[25]

§ 481. By Whom Made.

The annual expenditure may be made by the locator, his heirs, assigns or legal representatives [26] or by some one in privity therewith [27] or by one who has an equitable or beneficial interest in the property.[28] A stockholder in a corporation claiming the property [29] or a receiver appointed by a court,[30] are within the rule. It is sufficient if the work done is gratituously contributed [31]; but labor done or improvements made by a trespasser or a stranger to the title will not inure to the benefit of the owner.[32]

[24a] In U. S. vs. West, 30 Fed. (2d) 744, aff'd. 280 U. S. 306, the court said: "The statutory requirement of the mining law of annual expenditure upon an unpatented mining claim never was considered, either by the courts or the government, as a matter of concern to the Interior Department. Section 53 of the Department Regulations, adopted after the passage of the mining act, declares that the annual expenditure of $100 in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes, is solely a matter between rival or adverse claimants to the same mineral land and goes only to the right of possession, the determination of which is committed exclusively to the court.'"

This rule has been followed in the courts and by the land department, generally. An agricultural claimant can not take advantage of the failure to perform the annual work. Gorda Co. vs. Bauman (on petition), 52 L. D. 519.

[25] Poore vs. Kaufman, *supra*.[16]

[26] U. S. Comp. St., p. 5525, § 4620; see Keeler vs. Trueman, 15 Colo. 146, 25 Pac. 311.

[27] Black vs. Elkhorn Co., 163 U. S. 451; Jupiter Co. vs. Bodie Con. Co., *supra* [4]; Godfrey vs. Faust, 18 S. Dak. 567, 101 N. W. 718; Book vs. Justice Co., *supra* [4]; see Nesbitt vs. Delamar's Co., *supra*.[12] See, also, Stewart vs. Westlake, 148 Fed. 349; Golden Giant Co. vs. Hill, *supra* [16]. By a conveyance of his interest the locator ceases to do any work upon the claim, and he thereby puts another in possession with all rights to do the work called for, and gives the purchaser the right to do all that he could have done towards purchasing the land itself. Black vs. Elkhorn Co., *supra*. A deed for an interest in a mining claim may compel the grantee to perform all the assessment work required under the law. Shaw vs. Caldwell, 16 Cal. A. 3, 115 Pac. 941.

[28] St. Louis Co. vs. Kemp, *supra* [3]; Jupiter Co. vs. Bodie Con. Co., *supra* [4]; Book vs. Justice Co., *supra* [4]; Anderson vs. Caughey, *supra* [4]; Dye vs. Crary, 13 N. M. 439, 85 Pac. 1038, aff'd. 208 U. S. 505. As to one holding under color of title see Dolles vs. Hamberg Co., 23 L. D. 267. As to work done by optionee, see Whitwell vs. Goodsell, *supra*.[22]

[29] A stockholder in a mining corporation has such a beneficial interest in the corporate property that any work done by him upon an unpatented mining claim of such corporation must be counted as assessment work, and that such work will inure to the benefit of the corporation as against a denial of such intention on the part of the stockholder performing the work where he seeks to gain a personal advantage by denying the intention. Wailes vs. Davies, *supra* [4]; Musser vs. Fitting, 26 Cal. A. 746, 148 Pac. 536. The annual assessment work may be performed by a person or corporation for whose benefit or interest the legal title of a mining claim is held in trust. Wailes vs. Davies, *supra*; see, also, Book vs. Justice Co., *supra* [4]; Repeater Claims, 35 L. D. 54; Godfrey vs. Faust, *supra* [27]; Dye vs. Crary, *supra*.[28]

[30] Whalen Co. vs. Whalen Co., 127 Fed. 611; see Nevada Sierra Co. vs. Home Oil Co., 98 Fed. 673.

In Idaho a judgment, attachment or mortgage creditor having a lien upon an unpatented mining claim may perform the necessary labor, under order of court. Sess. Laws, 1923, p. 9.

[31] Wailes vs. Davies, *supra* [4]; Anderson vs. Caughey, *supra* [4]; Thornton vs. Phelan, 65 Cal. A. 480, 224 Pac. 259.

[32] Nesbitt vs. Delamar's Co., *supra* [12]; see Little Gunnell Co. vs. Kimber, Fed. Cas. 629. Weigle vs. Salmino, 49 Ida. 522, 290 Pac. 552. The federal mining act in relation to the performance of annual labor says nothing as to the person by whom it shall be performed. The obvious purpose of the law is to exact work as an evidence of good faith on the part of the owner, and also to discourage the holding of mining claims without development or intention to develop, to the exclusion of others who could or would improve such ground if they had opportunity. Manifestly the annual work must be performed by the owner, at his instance, by some one in privity with him, or by some one who holds an equitable or beneficial interest in the property. Work by such person will inure to the benefit of the claim. Wailes vs. Davies, *supra* [4]; Anderson vs. Caughey, *supra*.[4]

§ 482. Presumption.

In the absence of proof to the contrary it will be presumed that the labor done or improvements placed upon the claim were at the expense of its claimant.[33]

§ 483. Place of Performance.

The labor may be done upon or underneath the surface of the location or be at a distance therefrom.[34] It must have a direct relation to the present or future development or working of the property.[35] This is always a question of fact.[36]

§ 484. Labor and Improvements.

The character of the work done becomes material only when it is performed outside of the boundaries of the claim.[37] The labor may be done upon the vein or lode [38] or in a tunnel or upon or below the surface.[39] Work done upon the vein or lode is something more than taking rock therefrom, from time to time, and testing it for the purpose of finding pay ore.[40] It may perhaps consist of unwatering the claim [41] or in the erection of a flume to carry away water or waste, or in the

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[33] Yarwood vs. Johnson, 29 Wash. 643, 70 Pac. 123.

[34] Mt. Diablo Co. vs. Callison, Fed. Cas. 9886; Justice Co. vs. Barclay, *supra* (21); Wailes vs. Davies, *supra* (4); Ring vs. U. S. Gypsum Co., *supra*.(4)

[35] Jackson vs. Roby, *supra* (15); Anvil Co. vs. Code, 182 Fed. 207; Yreka Co. vs. Knight, 133 Cal. 544, 65 Pac. 1091; Fissure Co. vs. Old Susan Co., 22 Utah 438, 63 Pac. 587.

A direct relation between an expenditure outside of the claim and actual mining must be established before such an expenditure is available. Love vs. Mt. Oddie Co., *supra* (4); Champion Co. vs. Peyer, 30 N. M. 147, 228 Pac. 606; Kirkpatrick vs. Curtiss, 138 Wash. 333, 244 Pac. 571.

Expenditures made for work performed, labor done, and repairs made upon a stamp mill do not tend to develop the claim, nor facilitate the extraction of ore therefrom, and consequently do not constitute any part of the sum required to be expended for annual assessment work. Golden Giant Co. vs. Hill, *supra* (16); *but see* Big Three Co. vs. Hamilton, *supra* (4), holding mill, cyanide tanks and waterworks to be sufficient. A limekiln has nothing to do with the excavation of the material or the development of the property and its erection and operation do not meet the requirements of the law. Schirm-Carey Placers, 37 L. D. 371; see Highland Marie Claims, 31 L. D. 37. Nor is excavation for a smelter. Fargo No. 2 Claim, 37 L. D. 404, nor the erection of a smelter, Copper Glance Lode, 29 L. D. 542; Monster Lode, 35 L. D. 493, within the requirements of the law. Areal geological work does not tend in any way to facilitate the extraction nor develop any minerals within the claim, and therefore, can not be considered as assessment work. Lewis vs. Carr, 49 Nev. 366, 246 Pac. 696.

By statutory enactment in Idaho a survey of a mining claim by a United States mineral surveyor may be credited to annual assessment work. Sess. Laws, p. 362. See *infra*, notes 40, 41, 42, and 43a.

[36] Gear vs. Ford, 4 Cal. A. 562, 88 Pac. 600; Taylor vs. Middleton, 67 Cal. 656, 8 Pac. 594; Altoona Co. vs. Integral Co., 114 Cal. 100, 45 Pac. 1047; Love vs. Mt. Oddie Co., *supra* (4); Wooton vs. Dragon Co., 54 Utah 459, 181 Pac. 593; see McCornick, *supra* (4); Sherlock vs. Leighton, *supra*.(4)

For instance of negative testimony contradicting performance of assessment work see First Nat. Bank vs. Altvater, 149 Fed. 393; Gear vs. Ford, *supra;* Dickens-West Co. vs. Crescent Co., 26 Ida. 153, 141 Pac. 566.

[37] Wailes vs. Davies, *supra*.(4) In saying that work done outside the boundaries of the location is done on the claim, the courts are giveng a common-sense construction of the statute. Justice Co. vs. Barclay, *supra* (21). See Walton vs. Wild Goose Co., *supra* (4).

[38] Lockhart vs. Rollins, *supra*.(4)

[39] Book vs. Justice Co., *supra* (4); Mills vs. Fletcher, *supra* (20); Godfrey vs. Faust, *supra* (27); Yarwood vs. Johnson, 29 Wash. 643, 70 Pac. 123. See Ortman, 52 L. D. 471; Hall vs. Kearney, 18 Colo. 505, 33 Pac. 375.

[40] Bishop vs. Baisley, *supra* (3); see DuPrat vs. James, *supra* (23); Honaker vs. Martin, 11 Mont. 91, 27 Pac. 397. Gathering surface ore is not development work. Buckeye Co. vs. Powers, 43 Ida. 532, 257 Pac. 833.

[41] Evalina Co. vs. Yosemite Co., 15 Cal. A. 714, 115 Pac. 946; *but see* U. S. vs. N. P. R. Co., 1 Fed. (2d) 56, wherein it is said: "Cleaning debris from open pit is of no more validity as development work than annual drainage by pumping water out of a shaft." See, also, Honaker vs. Martin, *supra*.(40)

introduction of water or the turning of a stream.[42] The erection of machinery and other works[43] or of a building, if of benefit to the claim[44] and not too distant therefrom,[45] or the building of a road or trail or the clearing of brush from a mining claim to facilitate the work thereon,[46] may be sufficient. Reasonable compensation may be allowed for the use[47] or for the sharpening of tools used,[48] but not the purchase price thereof.[49] The value of powder, fuse, candles, rails and timber actually used,[50] but not the cost of transporting them,[51] may be counted. Reasonable compensation for the daily use of horses employed in drawing cars or in raising ore, etc., but not their cost; livery hire, feed or shoeing, may be treated as labor performed.[52] Reasonable value of meals furnished to men while employed in "assessment work," but not the cost of tableware, house furnishing, provisions, nor tobacco, may be counted.[53] The survey of a mining claim may possibly be sufficient as annual expenditure.[53a]

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[42] St. Louis Co. vs. Kemp, *supra* [3]; Love vs. Mt. Oddie Co., *supra* [4]; see Anvil Co. vs. Code, *supra*.[35] The construction of a flume used merely to remove the debris of one claim is not a performance of labor or improvements within the meaning of the law. Jackson vs. Roby, *supra* [15] and *infra*, note 46; Chambers vs. Harrington, *supra* [1]; Hain vs. Mattes, 34 Colo. 351, 83 Pac. 127.

See *supra*, note 36.

[43] Lockhart vs. Rollins, *supra* [2]; Big Three Co. vs. Hamilton, *supra* [4]. A tool house and a blacksmith shop when necessary and ultilized for mining operations. The circumstance that such a building is also designated as a dwelling house necessary for the operation of the mine will not preclude its due availability, where good faith on the part of the claimant is present. Pacific Co., *supra* [4]. See Upton vs. Santa Rita Co., 14 N. M. 96, 89 Pac. 276. In Champion Co. vs. Peyer, 40 N. M. 147, 228 Pac. 606, it was held that, unless expenditures for machinery bear some direct relation to mining operations, they are not available as an annual expenditure required by the federal statute. Golden Giant Co. vs. Hill, *supra* [15]. See, also, Kirkpatrick vs. Curtiss, 138 Wash. 333, 244 Pac. 572; see *infra*, note 46.

[44] Bryan vs. McCaig, 10 Colo. 309, 15 Pac. 413; Pacific Co., *supra* [4]; *but see* Remmington vs. Baudit, 6 Mont. 140, 9 Pac. 819. An uninhabited cook house erected upon one of two overlapping claims is insufficient. Granlick vs. Johnston, 29 Wyo. 349, 213 Pac. 100.

[45] Remmington vs. Baudit, *supra* [14].

[46] Doherty vs. Morris, *supra* [4]; Sexton vs. Washington Co., *supra* [4]; Tacoma Co., *supra* [4]; Pacific Co., *supra* [4]; Big Three Co. vs. Hamilton, *supra* [4]; Ring vs. U. S. Gypsum Co., *supra*.[4] In Florence-Rae Co. vs. Kimbel, *supra*,[4] the original claimant prior to the relocation had resumed operations by building and improving trails and roads for the development of the claim and was furnishing and moving a donkey engine and other material for the purpose of facilitating mining operations, and it was held that this satisfied the requirements of the law as to annual labor or improvements on the property.

In Tacoma Co., *supra*, the land department held that "A wagon road or trail constructed in good faith and for the manifest purpose of aiding in the conduct of mining operations on the particular claim to which it is sought to be accredited, is available toward meeting the statutory requirement as a basis of patent," overruling Douglas Lodes, 34 L. D. 556, modifying Fargo No. 2 claim, 37 L. D. 404, and following Doherty vs. Morris, *supra* [4].

In Ring vs. U. S. Gypsum Co., *supra*, the court said: "It was then shown that numerous roads had been constructed leading from the various claims to the mill operated by the respondent, some of which were made specially for the accommodation of tractors, and that this work was a necessary part of the development of the varous claims for the purpose of facilitating the extraction of the mineral therefrom.

"Upon this evidence, as we have said, the trial court found that labor expended by the respondent tended directly to the development and benefit of each and all of said claims to facilitate the extraction of mineral therefrom. This finding was plainly on a question of fact, which the trial court was required in the first instance to determine." Big Three Co. vs. Hamilton, *supra*; Yreka Co. vs. Knight, *supra* [35]; Emerson vs. McWhirter, 133 Cal. 510, 65 Pac. 1036.

An areal tramway is applicable toward meeting the statutory requirement; it being in the same category as a road. Commissioner's letter of September 1, 1922, to San Francisco District Cadastral Engineer.

[47] Fredericks vs. Klauser, *supra* [3].

[48] Hirschler vs. McKendricks, 16 Mont. 211, 40 Pac. 290.

[49] Fredericks vs. Klauser, *supra* [3].

[50] Id.; *but see* Stratton vs. Raine, 45 Nev. 10, 197 Pac. 694.

[51] Id. *but see* Whalen Co. vs. Whalen, *supra* [30].

[52] Fredericks vs. Klauser, *supra* [3].

[53] Id.

[53a] Wigand vs. Byrnes, 24 Fed. (2d) 179, upholding a session law of Alaska providing that the cost of an official survey may be credited as assessment work,

Diamond drill holes on lode claims [54] and drill tests on placer claims in connection with dredging operations upon adjoining land [55] and the searching for lodes within placer claims [56] have been held to be sufficient compliance with the law.

§ 485. Personal Services.

The services of a watchman are sufficient, if necessary to preserve the excavations, the structure erected to work the claim[57] or to preserve personal property [58]; but they are not sufficient where he merely lives upon the claim [59] or warns others from locating it.[60] Negotiations, traveling, preparations for work, contracts and the like, can in no sense be said to be work done on the claim.[61] Personal expenses incurred and the time spent for the purpose of getting water to operate the mill [62] or the services of a person whose time is spent in endeavoring to obtain means for the development of property [63] are, also, in no sense labor performed upon the claim.

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is disapproved in Opinion, 52 L. D. 561, holding that an official survey can not be credited as assessment work or expenditure required as prerequisite to patent either under the act of March 2, 1907, 34 Stats. 1243, which pertains to mining claims within the Territory of Alaska, or under § 2324, Revised Statutes, relating to mining claims generally. See Stork & Herron Placers, 7 L. D. 359.

[54] East Tintic Co., 43 L. D. 79; see McCornick, *supra* (4).

[55] See 2 Lindl. Mines (3d ed.), p. 1544, § 629. A prospect hole on a placer mining claim adds nothing to the value of the land, but only tends to show its actual condition. Tyson Creek Co. vs. Empire Mill Co., 31 Ida. 580; 174 Pac. 1004.

[56] U. S. vs. Iron Co., *supra* (4).

[57] Tripp vs. Dunphy, 28 L. D. 14; Altoona Co. vs. Integral Co., *supra* (36); Gear vs. Ford, *supra* (36); Lockhart vs. Rollins, *supra* (4); see Fredericks vs. Klauser, *supra* (3). In Hough vs. Hunt, 138 Cal. 142, 70 Pac. 1059, the court in discussing whether the services of a watchman could be held to be assessment work pointed out when and when not the same would be allowable as annual expenditure, and held that, where there were structures upon the mine which were likely to be lost if not cared for, and the structures would be required when work would be resumed, the services of a watchman might be allowed as assessment work. In Merchants Bank vs. McKeown, 60 Or. 325, 119 Pac. 334, the court said: "The expense of the keeper is only allowable as annual expenditure when the mine is temporarily idle and the work is to be resumed again, the watchman being necessary to preserve the property needed when the work is resumed, and can not be so applied from year to year indefinitely, as a substitute for the annual labor."

[58] Kinsley vs. New Vulture Co., 11 Ariz. 66, 90 Pac. 438, 110 Pac. 1135. In Agard vs. Scott, 13 Ariz. 165, 108 Pac. 460, the court said: "The employment of a watchman was necessary for the preservation of the personal property, the claim being on the main road, but was not necessary for the purpose of preserving the shaft and workings, buildings and other structures which were erected to work the mine. The workings upon the mine consisted of the main shaft four hundred feet deep with drifts, cross cuts and winzes. The buildings consisted of a hoist house, stone buildings, blacksmith shop, and several smaller houses. While it is clear the keeper was employed for the sole purpose of preserving the personal property upon the mine in question, it is equally clear that the preservation of such personal property was necessary for the resumption of work in contemplation during the time the watchman was employed." The presence of a watchman shows, or tends to show the actual possession of the ground and that such possession is open and notorious. Justice Co. vs. Barclay, *supra* (21).

"Merely watching a tract of land or an intended claim for a considerable time as in this case, to see that it is not intruded upon by others, without the performance of any work, calculated to assist in its exploration or development, will not conduce materially to either the discovery or appropriation of mineral. In the case of New England Oil Co. vs. Congdon, 92 Pac. 180, it appeared that a watchman had been employed by a party to watch the land in controversy as well as others, which is the situation here, and it was held insufficient to show actual possession and the trial court was held to have been justified in concluding that there had been no actual possession, but merely a pretense of occupation without any intention of actually proceeding to development of mineral oils." Whiting vs. Straup, 17 Wyo. 1, 95 Pac. 849.

[59] Hough vs. Hunt, *supra* (57).

[60] Altoona Co. vs. Integral Co., *supra* (36); Whiting vs. Straup, *supra*.(58)

[61] McGarrity vs. Byington, 12 Cal. 432.

[62] DuPrat vs. James, *supra* (23).

[63] Id. McLemore vs. Express Oil Co., 158 Cal. 559, 112 Pac. 59. The employment of a consulting engineer to find the most feasible route for the transportation of ore from the mine to a shipping point is in no sense annual labor as required by the federal statute. Kirkpatrick vs. Curtiss, *supra*,(43) but the services of a superintendent have been held to count as annual assessment work. Rara Avis Co. vs. Bouscher, 9 Colo. 385, 12 Pac. 433.

§ 486. Work Done Outside of the Claim.

Work done in good faith outside of the limits of a mining claim for the purpose of prospecting or working it, will hold the claim the same as if done within the boundaries of the location itself.[64] But it must be made to appear that the work is of value to the claim upon which it is

[64] Chambers vs. Harrington, 111 U. S. 350; Union Oil Co. vs. Smith, 249 U. S. 351, aff'g. 166 Cal. 217, 135 Pac. 966; Gird vs. California Oil Co., 60 Fed. 531; Walton vs. Wild Goose Co., *supra* [4]; Anvil vs. Code, *supra* [35]; Con. Mutual Oil Co. vs. U. S. 245 Fed. 523; Willitt vs. Baker, *supra* [20]; Baake vs. Latimer, *supra*, 3 Alaska 95; see Big Three Co. vs. Hamilton, *supra*.[4]

"'Group assessment work' did not originate with the act of 1903. From an early period the economy of operating contiguous mines or claims by a single system was recognized. In Section 5 of the act of May 10, 1872, c. 152, 17 Stats. 92, now Section 2324 R. S. U. S., it was provided with respect to annual labor work that 'where such claims are held in common such expenditure may be made upon any one claim.' Questions as to the precise meaning of this naturally arose, and it was determined *that it applied only to contiguous* claims, and that the work must be done for the common benefit or for the purpose of developing all the claims. Smelting Co. vs. Kemp, 109 U. S. 440, 444; Chambers vs. Harrington, 111 U. S. 350, 353; Anvil Hydraulic Co. vs. Code, 182 Fed. 205. It is plain that the draftsman of the act of 1903 (defining what shall constitute and providing for assessments on oil mining claims) had this settled rule in mind for the bill as introduced, with enacting clause in the same form as finally passed had this proviso; 'provided that said labor will benefit or tend to the development of such *contiguous* claims.'" Union Oil Co. vs. Smith, *supra*.

Where two or more contiguous claims are held by the same person or persons, work done in good faith upon one of them or outside of the boundaries of either of them that directly tends to the development or benefit of all the claims for mining purposes, is applicable to each and all of such claims and is a compliance with the statute relating to assessment work. Con. Mutual Oil Co. vs. U. S., *supra; but see* Big Three Co. vs. Hamilton, *supra* [4], holding that assessment work may be done upon one of a group of claims owned in common, even though the claims are not all adjoining; citing 1 Snyder on Mines, 144; Altoona Co. vs. Integral Co., *supra* [36].

In Love vs. Mt. Oddie Co., *supra* [4] the court takes occasion to criticise adversely, Lindl. Mines, Section 630, and also the phrase "must manifestly" (as used by the lower court as the basis of its opinion) and said:

"If it were the rule that the work 'must manifestly' tend to develop a group of claims, work done on the public domain could not count, as by no possible stretch of the imagination could it be said that such work would 'manifestly' tend to develop such group, nor could proof cause it to 'manifestly' so appear. The correct rule is declared by the Supreme Court of the United States in Smelting Co. vs. Kemp, 104 U. S. 636, * * * as follows:

Labor and improvements, within the meaning of the Statutes, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development; that is to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on ground which originally constituted only one of the locations as in sinking a shaft, or *be at a distance* from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material. * * * "All the courts of the land are in accord with the view thus expressed, and some of the authorities so holding are: Copper Co. vs. Butte & Corbin Co., 39 Mont. 487, 104 Pac. 540; Chambers vs. Harrington, 111 U. S. 350; Fredericks vs. Klauser, 52 Or. 110, 96 Pac. 679; Big Three &c. Co. vs. Hamilton, 157 Cal. 103, 107 Pac. 304; Nevada Co. vs. Spriggs, 41 Utah 171, 124 Pac. 773; Lindley on Mines (3d ed.), Sec. 628; Snyder on Mines, Sec. 480; Costigan on Mines, p. 278."

The case of Love vs. Mt. Oddie Co., *supra*, is cited in Rick vs. Messenger, 19 Nev. 1, 234 Pac. 30, the court saying that in that case we laid down the law "stating what is necessary to constitute the annual labor for a group of claims when the work is not done on each claim. The test as to whether work done upon one claim for a group of claims will constitute the annual labor for the group is whether it is done in a manner tending to develop the entire group and for the purpose of so developing the entire group, in the honest belief that it so tends to develop them."

In Big Three Co. vs. Hamilton, *supra*,[4] the court said: "Work done on one of a group of mining claims which has a tendency to develop or benefit all of the claims in the said group, inures to the benefit of each and all said claims, even though the system adopted may not be the best that could have been devised under the circumstances.

"Improvements made, such as the construction of roads, mills or mining machinery for the working and operation of an entire group owned by one party, and which said improvements tend to the benefit of all of the claims in said group will inure to the benefit of each and all, though such improvements may be outside the lines of any of said claims. * * * Undoubtedly the better authority supports the contention that assessment work may be done upon one group of claims owned in common, even though the claims are not all adjoining."

In Miehlich vs. Tintic Co., 60 Utah 569, 211 Pac. 686, 690, the court said: "The statutes do not attempt to prescribe the manner in which work shall be done upon a mining claim in order to protect the miner's rights. If the labor tends to develop the mineral resources of the claim, that satisfies the law. More-

sought to apply such work.[65] The work may be done at a distance from the property [66] and may consist, say, in the turning of a stream, or the introduction of water, or the construction of a flume to carry off the debris or waste material,[67] or the construction of a road or trail outside of the limits of the claim,[68] or the construction of a tunnel made solely with reference to the development of the claim,[69] or the sinking of a shaft and running drifts therefrom.[70]

§ 487. Group Claims.

Any number of contiguous locations held in common may form a group, except in case of oil placer claims, which, by law, are limited to groups of five.[71] This law is known as the "Five Claims Act." It does not apply to oil-shale claims.[71a]

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over, the courts will never substitute their judgment for that of the practical miner acting in good faith while expending his money and labor for the development of a group of mining claims, as has the trial court in this instance. 2 Lindl. on Mines (3d ed.), Sec. 631; Minn vs. Budlong, 129 Cal. 579, 62 Pac. 120; Chambers vs. Harrington, 111 U. S. 353; Smelting Co. vs. Kemp, 104 U. S. 655; Mining Co. vs. Spriggs, 41 Utah 171, 179, 124 Pac. 770."

[65] Anvil Co. vs. Code, *supra* [42]; Brethour vs. Clack, 31 Ariz. 24, 250 Pac. 254. In Utah Co. vs. Tintic Co., ___ Utah ___, 274 Pac. 954, the court said: "There is no principle of law that we are aware of which asserts that, if the owner of a group, of twenty-two claims undertakes to do the annual work for that group, as a consolidated group, and performs only the labor necessary for nine claims, he loses the benefit of that work on nine claims, provided it is in fact performed on one of the nine claims in such a way as to benefit the remaining eight, as well as the one upon which performed. In this case what is called the 'big tunnel' is located on Tintic Indian Chief Claim No. 3, and projects slightly into the territory of Tintic Chief No. 2. The work was performed upon the claim which seems to have been the most important one of the group. Inasmuch as the defendants indisputedly performed the work on this claim, they can not lose the benefit of it.

"While the burden was upon the plaintiff to prove that the defendants had forfeited their rights by failure to do the statutory quantum of improvements during the year in question, the defendants proved by affirmative evidence that they performed 75 feet of work in the big tunnel. According to the uncontradicted testimony of witnesses on behalf of the defendants, the tunnel work was worth from $25 to $30 a foot."

[66] St. Louis Co. vs. Kemp, *supra* [3]; Union Oil Co. 23 L. D. 225; DeNoon vs. Morrison, 83 Cal. 165, 23 Pac. 374; see Bryan vs. McCaig, *supra* [44]; Power vs. Sla, *supra* [2].

[67] St. Louis Co. vs. Kemp, *supra* [3]; Anvil Co. vs. Code, *supra* [35]; Copper Glance Lode, 29 L. D. 542.

[68] Roadways are necessities, and where they have been constructed for the manifest purpose of assisting in the development of the claim, such as transporting machinery and materials to and from the property, Emily Lode, 6 L. D. 220; Tacoma Co., *supra* [4]; Pacific Co., *supra* [4]; Kingley Co. vs. New Vulture Co., *supra* [58]; Ring vs. U. S. Gypsum Co., *supra* [4]; Doherty vs. Morris, *supra* [4]; Sexton vs. Washington Co., *supra* [4]; Nevada Ex. Co. vs. Spriggs, *supra* [4] apply as assessment work.

[69] Godfrey vs. Faust, *supra* [27]; Garwood vs. Johnson, *supra* [39]; see Book vs. Justice Co., *supra* [4]; Duncan vs. Eagle Rock Co., 48 Colo. 583, 111 Pac. 588. See Lawson Mine, 34 L. D. 657. Erection of a mill and running of tunnels for benefit of adjoining claims are sufficient as annual work. Winters vs. Burkland, *supra* [25]; Ortman, *supra* [39].

[70] Fissure Co. vs. O'd Susan Co., *supra* [55]; Nevada Ex. Co. vs. Spriggs, *supra* [4]; Utah Co. vs. Tintic Co., *supra* [66].

See § 472.

[71] 5 U. S. Comp. St., p. 5680, § 4636; see Con. Mutual Oil Co. vs. U. S., *supra* [64], dis'g. Gird vs. California Oil Co., 60 Fed. 531, in respect to assessment work on oil claims, see Smith vs. Union Oil Co., 166 Cal. 217, 135 Pac. 966, aff'd, 249 U. S. 337. It is unnecessary where a placer oil claim is located as an "association claim" that the annual assessment work be performed on each twenty acres included therein; it being sufficient if one hundred dollars worth of labor is performed or expenditure made upon the claim as a whole. Rooney vs. Barnette, *supra* [20]; Miller vs. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, aff'd. 197 U. S. 313; Reeder vs. Mills, 62 Cal. A. 581, 217 Pac. 562; McDonald vs. Montana Wood Co., 14 Mont. 88, 35 Pac. 668. See Utah Co. vs. Tintic Co., *supra* [65].

In Rice Oil Co. vs. Toole County, 86 Mont. 427, 284 Pac. 145, the court held that where adjoining tracts of oil land are held under different oil leases the several lessees have antagonistic interests. That the rules governing the development and operation of metalliferous mines held in group are radically at variance with that of oil mining. In other words, there was no community of interest between such lessees have antagonistic interests. That the rules governing the development and

[71a] Standard Shales Co., 52 L. D. 522.

§ 488. Group Development.

A general system may be adopted for the improvement and working of contiguous claims held in common.[72] In such case the expenditure required under the law may be made upon any one of them, or upon adjacent patented lands, or upon public lands, but the expenditure of money or labor must be equal in value to that which would be required on all the claims if they were separate and independent.[73] The claims must be contiguous, and each location thus associated must, in some way, be benefited by the work done or money expended as labor performed or improvements made upon or for a location therein. Assessment work which has no reference to the development of all the locations will not be sufficient.[74] It is not necessary for a claimant to

[72] St. Louis Co. vs. Kemp, *supra* (3); Jackson vs. Roby, *supra* (15); Chambers vs. Harrington, *supra* (1); Anvil Co. vs. Code, *supra* (35); Con. Mutual Oil Co. vs. U. S., *supra* (64); Morgan vs. Meyers, 159 Cal. 187, 113 Pac. 153; Duncan vs. Eagle Rock Co., 48 Colo. 569, 111 Pac. 588; Power vs. Sla, *supra* (2); Fissure Co. vs. Old Susan Co., *supra* (35). Where several contiguous mining claims constitute a group and expenditures are made upon an improvement which is intended to aid in the development of all so held, the improvement constitutes a distinct entity not subject to physical subdivision or apportionment in its application to the claims, intended to be benefited by it. The work performed attaches to the claim collectively and not severally. Duncan vs. Eagle Rock Co., *supra*. See, also, Eberle vs. Carmichael, *supra* (4).

[73] Id. When several adjoining locations are held in common, work done for the benefit of all done upon any one of them, or outside of all, within a given year to an amount equal to that required to be performed upon all the locations within that year meets the requirements of the federal mining law in relation to annual expenditure. St. Louis Co. vs. Kemp, *supra* (3); Jackson vs. Roby, *supra* (15); Chambers vs. Harrington, *supra* (1); Book vs. Justice Co., *supra* (4); Royston vs. Miller, 76 Fed. 52; Justice Co. vs. Barclay, *supra* (21); Mt. Diablo Co. vs. Callison, *supra* (34); Baake vs. Latimer, *supra* (64); McCormick vs. Baldwin, 104 Cal. 229, 37 Pac. 903; Little Dorrit Co. vs. Arapahoe Co., 30 Co'o. 431, 71 Pac. 389; Rice Oil Co. vs. Toole County, *supra* (51); Eberle vs. Carmichael, *supra* (4); Axiom Co. vs. White, 10 S. Dak. 198, 72 N. W. 462; Hawgood vs. Emery, 22 S. Dak. 573, 119 N. W. 177; Godfrey vs. Faust, *supra* (27); Sexton vs. Washington Co., *supra* (4); see Anvil Co. vs. Code, *supra* (35); Big Three Co. vs. Hamilton, *supra* (4); Copper Co. vs. Butte & Corbin Co., 39 Mont. 493, 104 Pac. 542. Whether the work was intended for the benefit of all the locations is one of fact. DeNoon vs. Morrison, *supra* (66); Evalina Co. vs. Yosemite Co., *supra* (41); Yreka Co. vs. Knight, *supra* (33); Fredericks vs. Klauser, *supra* (3); Utah Co. vs. Tintic Co., *supra* (65).

[74] Anvil vs. Code, *supra* (42), citing Chambers vs. Harrington, 111 U. S. 350; Jackson vs. Roby, 109 U. S. 440; Smelting Co. vs. Kemp, 104 U. S. 655; Book vs. Justice Co., 58 Fed. 106; Jupiter Co. vs. Bodie Con. Co., 11 Fed. 666; Royston vs. Miller, 76 Fed. 50; Gird vs. California Oil Co., *supra* (64); Powers vs. Sla, 24 Mont. 243, 61 Pac. 468; Yreka Co., vs. Knight, 133 Cal. 544, 65 Pac. 1091; Fissure Co. vs. Old Susan Co., 22 Utah 438, 63 Pac. 587; Little Dorrit Co. vs. Arapahoe Co., 30 Colo. 431, 71 Pac. 389; Upton vs. Santa Rita Co., 14 N. M. 96, 89 Pac. 281." See, also, Union Oil Co. vs. Smith, *supra* (61); Justice Co., vs. Barclay, *supra* (21); Hidden Treasure Mines, 35 L. D. 485, *but see* Altoona Co. vs. Integral Co., *supra* (30), in which case the claims did not actually touch each other, and there was a narrow strip of land between the locations. Big Three Co. vs. Hamilton, *supra* (4), wherein it is said: "Undoubtedly the better authority supports the contention that assessment work may be done upon one of a group of claims owned in common, even though the claims are not all adjoining," citing 1 Snyder on Mines, p. 444; Altoona Co. vs. Integral Co., *supra*; *compare* Morgan vs. Myers, supra (72), citing Chambers vs. Harrington, 111 U. S. 350. In Brethour vs. Clack, *supra* (65), the court said: "All of the assessment work done by plaintiff and his associates, according to the testimony was on the C. O. D. mining claim or a road leading thereto, and there is no evidence in the record that any work whatever was done on or for the Full Moon claim. It is of course true that assessment work may be done on one of a group of claims if it is of a character which will naturally tend to develop the group as a whole, and it will inure to the benefit of all of the claims. When, however, it is contended that work done on one claim should be credited to another, the party so maintaining must show affirmatively he is within the rule. This burden of proof is not sustained by the record. Such being the case, the Full Moon claim was open for relocation after 12 o'clock noon, July 1, 1923, and it was not material as to whether the C. O. D. Mines Company had formed the intention of abandoning it before 5 o'clock the evening of that day or not." Riek vs. Messenger, *supra* (61).

It does not follow as a matter of law that the annual asssessment work performed upon any one location must be equally apportioned to all adjoining locations within the group. A person owning a number of adjoining locations can do one hundred dollars worth of work upon any one location and hold it and forfeit all the others; or he might do enough work upon one location to hold two locations and forfeit the remainder, and he might designate the particular locations he intended to hold. In such case the assessment work would hold the location upon which it was done or any other locations for which it was done, where the particular location is designated.

prepare plans and specifications with regard to how he intends to develop his location.[75] A court should not substitute its judgment for

McKirahan vs. Gold King, 39 S. Dak. 535, 165 N. W. 542. See, also, Little Dorrit Co. vs. Arapahoe Co., *supra* (72). When the testimony tends to show that several claims were selected and worked for development purposes, and that work on tunnel and shaft was done to apply on the respective locations, and the development work was a benefit to all the locations, it sustains a finding that the work done on the tunnel and shafts was beneficial to all the locations and a compliance with the statute. Fissure Co. vs. Old Susan Co., *supra* (35). "Where sufficient labor has been performed upon a claim to represent a single claim, and it is contended by a junior locator that the work was done for the purpose of representing several claims, and for that reason was insufficient to represent the particular claim, that in determining the sufficiency of the labor the court will apply the labor done to the particular claim upon which the work was done. Fredericks vs. Klauser, (Or.) 96 Pac. 679." Swanson vs. Kettler, 17 Ida. 321, 105 Pac. 1059, aff'd. 224 U. S. 180.

[75] In Jackson vs. Roby, *supra* (15), it was held that one enjoying a mining right defined by metes and bounds does not, by expending money upon a flume which passes over adjoining land and deposits tailings from his mine on that land without benefit to such adjoining land and without evidence of a claim to it, thereby makes an expenditure within the meaning of the statute as to annual work. The court said: "With the exception of the extension of the flume over the premises and their use as a place of deposit, for the waste material from the adjoining claims it was not shown that either he or his grantor ever did any work upon them or even had possession of them. He insisted however, that this extension of the flume and use of the premises were sufficient to give him the right of possession under that clause of the statute which provides that where several mining claims are held in common the labor or expenditure required may be made on any one of them. * * * The contention was made upon a singular misapprehension of the meaning of the act of congress, where work or expenditure on one of several claims held in common is allowed in place of the required expenditure on the claims separately. In such case the work or expenditure must be for the purpose of developing all the claims. It does not mean that all the expenditure upon one claim—which has no reference to the development of a mine upon which several claims have been located, expenditures are required exceeding the value of a single claim, and yet without such expenditures the claim could not be successfully worked. In such a case it has always been the practice for the owners of different locations to combine and to work them as one general claim and expenditures which may be necessary for the development of all the claims may then be made on any one of them. The law does not apply to cases where several claims are held in common and all expenditures made are for the development of one of them without reference to the development of the others. In other words the law permits a *general system* to be adopted for adjoining claims held in common. And in such case the expenditures required may be made, or the labor be performed upon any one of them.

"As was said in Smelting Co. vs. Kemp, 104 U. S. at page 655, 'labor and improvements within the meaning of the statute are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream or the introduction of water or where the improvement consists of the construction of a flume to carry off the debris or waste material.' The language as to the construction of a flume to carry off the debris or waste material at the conclusion of the citation above, has reference to such a structure as may be used to carry off the common debris of several claims, not to a flume used merely to remove the debris of one claim. Here no work was done for the general improvement of all the claims. The deposit of the debris from the Lomax Gulch on the premises in controversy so far from tending to develop them imposed obstacles in the way of their development by covering them up with refuse matter."

In Hawgood vs. Emery, *supra* (73), it was said: "I think it is well settled both by the decisions of this court found in Godfrey vs. Faust, 20 S. D. 203, 105 N. W. 460, and under the holding in 2 Lindley on Mines, Secs. 630–631, together with the long line of authorities cited by our court, and also by Lindley, as well as the authorities cited by both parties on this appeal, that where a person or persons hold several claims that are adjacent, work can be done on one claim and be credited on the other claims; also the work can be done outside of the limits of the claim and have it credited on such claim where such work is beneficial to the claims and that this is true even if there are several claims for which credit is asked for said outside work, provided said several claims are held in common; also that where there are several claims adjacent held by different persons and work beneficial to all of said claims can best be done on one of them under a proper agreement between the owners of said claims, development work can all be done on one claim and be credited to the several claims, such work being a part of the *general plan or scheme* for the development of the several claims." See, also, Wilson vs. Triumph Co., 19 Utah 66, 56 Pac. 300.

In Nevada Ex. Co. vs. Spriggs, *supra* (9), the court in discussing the principle that a system or plan of development was sufficient to meet the requirement of the annual expenditure on each of a group of claims in that connection said: "We think what was intended by the use of the term 'system' or 'general system' of work means simply this: That the work, as it is commenced on the ground, is such that, if continued, will lead to a discovery and development of the veins or ore bodies, that are supposed to be in the claims, or, if these are known, that the work will facilitate the extraction of the ores and mineral." See Chambers vs. Harrington, *supra* (1).

that of the claimant as to the wisdom and expediency of the "plan."[76] Yet it remains a question whether the requirement of the law has been fulfilled, i.e. that the work is such that, if continued, it will lead to a discovery and development of the veins or ore bodies that are supposed to be in the locations, or, if these are known that the work will facilitate the extraction of the ores,[77] or be necessary for the care and protcetion of the property.[78]

§ 489. Risk of Adoption.

By adopting a general scheme for the gronp of claims instead of making the expenditnre npon each separate location, there is the risk of an adverse judicial determination of the question of the sufficiency of the expenditure of labor or money to protect all of the claims within the group.[79]

§ 490. Presumption.

The natural and reasonable presumption is that all the work is done as a part of the "plan" or system, and, as such applicable to all the locations within the group;[80] still the burden of proof as to the sufficiency of the expenditure rests with its claimant.[81]

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[76] Chambers vs. Harrington, *supra* (1); Mann vs. Budlong, *supra* (64); Nevada Ex. Co. vs. Spriggs, *supra* (4); Michlich vs. Tintic Co., *supra* (64). In Copper Co. vs. Butte & Corbin Co., *supra* (73), the court said: "Counsel for plaintiff contends that the work was done by the plaintiff on the M. L. in good faith for the purpose of developing the group of claims, and that the work should not be permitted to substitute its own judgment as to the wisdom or expediency of the method employed by the owner in adopting the work pursued. As an abstract proposition we think counsel states the correct rule. Nevertheless, the purpose for which the work is alleged to have been done must always be manifested by the relation which it bears to the claim itself. If the plan pursued can have no reasonable adaptation to its alleged purpose, the mere assertion that it was pursued for that purpose does not suffice, even though good faith in its pursuit be conceded." See, also, Hughes vs. Ochsner, 26 L. D. 540, Sherlock vs. Leighton, 9 Wyo. 397, 63 Pac. 581. In Stone vs. Bumpus, 46 Cal. 221, the court said, "It is not within the province of a court to question the judgment of a property owner in the legitimate use of his property, or to determine whether one mode of use would be more beneficial than another." In Nevada Ex. Co. vs. Spriggs, *supra*, the court said: "We think the court was right in not substituting his own judgment for that of the mining men and engineers. The court should be very slow indeed in holding that certain work is not calculated to develop certain mining claims or is not proper prospecting work when there is competent evidence that such is the effect of the work in question and where there is no evidence to the contrary."

"If the work was actually done in good faith for the purpose of developing the mine, the strict compliance with the requisite of the statute is established, and a court will not be permitted to substitute its own judgment as to the wisdom and expediency of the method employed for developing the mine in place of the owner." Gear vs. Ford, *supra* (36).

In Kruschnic, 52 L. D. 282, it is said that the rule to the effect that it is not within the province of the courts to question the judgment of a mine owner in the legitimate use of his property, or to determine whether one mode of use would be more beneficial than another, will not be applied for the benefit of a mining claimant if the plan pursued can have no reasonable adaptation to its alleged purpose, the mere assertion that it was pursued for that purpose being insufficient, even though good faith in i's pursuit be conc ded.

[77] Love vs. Mt. Oddie Co., *supra* (4); Nevada Ex. Co. vs. Spriggs, *supra* (4).

[78] Douglas Claims, 34 L. D. 556.

[79] Anvil Co. vs. Code, *supra* (55); Big Three Co. vs. Hamilton, *supra* (4); Copper Co. vs. Butte & Corbin Co., *supra* (73); Golden Giant Co. vs. Hill, *supra* (36); Love vs. Mt. Oddie Co., *supra* (4). In McCulloch vs. Murphy, 125 Fed. 147, the court said: "There is always a conflict as to the actual or reasonable value of the labor. It has been said—and a wide experience in such cases has convinced the court of its truth—that every relocator is interested in depreciating the value of the work performed by the original locator, and the latter, in saving his claim from forfeiture, is interested in extolling his work. The case in hand certainly proves no exception to the general rule. In case of a conflict upon this point it is always proper to consider whether there has been a *bona fide* attempt to comply with the law."

[80] Mt. Diablo Co. vs. Callison, *supra* (34). In this case the court said: "Work done outside of any claim if done for the purpose of and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim as if done within the boundaries of the claim itself. One general system may be formed well adapted and intended to work several contiguous claims or lodes, and when such is the case, work in furtherance of the system is work on the claims

§ 491. Sufficiency of Performance.

The test of the sufficiency of the annual expenditure is the reasonable value; not what was paid nor the contract price, but whether the expenditure tends to facilitate the development or actually promotes or directly tends to promote the extraction of mineral from or improve the property or be necessary for its care or the protection of the mining works thereon or pertaining thereto.[82]

§ 492. Compliance With Local Statute or District Rule.

A compliance with the provisions of a local statute or district rule to the effect that a certain number of days work at a certain sum each day, or that work of a certain character or extent shall constitute the requisite expenditure, may be insufficient to meet the requirements of the federal mining act.[83]

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intended to be developed by it. A general system of work for the exploration of the whole ground embraced in these three sets of contiguous claims seems to have been carried on by plaintiff. And we think that all work done was a part of that general system and, as such, applicable to all the claims which had by purchase been concentrated in a single party, the plaintiff. Under the circumstance of this case, it would be little short of downright absurdity to require the plaintiff to segregate his work and proclaim the labor of removing one wheelborrow full of earth from the common tunnel to be specifically applicable to the Dinero claim, another to the Mt. Diablo, and a third to the Peru. The natural and reasonable presumption is that all the work is done as a part of the system and as such applicable to all claims."

[81] Whalen Co. vs. Whalen, *supra* [30]; see Wailes vs. Davies, *supra* [4]; Yreka Co. vs. Knight, *supra*.[35]

[82] Jackson vs. Roby, *supra* [15]; McCulloch vs. Murphy, *supra* [20]; McKay vs. Neussler, 148 Fed. 66; Highland Marie, *supra* [35]; Cassel, 32 L. D. 35.

Work done for the purpose of discovering mineral whatever the particular form or character of the deposit which is the subject of search, is within the spirit of the statute. U. S. vs. Iron Co., *supra* [4]; see Bishop vs. Baisley, *supra* [3]. Work done upon the surface may be insufficient. Mills vs. Fletcher, *supra* [20]; *but see* Ring vs. U. S. Gypsum Co., *supra* [4] in which the court said: "It was also shown that the deposit of gypsum lay directly beneath the surface, which was a thin coating of mud and silt, the entire territory being the bed of an old lake which had completely dried and disappeared. The method of operations was to plow or scrape the surface from the mineral deposit and then to load the mineral into trucks by means of scrapers attached to tractors. The mineral deposit was then hauled to the mill, where it was cleaned and dried. It is claimed, with apparent good reason, by the respondent, that this process of cleaning the dirt from the mineral deposit at the mill was a substantial and important part of extracting the mineral from the ground. That is to say, that the gypsum lying in a solid mass did not require any mining operations such as are necessary in the ordinary quartz or placer mining for gold or silver or other similar minerals, but that all that was required was to carefully clean from the mineral deposit the surface layer of dirt. In accordance with this theory it was then shown that numerous roads had been constructed leading from the various claims to the mill operated by the respondent, some of which were made specially for the accommodation of tractors, and that this work was a necessary part of the development of the various claims for the purpose of facilitating the extraction of mineral therefrom. Upon this evidence, as we have said, the trial court found that labor expended by the respondent tended directly to the development and benefit of each and all of said claims and to facilitate the extraction of mineral therefrom. This finding was plainly on a question of fact, which the trial court was required in the first instance to determine. Big Three Co. vs. Hamilton, 157 Cal. 130, 107 Pac. 301; Yreka Co. vs. Knight, 133 Cal. 544, 65 Pac. 1091, judgment affirmed." Repairs made upon a stamp mill are insufficient. Golden Giant Co. vs. Hill, *supra* [16]. See Champion vs. Peyer, *supra*.[43]

In Wailes vs. Davies, *supra* [4], it is said: "If one hundred dollars worth of labor in the nature of mining is performed on a claim by its owner, whether the work is beneficial or not, there can be no forfeiture. The character of labor becomes material when it is performed without the boundaries of the claim. In that event the labor must tend to the development or improvement of the mining claim for which it is designed, otherwise it will not count;" but see Love vs. Mt. Oddie Co. *supra* [4]; see, also, § 486, note 64.

[83] Woody vs. Barnard, 69 Ark. 579, 65 S. W. 100; Ware vs. White, 82 Ark. 220, 108 S. W. 831. The test is not as to the number of days work done, but what is the worth or reasonable value of the labor done or improvements made. These are to be measured in dollars, not in days. If when completed, the labor done or improvements are reasonably worth the required sum, the law has been fulfilled. Penn vs. Oldhauber, *supra* [15], see, also, Quimby vs. Boyd, 8 Colo. 194, 6 Pac. 462, dis. 128 U. S. 488. McKirahan vs. Gold King Co., *supra* [79]. In considering the amount and value of the labor or improvements, it is proper to consider all the circumstances in connection with the claim, its remoteness from any place where labor can be relied upon as available, the extra cost of supplies, the inconvenience of procuring wood

§ 493. Payment Not Conclusive.

Payment is not conclusive proof of performance.[84] It may be evidence of good faith,[85] but not that the labor done or improvements made were worth the amount paid.[86] Payment bears upon the value[87] which may be insufficient although equal to the amount required by law.[88] But what was, in fact, paid tends to prove the value.[89]

§ 494. Payment Not Essential.

Labor actually done or improvements made may be sufficient to hold the claim although not in fact paid for;[90] but payment made for work not actually done will not suffice.[91]

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and water, the fact that a team must be kept at or near the location, the lack of facilities for cooking, and other like circumstances, and if considering such circumstances, the work done on the claim amounted to one hundred dollars, and such amount was paid in good faith for the work done, and was intended to comply with the statute, a court will not, under such circumstances permit a claim to be forfeited, on merely conflicting evidence. Wright vs. Killian, 132 Cal. 60, 64 Pac. 98; Gear vs. Ford, *supra* (36); see, also, Fredericks vs. Klauser, *supra* (3); and see Walton vs. Wild Goose Co., *supra*.(4)

[84] McCulloch vs. Murphy, *supra* (20). Evidence of the amount of money paid for work done or materials used though not conclusive, is admissible, as bearing on the claimants good faith. Whalen Co. vs. Whalen, *supra* (30); McKirahan vs. Gold King Co., *supra* (74). Still, the question is not whether the money was paid for the work, nor whether the locator honestly believed the work was done, but whether the work actually was performed upon the mining claim. The statute requiring the work is mandatory. Dickens-West Co. vs. Crescent Co., 26 Ida. 153, 141 Pac. 566. See Richen vs. Davis, *supra*.(21)

In Dickens-West vs. Crescent Co., *supra*, it was said: "The mere fact that the respondent in rebuttal showed that it had actually paid the one hundred dollars for the performance of such assessment work was not sufficient evidence that the work was actually done in view of the fact that several witnesses had testified that only about four or five dollars worth of work had been performed upon the mining claim during the year 1911. While the evidence of the payment of one hundred dollars would tend to show good faith on the part of the respondent, *good faith* is not sufficient; the law requires the *actual performance* of the work. In such a case the principal question is not whether the money was paid for the work, or whether the owners honestly believed the work was done, but whether the work was *actually performed*. The statute is mandatory requiring such work to be done and must be substantially complied with." Protective Ass'n. vs. Forest City Co., 51 Wash. 643, 99 Pac. 1033.

[85] Id. Haws vs. Victoria Co., 160 U. S. 319; Whalen Co. vs. Whalen, *supra* (30); Anderson vs. Caughey, *supra* (4); Penn vs. Oldauber, *supra* (15); Wagner vs. Dorris, 43 Or. 392, 73 Pac. 318.

[86] Id.

[87] McCormick vs. Parriott, 33 Colo. 382, 80 Pac. 1044; Stolp vs. Treasury Co. 33 Wash. 619, 80 Pac. 817; see McKay vs. Neussler, *supra*.(82)

"To show that the work was not worth as much as it was found to be by the court, appellant introduced evidence showing the number of men that had been employed to do the said work, the length of time they were engaged, the amount of wages they received, and the amount and cost of material, etc., that was used. By adopting this method of computing value, appellant showed that the work performed by respondent did not amount to more than seventy-seven and 11/100 dollars per claim for the year 1914, but this is not the correct method of computing the value of assessment work on a mining claim. The true test is the actual value of the improvements to the mine. Evidence of the cost of labor, materials, etc., is competent as tending to show the good faith of the party making the expenditure, but it is not conclusive upon he question of the value of such improvements." McKirahan vs. Gold King Co., *supra*.(72)

In determining whether the amount of annual assessment work performed upon a mining claim fulfills the requirements of the federal mining law, the test is the reasonable value of the work, not what the contract price was, nor the actual amount paid for it. Standard Shales Co., *supra*.(71a)

[88] Mills vs. Fletcher, *supra*.(20)

[89] Big Three Co. vs. Hamilton, *supra* (4); Coleman vs. Curtis, 12 Mont. 301, 30 Pac. 266.

[90] Thornton vs. Phelan, *supra* (31); Anderson vs. Caughey, *supra* (4); see *supra*, note 89.

[91] Protective Ass'n vs. Forest City Co., *supra*.(84) In this case the court said: "It is true it (the mining company) paid the sum of five hundred dollars to parties whom it had, no doubt, employed in good faith, but who did no more than go upon the ground and make pretense of doing the work. This is not a compliance with the law. The work must be done as required in the federal statutes, or a forfeiture results." See, also, Dickens-West Co. vs. Crescent City Co., *supra*.(84)

§ 495. Proof of Performance.

The various local mining statutes provide for the making, recording and legal effect of affidavits of annual expenditure.[92] Such laws are not mandatory [93] and neither the failure to record the affidavit nor a mistake therein will work a forfeiture of the claim.[94]

If the affidavit be filed within or before the statutory period,[95] it presents *prima facie* evidence of the facts properly stated therein;[96]

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[92] See Book vs. Justice Co., *supra* [4]; Coleman vs. Curtis, *supra* [89], Davidson vs. Bordeaux, 15 Mont. 245, 38 Pac. 1075. In Debney vs. Iles, *supra* [19], the court, speaking of affidavits of labor, said: "I am of the opinion that such affidavits are not only unsatisfactory but exceedingly dangerous." Any number of locations may be embraced within a single affidavit of annual expenditure. McGinnis vs. Egbert, 8 Colo. 41, 5 Pac. 652. The making of false affidavits as to the performance of annual assessment work upon a mining claim may constitute perjury, and an indictment was held to be sufficient without stating the particular statute under which it was made. Where the evidence was not sufficient alone to justify a conviction, but taken in connection with the contradictions and discrepancies in the testimony of the defendant, a verdict of guilty was not disturbed on appeal. Vedin vs. U. S., 257 Fed. 551.

[93] Davidson vs. Bordeaux, *supra* [92], *but see* Harris vs. Kellogg, 117 Cal. 484, 49 Pac. 708; Jones vs. Peck, 63 Cal. A. 397, 218 Pac. 1034.

[94] McCulloch vs. Murphy, *supra* [20]; Betsch vs. Umphrey, 270 Fed. 45, rev'g. 6 Alaska 211; Hazzard vs. Johnson, 45 Cal. A. 19, 187 Pac. 121; Bismark Co. vs. North Sunbeam Co., 14 Ida. 561, 95 Pac. 14; Murray Hill Co. vs. Havenor, 24 Utah 73, 66 Pac. 762. The claim is not open to relocation until after the time allowed by local statute for the filing of such affidavit. Harris vs. Kellogg, *supra* [93]; Jones vs. Peck, *supra*.[93] In Book vs. Justice Co., *supra* [4], the court said: "The object of this act (Nevada statute) was evidently to fix some definite way in which the proof as to the performance of the work or expenses incurred in the making of improvements might be, in many cases, more accessible. In all mining communities there is liable to be some difficuty in finding the men who actually performed the labor or made the improvements, and procuring their testimony, in order to establish the facts necessary to show a compliance with the mining law in this respect. The act was passed, as expressed in the title, 'for the better preservation of titles to mining claims.' Locators of mining claims would doubtless save much time and trouble, as well as hardship, inconvenience, and expense by complying with the provisions of this act; but the act does not prevent, and was not intended to prohibit, the owner of a mining claim from making the necessary proof in any other manner, nor does it prohibit the contesting party from contradicting the facts stated in the affidavit. It simply makes the record *prima facie* evidence of the facts therein stated. In Coleman vs. Curtis, (Mont.) 30 Pac. Rep. 266, the supreme court, referring to a statute of that state similar to the one here quoted, said that the statute 'relates not to the effect of doing the work or making the improvements, as required by law, but to the mehod of preserving *prima facie* evidence of the fact that such requirement had been fulfilled.' See, also, McGinnis vs. Egbert, 8 Colo. 41, 5 Pac. Rep. 652. There is no provision in the statute to the effect that a failure to comply with its terms will work a forfeiture, and the statute is not susceptible of any such construction. A forfeiture of a mining claim can not be established except upon clear and convincing proof of the failure of the locators or owners of the claim to have the work done or improvements made to the amount required by law. Hammer vs. Milling Co., 130 U. S. 292, 9 Sup. Ct. Rep. 548."

The Alaskan law providing for the forfeiture of mining claims for failure to file affidavits of labor within the statutory time was held to be void in Betsch vs. Umphrey, *supra*, revs'g. 6 Alaska 211, as being in conflict with the federal mining law, which gives to the owner of a mining claim the right to hold and occupy the same so long as he shall perform the requisite annual assessment work thereon. "To legislate thus" says the court, "was to interfere with the right of congress to dispose of the public domain, was to destroy an estate which congress grants in public lands and was to exercise a power which congress never intended to delegate, the power to declare the forfeiture of mining claims."

[95] Book vs. Justice Co., *supra* [4]; Big Three Co. vs. Hamilton, *supra* [4]; McGinnis vs. Egbert, *supra*.[92]

[96] Book vs. Justice Co., *supra* [4]; Jones vs. Peck, *supra* [93]. In Idaho the failure to file such affidavit is, by statute, considered *prima facie* evidence that such labor had not been done. Ida. C. C. § 3211; Sess. Laws, 1913, p. 309. The affidavit provided by § 1426*m* of the Civil Code of California constitutes *prima facie* evidence of the performance of the annual assessment work upon a mining claim. If such *prima facie* case is not overcome by proof, then the fact of the performance of such work must be taken as established. Musser vs. Fitting, *supra* [20] Under § 3211 of the Rev. Codes of Montana the affidavit of the performance of the assessment work upon mining claims is *prima facie* evidence thereof. But when such *prima facie* evidence is met and overcome by positive evidence that the labor was not performed, it then devolves upon the claimant to show by evidence of a positive and affirmative nature other than the affidavit, that the work had actually been performed. But the mere proof that the locator or owner had actually paid one hundred dollars for the performance of such assessment work is not sufficient evidence that the work actually was done where the proof showed that the work was not done, as in such case the question is not whether the money was paid for the work, or whether the locator or owner honestly believed that the work was done, but whether the work was actually performed upon the mining claim, and the federal statute requiring the work is mandatory. Dickens-West Co. vs. Crescent Co., *supra*.[84]

but it does not prevent other proof by the owner, nor attack by his adversary.[97] Its filing may prevent attempted adverse relocation.[98]

If the affidavit of annual expenditure is filed for record subsequent to the time fixed by statute for that act it is not admissible in evidence.[99]

§ 496. Burden of Proof.

The burden of proof of showing failure to make the annual expenditure is upon the party alleging it,[100] except in Alaska, Idaho and New Mexico, upon failure to file proper or any affidavit of labor.[100a]

§ 497. Alaskan Provision.

Congress has conferred upon mineral claimants in Alaska a privilege not previously given by the mining statutes, by permitting them to file for record an affidavit showing the performance of the required annual assessment work and providing that such affidavit should be *prima facie* evidence of such performance.[101]

§ 498. Failure to Contribute.

Upon the failure of any one of several coowners to contribute his proportion of the expenditures required by the mining act,[102] the coowners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent coowner personal notice in writing or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by § 2324 of the Revised Statutes, his interest in the claim shall become the property of his coowners who have made the required expenditures.[103] This provision of the statute is constitutional.[104]

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[97] Book vs. Justice Co., *supra* (1); Dickens-West Co. vs. Crescent Co., *supra* (84); *but see* Harris vs. Kellogg, *supra* (93); Jones vs. Peck, *supra* (93); McKnight vs. El Paso Co., 16 N. M. 721, 120 Pac. 695, revs'd. 233 U. S. 250. An affidavit to the effect that assessment work had not been done, is not even hearsay evidence of any fact. Anderson vs. Robinson, *supra*.(4)

[98] McCulloch vs. Murphy, *supra*.(20)

[99] McKnight vs. El. Paso Co., *supra*.(97)

[100] Strassburger vs. Beecher, 20 Mont. 151, 49 Pac. 740; Tiggeman vs. Mrzlak, 40 Mont. 19, 105 Pac. 81. See Coleman vs. Curtis, *supra* (89). He who asserts forfeiture must prove it by clear and convincing testimony. Hammer vs. Garfield Co., 130 U. S. 291; Walton vs. Wild Goose Co., *supra* (4); McCulloch vs. Murphy, *supra* (20); Zerres vs. Vanina, 134 Fed. 667, aff'd. 150 Fed. 564; Wailes vs. Davies, *supra* (4); Harris vs. Kellogg, *supra* (93); Callaghan vs. James, 141 Cal. 291, 74 Pac. 853; Goldberg vs. Bruschi, 146 Cal. 708, 81 Pac. 23; Johnson vs. Young, 18 Colo. 625, 34 Pac. 173; Power vs. Sla, *supra* (2); Crown Point Co. vs. Crismon, *supra* (21); Sherlock vs. Leighton, *supra* (4); see Willson vs. Ringwood, 190 Fed. 550. An agricultural claimant can not raise the point. Coleman vs. McKenzie, 29 L. D. 359.

[100a] See succeeding note; Upton vs. Santa Rita Co., 14 N. M. 96, 89 Pac. 283; McKnight vs. El Paso Co., 16 N. M. 721, 120 Pac. 700.

[101] 34 Stat. 1243, Comp. Stats. Sec. 5051; Thatcher vs. Brown, *supra* (24); Betsch vs. Umphrey, *supra*.(94)

If the affidavit of labor is not filed within the statutory period the burden of proof is cast upon the claimant to establish the performance of the annual work and improvements. 34 Stats. 1243.

[102] 5 U. S. Comp. St., p. 5525, § 4620. The right to give the notice is limited to a coowner who has performed the labor. Turner vs. Sawyer, 150 U. S. 578; Van Sice vs. Ibex Co., 173 Fed. 895, dis. 223 U. S. 712; *certiorari* denied, 215 U. S. 607, and does not extend to a person having an inchoate title. Id. Repeater Claims, 35 L. D. 54, nor to a stockholder of a corporation, as such. Id.

[103] Id. Pomeroy vs. Sam Thorpe Co. __ Ariz. __, 296 Pac. See, also, Cal. C. C., § 1426*o*.

The only method by which an owner of a mining claim may acquire by forfeiture under the mining laws the interest of his coowners for noncontribution to the expenditures made on the claim is by service of notice upon the delinquent coowner in the manner prescribed by § 2324 of the Revised Statutes. Alaska-Dano Co., 52 L. D. 550. The publication of notice to a part owner of a mining claim

§ 499. Enforcement of Forfeiture.

When one coowner asserts that he has divested his coowner of his interest in the common property, the courts make examination of the circumstances under which the alleged divestiture has been brought about, and deny the claim, unless the facts exist authorizing the invocation of the provision and the personal or constructive notice prescribed has been given in strict conformity with its requirements.[105]

§ 500. Strict Construction.

The statute is one of forfeiture, and as such must be strictly construed, hence a notice given by one who was not at the time actually a coowner, but vested only with an equity under a sheriff's certificate of sale, was not effective to work a forfeiture, though he had done the full amount of work necessary to preserve the claim.[106] So where the delinquency was not shown by the facts prescribed by the evidence as, for instance, where the alleged delinquent coowner had, in fact, performed his share of the work,[107] or where the labor had not in fact been done,[108] wholly or only in part,[109] or where the required work for the particular year was excused by act of congress,[110] or where the delinquent coowner to whom the notice alone was addressed was dead, the attempt to work a forfeiture was ineffective.[111]

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to contribute his share of the cost of assessment work thereon for the previous year under penalty of forfeiture of his interest under § 2324 Rev. St. is a waiver of a prior personal notice, and the delinquent cotenant may make his contribution at any time within 90 days from such notice of publication. Knickerbocker vs. Halla, 177 Fed. 174, aff'd. 162 Fed. 318. In Robinson vs. Briest, 178 Cal. 237, 173 Pac. 89, a coowner sought by cross complaint to quiet title to the mining claim in himself as against his coowner on the ground that the coowner had failed to contribute his share to the performance of the required annual expenditure and that notice of such failure had been duly recorded in the office of the proper county recorder. The proof showed that the cross plaintiff failed to file the notice served upon the coowner within the ninety days as required by § 1426 of the Civil Code of California, and, therefore, the record did not constitute *prima facie* evidence under the provisions of that section and he was not entitled to a decree quieting his title in the absence of actual proof of the failure of his coowner to contribute his proportion of the assessment outlay.

When rightfully given the notice is effective in cutting off all parties and the title thus kept free and clear from uncertainty and doubt. Van Sice vs. Ibex Co., *supra* (102). The notice is fatally defective if it embraces several locations and the amount of work done upon each thereof is not separately stated and does not contain facts that might excuse expenditure upon each location. Porter vs. Jugovich, 47 Ida. 682, 278 Pac. 219. See, also, Pack vs. Thompson, 223 Fed. 635, aff'g. 219 Fed. 625. It must appear that one claiming the forfeiture has done the entire requisite amount of work necessary to protect the title to the claim. Pack vs. Thompson, *supra*.

[104] Van Sice vs. Ibex Co., *supra*.(102)

[105] O'Hanlon vs. Ruby Gulch Co., 48 Mont. 65, 135 Pac. 914. When a cotenant in possession excludes his cotenant and refuses to permit him to contribute to the assessment work, he is not entitled to forfeit the interest of the excluded cotenant. Becker-Franz Co. vs. Shannon Co., *supra*.(20)

[106] Turner vs. Sawyer, *supra*.(102) "The law seems to be well settled that the right to acquire a defaulting coowner's interest exists only in favor of one who is a coowner during the year for which the forfeiture is claimed." Mecum vs. Metz, 30 Wyo. 495, 229 Pac. 1105.

[107] Brundy vs. Mayfield, 15 Mont. 201; 38 Pac. 1067; Delmoe vs. Long, 35 Mont. 139, 88 Pac. 778.

[108] McKay vs. Neussler, *supra* (82); Pack vs. Thompson, *supra* (103); Delmoe vs. Long, *supra* (107).

[109] Pack vs. Thompson, *supra* (103).

The interest of a coowner of a group of mining claims can not be forfeited for nonpayment of his share of expense of annual expenditure, where bulk of work was driving tunnel on one claim in direction opposite the other claims in the group, and which could not possibly benefit such other claims. Riek vs. Messenger, *supra* (64).

[110] Royston vs. Miller, 76 Fed. 50.

[111] Billings vs. Aspen Co., 51 Fed. 338.

§ 501. Sufficiency of Notice.

But where the coowner is dead and the notice is addressed to him and to all whom it may concern, the notice is sufficient although there was no administrator.[112] Notice to the administrator alone is insufficient or notice improperly served upon him and his imparting information to the heirs that he had received notice, would not be sufficient notice to such heirs to forfeit their interest in the mining property involved. It is the actual coowner, the heirs of the delinquent coowner, who are the proper persons to receive notice of forfeiture, otherwise there is no forfeiture and, for instance, the administrator's deed would convey no title.[113]

§ 502. Local Statutes.

Where a local statute, as in California,[114] prescribes the time within which the notice of forfeiture and accompanying documents must be filed in the proper recorder's office, a subsequent filing confers no rights nor advantages which might have been secured by a compliance with its provisions.[115]

§ 503. Termination of Rights.

Where the notice has been properly served or sufficiently published, the rights of a delinquent coowner are absolutely cut off, and the title is perfected [116] in the coowner who made the yearly expenditures.[117]

§ 504. Notice to Delinquent Coowner.

Two or more locations and the demand for one or more years' expenditure may be included in one notice.[118] This notice must specify the expenditure upon each location for each year named therein [119] or the

[112] Elder vs. Horseshoe Co., 15 S. Dak. 124, 87 N. W. 586, aff'd. 194 U. S. 248.

[113] "The theory of the court in excluding the notice was that, since it was addressed to the administrator alone, it was wholly insufficient because an administrator is not by virtue of his office a coowner with the cotenants of his decedent in a mining claim, within the meaning of the federal statute, *supra*, because the legal title to property belonging to an estate descends, not to the administrator, but directly to the heirs, subject only to a lien in favor of the administrator, for the payment of debts. So far as the notice with proof of service upon Bogy was evidence of the forfeiture, the view of the trial court was correct. 'The property, both real and personal, of one who dies without disposing of it, by will, passes to the heirs of the intestate subject to the control of the district court and to the possession of any administrator appointed by that court for the purpose of administration.' Rev. Code, § 4819. The administrator was not, therefore, by virtue of his office, a coowner with Carter and McKenzie; hence the service of notice upon him could not be deemed a service upon the actual coowners." O'Hanlon vs Ruby Co., *supra* [105]; dist'g. Evalina Co. vs. Yosemite Co., *supra* [41], in which case it was held that where a corporation grantee actually received the notice of forfeiture though it was not addressed to it by name, and also had knowledge that the work had been done by the coowners of its grantors, the notice was sufficient to forfeit its right because the grantors of the real owner had had full opportunity to protect itself from forfeiture.

Any hiatus in the publication of the newspaper during the ninety days period of publication of the notice of forfeiture will defeat the proceedings. Reick vs. Messenger, *supra*.[64] See Badger Co. vs. Stockton Co., 139 Fed. 838; Pomeroy vs. Sam Thorpe Co., *supra*.[103]

[114] Cal. Civil Code § 1426*o*.

[115] Robinson vs. Briest, *supra* [103]; *but see* Pomeroy vs. Sam Thorpe Co., *supra*.[103]

[116] Elder vs. Horseshoe Co., *supra* [112]; Van Sice vs. Ibex Co., *supra*.[102] See Riek vs. Messenger, *supra*.[64]

[117] Rev. St. § 2324, Van Sice vs. Ibex Co., *supra* [102]; Emerson, 29 L. D. 613; Evalina Co. vs. Yosemite Co., *supra* [41]; see Miller vs. Chrisman, *supra*.[71]

[118] Elder vs. Horseshoe Co., *supra* [112]; see Pack vs. Thompson, *supra*.[103]

[119] Haynes vs. Briscoe, 29 Colo. 137, 67 Pac. 156.

facts which might exclude expenditure upon each claim.[120] The service of the notice may be actual or constructive[121]; but publication is a waiver of a prior personal demand for contribution.[122] If constructive notice is given, the publication must be for at least ninety days in "the newspaper published nearest the claim"[123] in a direct line and not by the usually traveled route.[124] The publication must be for at least once a week for ninety days.[125] This period begins with the first publication of the notice,[126] either in a daily or weekly newspaper.[127] A publication on each succeeding Monday for the entire period of ninety days constitutes at least one publication each week.[128] There can be no question about the effect of a notice rightfully served or published under this provision of the mining law.[129]

§ 505. Prevention of Forfeiture.

A delinquent coowner may prevent forfeiture by payment or by proper tender made within the time stated in a valid notice of forfeiture.[130] A tender made by one coowner in behalf of an other coowner[131] or by a friend of a coowner[132] if thereafter ratified will avoid a forfeiture. A pretermitted coowner is not affected by a published notice of forfeiture.[133] The right to give notice of forfeiture does not extend to a stockholder of a corporation as he is not a coowner with the corporation nor with its other stockholders,[134] but he may personally make the statutory expenditure upon the company's property, for the purpose of holding the same.[135] A coowner can not make the annual expenditure upon claims adjacent to the common property and in the absence of an agreement with the remaining coowners hold them liable for contribution.[136] A coowner can not claim a forfeiture where he forcibly prevented his coowner from completing the annual assessment work and forcibly ejected and drove him from the mining claim while in the act of performing such annual assessment work.[137]

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[120] Id.

[121] Knickerbocker vs. Halla, 162 Fed. 318, aff'd. 177 Fed. 172; Elder vs. Horseshoe Co., 9 S. D. 636, 70 N. W. 1060.

[122] Knickerbocker vs. Halla, *supra*.(121)

[123] Elder vs. Horseshoe Co., *supra*.(112)

"We hold that the word 'nearest' means in the nearest community to the mining claim, and that if there be in the community which is actually nearest, two or more newspapers, a publicaion in any one of them satisfies the statute even though the building in which one is printed may happen to be a few inches nearer the claim than the other." Strode vs. Wende, Ar. 242 Pac. 868. See Riek vs. Messenger, *supra*.(64)

[124] Haynes vs. Briscoe, *supra*.(119)

[125] Elder vs. Horseshoe Co., *supra* (112); Evalina Co. vs. Yosemite Co., *supra*.(41)

[126] Id.

[127] Id.

[128] Id.

[129] Van Sice vs. Ibex Co., *supra*.(102) Where a part owner of a number of placer mining claims served notices of forfeiture, some relating to all of the claims, and some to less than all, and which notices were inconsistent with respect to the assessment work claimed to have been done, a temporary injunction will issue to restrain such forfeiture until a hearing on the merits of a suit brought by one of the part owners whose interest was sought to be forfeited. Pack vs. Thompson, *supra* (103).

[130] Knickerbocker vs. Halla, *supra*.(121)

[131] Id.

[132] Forderer vs. Schmidt, 154 Fed. 475.

[133] Ballard vs. Golob, 34 Colo. 417; 83 Pac. 376. See O'Hanlon vs. Ruby Co., *supra* (105); *compare* Evalina Co. vs. Yosemite Co., *supra*.(41)

[134] Repeater Claims, 35 L. D. 55; Yard, 38 L. D. 68.

[135] Wailes vs. Davies, *supra*.(4)

[136] Hargood vs. Emery, *supra*. (65) Where it appeared that defendant had forcibly prevented plaintiff in an action in ejectment, from doing the necessary assessment work, he could base no rights on the failure to do the work. Ames vs. Sullivan, *supra* (20); Madison vs. Octave Oil Co., 154 Cal. 268, 99 Pac. 176.

[137] Pack vs. Thompson, *supra* (103); see Becker-Franz Co. vs. Shannon Co., *supra*.(20)

§ 506. Proof of Forfeiture.

The mining act does not provide for record evidence of forfeiture,[138] but this omission is supplied by statutory enactment in several of the states.[139] The land department requires that, in patent proceedings, the claimant of the forfeited interest must present proof of publication of the notice of forfeiture and that proper payment was not made during the time fixed by the statute.[140]

§ 507. Limitations.

Unless he is "advertised out" by his coowners,[141] the interest of a delinquent coowner does not automatically pass to them[142]; nor does the failure to do the annual assessment work, at all, invest a colocator with right to make a relocation adverse to his coowners.[143] If a coowner fraudulently makes a relocation in his own name, he holds in trust for his coowners.[144]

§ 508. No Personal Liability.

A coowner of a mining claim is not personally responsible for any part of the annual expenditure as the remedy given by the mining act is exclusive.[145] But there may be an implied promise on the part of a coowner of a mining claim to pay his part of the assessment work as well as a part of the expense of procuring a patent.[146]

§ 509. Coowner as Trustee.

One coowner can not obtain title to the location as against his coowner by relocating the claim on the ground that the required annual assessment work had not been done.[147] An agreement by one to perform the annual assessment work on a claim for an interest therein, and an agreement by him to relocate another claim in the joint names of the parties establishes a trust relation, and if he fails to perform the work, and the first claim reverts to the public domain, and in relocating the

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[138] Riste vs. Morton, 20 Mont. 139, 49 Pac. 656.

[139] Arizona, Rev. St. 1901 §§ 3245–3249; California C. C. § 1426*o*; Nevada, Rev. Laws, 1912, § 3432 Oregon, Lord's Laws, §§ 5142–5150. The record is *prima facie* evidence of the facts recited therein and forms a link in the chain of title. If, however, the demand for contribution lacks sufficient basis of fact, as, for instance, failure to expend the amount claimed, the proceeding may be enjoined. See Pack vs. Thompson, *supra* (103), and see *supra*, note 129.

[140] Min. Regs. par. 15; see Turner vs. Sawyer, *supra*.(102)

[141] Evalina Co. vs. Yosemite Co., *supra*.(31)

[142] Guerin vs. American Co., 28 Ariz. 160, 236 Pac. 686; Faubel vs. McFarland, 144 Cal. 717, 78 Pac. 261.

[143] Speed vs. McCarthy, 181 U. S. 273, dism'g. 12 S. Dak. 7, 80 N. W. 135. See McCarthy vs. Speed, 11 S. Dak 362, 77 N. W. 590.

[144] Sussenbach vs. Bank, 5 Dak. 504, 41 N. W. 662; dis. 149 U. S. 787; see, also, Lockhart vs. Johnson, 181 U. S. 530; Doherty vs. Morris, *supra* (4); Saunders vs. Mackay, 5 Mont. 523, 6 Pac. 361. In the case of Hunt vs. Patchen, 35 Fed. 816, there were three owners as tenants in common of certain mining claims, and by failure to do the annual assessment work there was a forfeiture. The relocation by one of the owners was adjudged to be a trust for the others. The court said: "I am entirely satisfied that these claims were relocated under the new names at the time for the benefit of all the original owners, or else they were located in bad faith by the defendant, after giving his associates, by his conduct, the right to believe, and when they did believe, that the location was for the benefit of all. Under this state of facts, I am clearly of the opinion that a trust arises in favor of complainants under the operation of law." See, also, Lakin vs. Sierra Buttes Co., 25 Fed. 337; Royston vs. Miller, *supra* (110); Trice vs. Comstock, 121 Fed. 622, citing numerous cases; Tonopah Co. vs. Fellanbaum, 32 Nev. 278, 107 Pac. 887; Stevens vs. Grand Central Co., 133 Fed. 28.

[145] McDaniel vs. Moore, 19 Ida. 43, 112 Pac. 317; see Pomeroy vs. Sam Thorpe Co., *supra*.(103)

[146] Id.

[147] Speed vs. McCarthy, *supra*.(143) See Guerin vs. American Smelting Co., *supra*.(142) See *supra*, note 144.

second one he does not include his coowners, the latter may enforce the trust.[148] A coowner of a mining claim may enforce a trust where another cotenant has taken title in his own name.[149]

§ 510. Patent Proceedings by Coowner.

Where one coowner of a mining claim makes an application for a patent for the entire claim and pending his application his interest in the claim is forfeited by a coowner for failure to perform his part of the annual assessment work, the application lapses, as in such case the other coowner can not base his right to a patent on the application made by the coowner whose interest has been forfeited.[150] Coowners of a mining claim who procure a forfeiture of the interest of a delinquent coowner must comply strictly with the statute, and such coowners can not procure a patent for the claim without showing notice and that the alleged delinquent coowner failed to contribute his part of the annual assessment work.[151] The coowners of a mining claim who obtained the interest of another coowner by forfeiture, stands in such an attitude of hostility to such coowner as to occupy the position of a protestant who alleges a material default upon the part of his coowner who has made an application for a patent in his own name.[152] But an excluded coowner is not required to adverse an application for patent.[153] Where a patent was issued to one person when in equity and good conscience and under the laws of congress it should have been issued to another person, a court of equity will convert the holder of the legal title into a trustee for the use and benefit of the owner.[154]

§ 511. When Annual Expenditure Not Required.

The receipt of the register of the proper land office issued by him upon final payment of the purchase price of the land in patent proceed-

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[148] Clark vs. Mitchell, 35 Nev. 447, 464; 130 Pac. 764; 134 Pac. 449.

[149] See *supra*, note 144.

[150] Surprise Fraction Claim, 32 L. D. 93.

[151] Turner vs. Sawyer, *supra* [102]; Grampian Lode, 1 L. D. 544.

[152] Surprise Fraction Claim, *supra* [150]; Marburg Claims, *supra*.[16]

[153] Turner vs. Sawyer, *supra* [102]; Suessenbach vs. Bank, *supra* [144]; McCarthy vs. Speed, *supra* [143]. In Van Sice vs. Ibex Co., *supra* [102], it appears that patent was applied for in the name of all the cotenants in the year 1880. This application was not pressed to a hearing. The interest of Van Sice, one of the cotenants joined in the application for patent, was forfeited for failure to contribute to assessment work in the year 1888; subsequently the other cotenants conveyed all interests in the property to the mining company which entered the claim in the names of the original applicants and received a patent running to their heirs and assigns. Upon this it was claimed the mining company was estopped from asserting the forfeiture proceedings and from disputing the continued existence of the Van Sice interest. The court said: "It is common practice to obtain patents from the government in the names of the original locators or entrymen, without regard to intervening changes in right or ownership. The patents generally run to the grantees named and their legal representatives, or, as in this case, 'their heirs and assigns,' and the question to whose benefit the title should inure is left open in the courts. (Hogan vs. Page, 2 Wall. 605.) The practice was in view of the difficulty and the burden that would be imposed on the land office of inquiring into and determining derivative titles. The claim of the mining company to the Van Sice interest under the forfeiture proceedings was not in issue before the land office, and was not one of the things necessary to be determined before the granting of a patent. (citing authorities.) That Van Sice was at the time of the original application entitled to be a grantee in the patent was conceded. Whether he afterwards parted with his interest, voluntarily or involuntarily, was not inquired into when the patent was issued, and it was unnecessary to make such inquiry. The claim of the mining company to his interest was a derivative one, like that of an heir, or a grantee in a deed voluntarily executed or made by a sheriff on execution sale," dist'g. King vs. McAndrews, 111 Fed. 860.

[154] Thomas vs. Horst, 54 Mont. 260, 169 Pac. 731; see, also, Turner vs. Sawyer, *supra* [102]; Lockhart vs. Johnson, *supra*.[144]

ings is, for many purposes equivalent to a patent,[155] no further annual expenditure is necessary; but, until that time comes, abandonment or a failure to do the assessment work upon the claim involved, subjects the same to adverse relocation.[156]

§ 512. Resumption of Work.

To "resume work" is to actually begin work in good faith and diligently prosecute the same to completion before an adverse relocation actually has been made.[157] That is to say, until all the things necessary to make a valid relocation have been performed, the owner may resume work upon the claim and thus prevent forfeiture.[158] In the

[155] Benson Co. vs. Alta Co., *supra*.[(6)] U. S. vs. Devil's Den Co., 236 Fed. 975, 25 Fed. 548; U. S. vs. Record Oil Co., 242 Fed. 749

"It doesn't appear in the present case that a patent has been issued to plaintiff, but it appears that he has complied with all the proceedings essential for the issue of such a patent. He is therefore the equitable owner of the mining ground and the government holds the premises in trust for him to be delivered upon the payments specified. We accordingly treat him in so far as the questions involved in this case are concerned, as the patent had been issued. Being entitled to it he has a right to ask a determination of any claim asserted against his possession which may throw doubt upon his title." Dahl vs. Raunheim, 132 U. S. 262, aff'g. 6 Mont. 167, 9 Pac. 892.

[156] Id. Brown vs. Gurney, *supra* [(17)]; Silver King Co. vs. Conkling Co., 255 U. S. 151, 230 Fed. 553, aff'd. 256 U. S. 18; Pacific Coast Co. vs. Spargo, 16 Fed. 34; Aspen Co. vs. Williams, 27 L. D. 16; Batterton vs. Douglas, *supra*.[(6)] The certificate of final entry may be canceled, however, for defects in the proofs. Mineral Farm Co. vs. Barrick, 33 Colo. 415, 80 Pac. 1055; see Hawley vs. Diller, 178 U. S. 476, aff'g. 75 Fed. 946; Kirk vs. Olson, 245, U. S. 225; or for irregularity in its issuance. Aspen Lode, 26 L. D. 81; see Myer vs. Heyman, 7 L. D. 83 and see, Richmond Co. vs. Rose, 114 U. S. 576. Where an entry has been canceled the possessory title is not affected. Shank vs. Holmes, 15 Ariz. 229, 137 Pac. 87; Rebecca Co. vs. Bryant, 31 Colo. 119, 71 Pac. 1110; *but see* Murray vs. Polglase, *supra* [(6)]; *compare* McKnight vs. El Paso Co., *supra*.[(97)] It may be conceded that the land department is without jurisdiction to order the cancellation of a mining location on an application for a patent; but the determination by the land department of the fact that the ground was not mineral land in effect destroys every step taken by an applicant under the mining laws, and necessarily includes his location. Cameron vs. U. S. 250 Fed. 946, aff'd. 252 U. S. 450. See, also, Clipper Co. vs. Eli Co., 194 U. S. 221; Oregon Basin Co. vs. Work, 6 Fed. (2d) 676, aff'g. 50 L. D. 253.

[157] McCormick vs. Baldwin, *supra* [(73)]; Honaker vs. Martin, *supra* [(40)]; Hirschler vs. McKendricks, 16 Mont. 211, 40 Pac. 290; see, also, Thatcher vs. Brown, *supra* [(24)]; Peachy vs. Frisco Co., *supra* [(11)]; Navajo Indian Res. 30 L. D. 515; Interstate Oil Corp. 50 L. D. 262; Jordan vs. Duke, 6 Ariz. 70, 53 Pac. 197; Worthen vs. Sidway, 72 Ark, 226, 79 S. W. 777; Emerson vs. Yosemite Co., 149 Cal. 53, 85 Pac. 122, aff'd. 208 U. S. 25; McKay vs. McDougall, 25 Mont., 258, 64 Pac. 66; Thornton vs. Kaufman, 40 Mont. 285, 88 Pac. 796; Bishop vs. Baisley, *supra* [(3)]; Richen vs. Davis, *supra* [(21)]; Plough vs. Nelson, *supra* [(20)]; Florence-Rae Co. vs. Kimbel, *supra*.[(4)] The law does not contemplate that when work is resumed upon a mining claim it shall be prosecuted every hour of the day, nor that a full shift shall be done every day, but simply requires that it shall be prosecuted in good faith with reasonable diligence. Stratton vs. Raines, 15 Nev. 10, 197 Pac. 694; rehearing denied 200 Pac. 533. See, also, Fee vs. Durham, *supra* [(20)]; Willitt vs. Baker, *supra*.[(20)]

"A party can not hold a mining claim for several years without doing in any year the work required by simply going upon it at the beginning of each year and doing a few hours work, with no *bona fide* intent to comply with the statutory requirement as to the amount of work to be done. * * * * It is against the policy of the law, and a fraud against the government to hold quartz claims by merely doing a few dollars worth of work thereon at or near the beginning of the year next following the year on which claimant failed to do the necessary work, when such work is not commenced with the *bona fide* intention of being continued till the full amount is done. Such labor so done is a mere pretense and a sham, and will not prevent the relocation for want of necessary work." McCormick vs. Baldwin, *supra*. A mining claim is not subject to relocation by a third person on the ground of the failure of the locator to perform the assessment work within the year where the owner had workmen upon the ground performing labor upon the location before and at the time of the attempted relocation. McKirahan vs. Gold King Co., *supra*.[(74)] Where a locator or owner has begun the assessment work before the expiration of any given year and is carrying on to completion such work, the claim is not subject to relocation, although the locator or owner is not on a particular day upon the claim at work. Plough vs. Nelson, *supra*.

Resumption does not *restore a lost estate*. See Knutson vs. Fredlund, 56 Wash. 639, 106 Pac. 200; it *preserves an existing* estate. Wilbur vs. Krushnic, 280 U. S. 306, aff'g 30 Fed. (2d.) 742.

[158] Swanson vs. Sears, 224 U. S. 180, aff'g. 17 Ida. 321, 105 Pac. 1059; Wilbur vs. Krushnic, *supra* [(157)]; Peachy vs. Gaddis, 14 Ariz. 214, 127 Pac. 739; Peachy vs. Frisco Co., *supra* [(11)]; Du Prat vs. James, *supra* [(23)]; Field vs. Tanner, *supra* [(12)];

absence of an intervening right an interval of years between the delinqueney and the resumption is immaterial.[159]

§ 513. Relocation by Delinquent Owner.

As a general rule a delinquent owner may, after the expiration of the "assessment year" relocate the claim and thus dispense with the necessity of resuming work thereon, in which event his relations to the claim are the same as those of any other relocator [160] except that the

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McKay vs. McDougall, *supra* (157) Lacey vs. Woodward, 5 N. M. 583, 25 Pac. 785; Klopenstine vs. Hays, 20 Utah 45, 57 Pac. 712; see Little Gunnel Co. vs. Kimber, Fed. Cas. 8402; Honaker vs. Martin, *supra* (40). The principle is that while failure to perform the annual assessment work will render the claims liable to location by other parties, yet if before such new location is made the original locator shall resume such work. It will be enough to forestall the attempt of other parties to jump the claim. Banfield vs. Crispen, *supra*.(19)

Where original locators resumed work for any one year before third parties attempted to relocate claims, it is sufficient to prevent the claims from becoming subject to relocation because of any antecedent failure by such original locators to perform the assessment work during any year preceding the time when they resumed work on the claim. Winters vs. Buckland, *supra*.(23)

[159] Peachy vs. Gaddis, *supra* (158); Crown Point Co. vs. Crismon, *supra* (21); see Anderson vs. Robertson, *supra* (4); see, also, Belk vs. Meagher, *supra*.(20) It is not necessary to perform the annual labor except to protect the rights of the locator or his grantees against parties seeking to initiate title to the same premises. Beals vs. Cone, *supra*.(1) As against such subsequent location, a *prima facie* case is made on the part of the original locator and his grantees by showing a valid location. Hammer vs. Garfield Co., *supra*.(100) After a valid location, the title thus acquired remains so, whether the annual assessment work is performed or not, until forfeiture or abandonment. Renshaw vs. Switzer, 6 Mont. 464, 13 Pac. 127; so that a party seeking to initiate a claim to mining premises already located must prove that the annual labor thereon has not been performed, in order to establish that the ground so located is subject to location. Lancaster vs. Coals, 27 Colo. A. 495, 150 Pac. 821. It is not necessary that the annual assessment work should be done for every year that the claim was idle. Temescal Oil Co., 137 Cal. 211, 69 Pac. 1010; Beals vs. Cone, *supra*; Field vs. Tanner, *supra* (12); see Lakin vs. Sierra Buttes Co., 25 Fed. 343; Cunningham vs. Pirrung, 9 Ariz. 62, 80 Pac. 329; Snowy Peak Co. vs. Tamarack Co., *supra* (20); Wilson vs. Freeman, 29 Mont. 470, 75 Pac. 86; McCarthy vs. Speed, *supra*.(143) Where a relocator fails to perform the annual assessment work for the year succeeding his relocation the former claimant may resume work upon the claim and resuscitate his title thereto. Richen vs. Davis, *supra* (21); see, also, Justice Co. vs. Barclay, *supra* (21); Anderson vs. Anvil Co., 3 Alaska 496; Bishop vs. Baisley, *supra* (3); Klopenstine vs. Hays, *supra*.(158) The government or a subsequent locator is the only one who can complain of a failure on the part of the locator to do the necessary annual assessment work; and the subsequent locator is not in a position to make a complaint until he has completed a valid location; and, if prior to that time, the original claimant has resumed such work in good faith his previous delinquency is of no consequence. Thornton vs. Kaufman, *supra*.(158) When a claim is open to relocation because of a failure to make the necessary annual expenditure, if thereafter the work is resumed upon the claim before a relocation actually is made, the rights of the original owner or his grantee stands as if there had been no failure to comply with the law in this respect. Belk vs. Meagher, *supra* (20); Fee vs. Durham, *supra* (20); Peachy vs. Frisco Co., *supra* (11); Lacey vs. Woodward, *supra* (158); see Field vs. Tanner, *supra*.(12) If a person shows himself entitled to possession of an unpatented mining claim by virtue of a valid location, or by adverse possession, for the statutory period, mere failure to perform the assessment work in absence of valid subsequent location on part or all of ground will not work a forfeiture. Law vs. Fowler, 45 Ida. 1, 261 Pac. 667.

Whenever five hundred dollars worth of labor in the aggregate has been performed, other requirements aside, the owner becomes entitled to a patent, even though in some years annual assessment labor has been omitted. Wilbur vs. Krushnic, *supra* (157).

[160] Warnock vs. DeWitt, 11 Utah 324, 40 Pac. 205; see Perley vs. Goar, 22 Ariz. 146, 195 Pac. 532; Johnson vs. Young, *supra* (100); *but see* Rohn vs. Iron Chief Co., 186 Cal. 703, 200 Pac. 644; Lehman vs. Sutter, 60 Mont. 102, 198 Pac. 1102. The right of a locator or his grantees to make a new location at the expiration of the time allowed for doing assessment work has been recognized by the courts of the United States. Lockhart vs. Johnson, *supra* (144); Hunt vs. Patchin, 35 Fed. 818; Leedy vs. Lehfeldt, 162 Fed. 304; see, also, Saunders vs. Mackay, *supra* (144).

The mining act of California provides that "the failure or neglect of any locator of a mining claim to perform development work of the character, in the manner and within the time required by the laws of the United States, shall disqualify such locators from relocating the ground embraced in the original location or mining claim or any part thereof under the mining laws, within *three* years after the date of his original location and any attempted relocation thereof by any of the original locators shall render such location void." This provision of the statute is not disturbed by the doctrine of the case of Rohn vs. Iron Chief Co., *supra*, as the mining claims there in controversy were located prior to said provision.

work he previously may have done upon the claim will serve in patent proceedings therefor, or, if it be less than five hundred dollars in value it may be tacked to the work done by him after the resumption.[161]

§ 514. Not Fraudulent.

Such a relocation does not amount to fraud either upon the United States nor upon persons desiring to claim under it.[162]

§ 515. What Is Not Resumption of Work.

Work is not "resumed" by posting a notice soliciting proposals for the work required on the claim[163] nor by the mere purchase of materials nor the mere bringing the same upon the ground[164] but labor used in moving and installing engines and wire cables intended for the development of the claim [165] or the clearing of the ground for the purpose of dredging a placer claim may be taken as fair indication of the good faith of the owner in maintaining the claim.[166]

§ 516. Prevention of Work.

A failure to resume work is not excused by reason of a mere threat of violence, made far distant from the claim [167]; but forcible ejectment and prevention of performing the necessary assessment work will not defeat the title of the rightful claimant.[168]

§ 517. Question of Fact.

Whether there was a resumption of work after the failure to perform the same for a particular year is a question of fact and not one of law.[169] The burden of proof rests upon him who asserts that the resumption preceded the adverse relocation.[170]

§ 518. Occupancy Insufficient.

Where the claimant of a mining claim has failed to perform the required assessment work, his mere occupancy of the claim will not prevent adverse location.[171]

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[161] Belk vs. Meagher, *supra* (20); Oscamp vs. Crystal River Co., *supra* (22); Anderson vs. Byam, 8 L. D. 388; Debney vs. Iles, *supra* (10); Jordan vs. Duke, *supra* (157); Honaker vs. Martin, *supra* (40); Lacey vs. Woodward, *supra* (158) *but see* Ingemarson vs. Coffey, 41 Colo. 407, 92 Pac. 908. See Wilbur vs. Krushnic, *supra*.(15)

[162] See *supra*, note 160; *but see* U. S. vs. McCutchen, 217 Fed. 650; McCann vs. McMillan, 129 Cal. 350, 62 Pac. 31; Cal. Civil Code, § 1426*s*; Emerson vs. Akin, 26 Colo. A. 40, 140 Pac. 481.

[163] Hirschler vs. McKendricks, *supra*.(157)

[164] Honaker vs. Martin, *supra* (40); Fredericks vs. Klauser, *supra* (3); *see, also*, Bishop vs. Baisley, *supra*.(3)

[165] Florence-Rae Co. vs. Kimbel, *supra*.(4)

[166] Richen vs. Davis, *supra*.(21)

[167] See *supra*, note 20; Field vs. Tanner, *supra* (12). Allegations that defendants entered and ousted the owners of the claims was held to be insufficient in the case of Hodgson vs. Midwest Oil Co., *supra*.(21)

[168] Thompson vs. Pack, *supra* (103). A third person can not by forcibly preventing the performance of assesment work initiate rights to defeat the right of the original locator or his grantees; nor can he be heard to say, after excluding the rightful owner from the principal part of the claim, that there was sufficient room or place on other parts of the claim from which he did not exclude the rightful owner. Ames vs. Sullivan, *supra* (20); see, also, Erhardt vs. Boaro, 113 U. S. 527; Halla vs. Rogers, 187 Fed. 778; Mills vs. Fletcher, *supra*.(20)

[169] Knickerbocker vs. Halla, *supra* (121); Peachy vs. Frisco Co., *supra* (11); see Shank vs. Holmes, *supra* (156); and see McCormick vs. Baldwin, *supra*.(73)

[170] McKnight vs. El Paso Co., *supra* (97); see Willson vs. Ringwood, *supra* (100); Strasburger vs. Beecher, *supra*.(100)

[171] DuPrat vs. James, *supra* (23).

§ 519. Conditions for Relocation.

An adverse relocation can not depend for validity on whether the present owner failed or not to subsequently make the required annual expenditure.[172] A mining claim is not subject to forfeiture where its claimant does not commence work thereon until immediately prior to noon of the first day of July of the assessment year [173] and diligently continues the same to completion.[174]

§ 520. Resumption of Work Within Withdrawn Areas.

Lacking discovery or the diligent prosecution of work tending to discovery [175] at the date of the withdrawal, neither resumption of work nor a relocation will protect the claim.[176] Where discovery was made prior to the withdrawal or the claimant was in diligent proseeution of work leading to discovery at such time, and thereafter, continued in diligent prosecution of said work, his rights are unaffected by the withdrawal.[177] But such rights possibly must be kept alive after discovery by the performance or resumption of annual assessment work; or application for patent be made.[178]

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[172] Fee vs. Dunham, *supra* (20); Rooney vs. Barnette, *supra* (20); McNeil vs. Pace, 3 L. D. 267.

[173] 42 Stats. 186; see Banfield vs. Cripsen, *supra* (10).

[174] Willitt vs. Baker, *supra* (157); Anderson vs. Robertson, *supra* (159); McKirahan vs. Gold King Co., *supra* (7); and see Jordan vs. Duke, *supra* (157).

[175] U. S. vs. Ruddock, 52 L. D. 313.

[176] Whether the withdrawal will attach upon failure to continue assessment work after the withdrawal, although such work has been performed prior thereto can only be determined through consideration of the terms and scope of the withdrawal. Navajo Indian Res., *supra* (155). The true rule is that where a claimant is in default so that his claim could be defeated by another individual claimant, surely the government, desiring to devote the land to an important public use may likewise take advantage of the default and divest the claim so as to free the land for government use. Kinney, 44 L. D. 580; Interstate Oil Corp., *supra*.(157) In this case the land department holds that: "Appellants claim that performance of assessment work is a matter of no concern to the government comes to this: By the withdrawal all subsequent locations are barred, yet the government may not take advantage of a default or abandonment, or how pressing the need for the land for a public purpose. No reason exists therefore for the performance of the annual labor prescribed as necessary to maintain a right to possession, and the locator is by the fact of withdrawal, sheltered from the consequences of his failure to perform the work prescribed by the statute and the said statute is repealed as to lands so withdrawn. The entire lack of justification either legal or equitable for the result above indicated, clearly demonstrates the fallacy of the claim of this appellant. Certainly there is nothing in the expressed provisions of the act of June 25, 1910, *supra*, which indicates an intent to repeal or abrogate section 2324 in the manner claimed." Krushnic, on rehearing, 52 L. D. 295; c. c. 30 Fed. (2d) 742, aff'd. 280 U. S. 306.. See, generally, Cameron vs. U. S., *supra* (156); Payne vs. C. P. R. Co., 255 U. S. 228, 46 App. D. C. 374, aff'd. with a modification. U. S. vs. Midway Oil Co., 232 Fed. 619; U. S. vs. McCutchen, *supra* (162); U. S. vs. Ohio Oil Co., 240 Fed. 1005; U. S. vs. Stockton Oil Co., 240 Fed. 1009; U. S. vs. Thirty Two Oil Co., 242 Fed. 736.

[177] A claimant to public land who has done all that is required under the law to perfect his claim acquires rights against the government, and his right to a legal title is to be determined as of that time. This rule is based upon the theory that by virtue of his compliance with the requirements, he has an equitable title to the land; that in equity it is his, and the government holds it in trust for him. Payne vs. C. P. R. Co., *supra* (155); Payne vs. New Mexico, 255 U. S. 371, 49 App. D. C. 80; 258 Fed. 980. It has been held, on many occasions, that the right of withdrawal relates only to unappropriated public land; and that, if there was at the time of withdrawal, a valid claim, said claim is unaffected by the withdrawal so long as it is maintained in accordance with the law under which it was initiated. Interstate Oil Corp. *supra* (157). See, also, Robbins vs. Elk Basin Co., 285 Fed. 179.

[178] U. S. vs. West, 30 Fed. (2d) 742, *certiorari* granted 279 U. S. 381, aff'd. 280 U. S. 306. See Hodgson vs. Midwest Oil Co., *supra*,(21) *but see* Wilbur vs. Krushnic, *supra*.(157)

CHAPTER XXIII.

BOUNDARIES.

§ 521. What Constitutes.

Under the federal mining law "the location must be distinctly marked on the ground so that its boundaries can be readily traced"; any natural or artificial physical marks or objects or writings alone or in connection therewith that serve to define the boundaries of the location upon the surface are sufficient;[1] but supplementary state legislation is more exacting.[2] It does not necessarily follow, however, that a compliance with local legislation or rule in respect, at least, to the manner of marking a location constitutes a sufficient compliance with the provisions of the mining act in that regard.[3] There can be no hard and fast rule as to what will constitute a requisite marking. It is the conformation and condition of the ground located together with the

[1] Haws vs. Victoria Co., 160 U. S. 303, aff'g. 7 Utah 515, 27 Pac. 695; Del Monte Co. vs. Last Chance Co., 171 U. S. 55; see 66 Fed. 212; McKinley Creek Co. vs. Alaska United Co., 183 U. S. 563; North Noonday Co. vs. Orient Co., 1 Fed. 532; Book vs. Justice Co., 58 Fed. 106; Walsh vs. Erwin, 115 Fed. 532; Oregon King Co., vs. Brown, 119 Fed. 55; rev'g. 110 Fed. 728; Loeser vs. Gardiner, 1 Alaska 643; Worthen vs. Sidway, 72 Ark. 215, 79 S. W. 777; Miller vs. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, aff'd. 197 U. S. 313. Congress has provided how mining claims can be acquired, and this may be done by discovery of mineral upon the public lands and by staking the same off or marking it upon the ground. Trinity Co. vs. Beaudry, 223 Fed. 741. See McKinley Creek Co. vs. Alaska United Co., *supra*. Posted notices may constitute a part of the marking and may aid in determining the situs of the monuments marking the claim, and they constitute a part of the marking, and while on account of their temporary nature may be of minor significance, yet this is not so where the location is followed by the actual and continued working of the claim. Meydenbauer vs. Stevens, 78 Fed. 787; Eaton vs. Norris, 131 Cal. 565, 63 Pac. 856; see Jupiter Co. vs. Bodie Con. Co., 11 Fed. 666; Carter vs. Bacigalupi, 83 Cal. 187, 23 Pac. 361; Green vs. Gavin, 11 Cal. A. 506, 105 Pac. 561; Huckaby vs. Northam, 68 Cal. A. 83, 228 Pac. 718; Bonanza Co. vs. Golden Head Co., 29 Utah 166, 80 Pac. 736; *but see* Doe vs. Waterloo Co., 70 Fed. 455; aff'g. 55 Fed. 11; Holland vs. Mt. Auburn Co., 53 Cal. 149. If a third person intending to locate a claim can readily ascertain from what has been done by the prior locator, the extent and boundaries of his location, then the object of the law has been accomplished. Kern Oil Co. vs. Crawford, 143 Cal. 298, 76 Pac. 1111; Madeira vs. Sonoma Co., 20 Cal. A. 731, 130 Pac. 175. See, also, Stock vs. Plunkett, 181 Cal. 193, 183 Pac. 657; Ninemire vs. Nelson, 140 Wash. 511, 247 Pac. 990.

[2] Butte City Co. vs. Baker, 196 U. S. 119, aff'g. 28 Mont. 222, 72 Pac. 617, Clason vs. Matko, 223 U. S. 646, aff'g. 10 Ariz. 175, 100 Pac. 773; Ledoux vs. Forester, 94 Fed. 600, dis. 99 Fed. 1004; Campbell vs. McIntyre, 295 Fed. 47; Myers vs. Spooner, 55 Cal. 257. See Last Chance Co. vs. Bunker Hill Co., 131 Fed. 583; Zerres vs. Vanina, 134 Fed. 610, aff'd. 150 Fed. 564; Sturtevant vs. Vogel, 167 Fed. 448; Cloninger vs. Finlaison, 230 Fed 98; Vedin vs. McConnell, 22 Fed. (2d) 753; Hawley vs. Romney, 42 Ida. 645, 247 Pac. 1070 holding that such laws are to be literally construed. Thompson vs. Barton Gulch Co., 63 Mont. 190, 207 Pac. 108.

In U. S. vs. Sherman, 288 Fed. 500, the court in sustaining a statute of South Dakota requiring the marking of the boundaries by "eight substantial posts," said: "a stake is not a post. The latter signifies more permanence and to sink it in the ground requires more effort and outlay than to drive down a stake. There is no pretense by appellee that he complied with the statute. His testimony shows that he did not and his location was therefore void. He acquired no possessory right to any of the ground in controversy."

But the provision "that the location must be distinctly marked on the ground so that its boundaries can be readily traced" is mandatory and can not be dispensed with by local statute. Belk vs. Meagher, 104 U. S. 284; Sweet vs. Webber, 7 Colo. 443, 4 Pac. 754; and is the main act of location, Donahue vs. Meister, 88 Cal. 121, 25 Pac. 1099; Eaton vs. Norris, *supra* [1] and "the ultimate fact in determining the validity of a location is the placing of such marks upon the ground as to identify the claim, or, to use the language of the statute, of such a character that the boundaries can be readily traced." McCleary vs. Broaddus, 14 Cal. A. 60, 111 Pac. 125.

See, also, Perigo vs. Erwin, 85 Fed. 905; aff'd. 93 Fed. 611; Stenfjeld vs. Espe, 171 Fed. 826; Campbell vs. McIntyre, *supra*; DeWitt vs. Sides, 81 Cal. A. 646, 254 Pac. 670; Buckeye Co. vs. Powers, 43 Ida. 532, 257 Pac. 833; Gibbons vs. Frazier, 68 Utah 182, 249 Pac. 473.

[3] Ledoux vs. Forester, *supra* [2]; Charlton vs. Kelly, 156 Fed. 433; Madeira vs. Sonoma Co., *supra* [1]; Nelson vs. Smith, 42 Nev. 312, 176 Pac. 264.

character and extent of the markings and not the mere placing of marks of the character and in the places, provided by local statute which must ultimately control.[4]

[4] See Book vs. Justice Co., *supra* (1). In this case it is said that the sufficiency of the stakes and monuments to enable the location to be traced depends more or less upon the conformation and condition of the ground located, and a location upon a hill covered by dense forests might require more definite marking than one upon a barren mountain where the boundary marks could be readily seen. See, also, Myers vs. Lloyd, 4 Alaska 268, Tiggeman vs. Mrzlak, 40 Mont. 23, 105 Pac. 77. In Charlton vs. Kelly, *supra* (3), it is said it may be further necessary to blaze trees along the line of the location, or cut away brush, or set more stakes at such distances that they may be seen from one to another, or dig up the ground in a way to indicate the lines so that the boundaries of the location may be readily traced. Ledoux vs. Forester, *supra* (2). In Southern Cross Co. vs. Europa Co., 15 Nev. 383, it was said that "stakes and stone monuments set at each corner of the claim and at the center of each of the end lines is sufficient marking of the boundaries." In Gleeson vs. Martin White Co., 13 Nev. 442, it was held that setting stakes at the four corners constituted a sufficient marking. To the same effect see North Noonday Co. vs. Orient Co., *supra* (1); Oregon King Co. vs. Brown, *supra* (1); Howeth vs. Sullinger, 113 Cal. 547, 45 Pac. 841; Green vs. Gavin, *supra* (1); Holdt vs. Hazzard, 10 Cal. A. 444, 102 Pac. 540.

The decided cases show a diversity of rulings and of methods employed in the marking. In Howeth vs. Sullinger, *supra*, it is said that no case has ever held that it is necessary to do more than to place stakes at the four corners, and on the center line, with notices on some of them. But Ledoux vs. Forester, *supra*,(2) and Charlton vs. Kelly, *supra*,(3) hold that all the stakes should be found after reading the notice, or the boundaries can not be readily traced and that one must be able to follow the lines and find all the stakes or the boundaries are not distinctly marked. In Donahue vs. Meister, *supra* (2), a notice folded and placed under a rock mound was held to be conspicuously posted—the notice being chiefly valuable as a temporary protection while the other acts are being done. In Buckeye Co. vs. Powers, *supra* (2), the exact contrary was held. In Loeser vs. Gardiner, *supra* (1), stakes set at the two ends of the center line with appropriate notices was held sufficient without further marking the boundaries. And in McKinley Creek Co. vs. Alaska Co., *supra* (1) a sufficient location was held made by notices affixed to a stump in a creek, claiming fifteen hundred feet along the creek by three hundred feet on each side of its center line, and stating that the claim was an extension of another. In Gleeson vs. Martin White Co., 13 Nev. 442, the court said as to the "Paymaster lode" that two posts, one at each end of the center line with notices claiming three hundred feet in width on each side were a sufficient marking of the boundaries of that lode. In North Noonday Co. vs. Orient Co., *supra* (1), a discovery shaft and a post at one extremity was held sufficient. But Holland vs. Mt. Auburn Co., *supra* (1) and Gelcich vs. Moriarty, 53 Cal. 217, both distinctly decide the contrary rule, holding such acts insufficient marking of the boundaries. In Mammoth Co. vs. Grand Central Co., 13 Fed. (2d) 26, one post established and courses and distances stated satisfied the court as to the location of the disputed boundary line against much conflicting evidence. In Walsh vs. Erwin, *supra* (1), it was held that a claim marked by a blasted tree at the point where the notice of location was posted, and on one of the boundary lines, and three corner stakes placed at stated distances from the notice and from each other, and the distance of the lines leading to and from a corner, at which no stake was placed, was accurately stated, was sufficiently designated to enable a surveyor to ascertain the exact limits of the location, and was therefore sufficient.

As to notices of location see Ninemire vs. Nelson, *supra* (1), reaffirming and applying to such notices the rule announced in Tiggman vs. Mrzlak, *supra*, regarding descriptions, viz; that if by any reasonable construction the notice will identify the ground sufficiently identifies the claim. See, also, Mammoth Co. vs. Grand Central Co., 13 Fed. (2d) 26; Hawley vs. Romney, *supra* (2). As to the purpose of the posted notices, it is stated that they may be an aid in determining the situs of the monuments and therefore constitute a part of the marking as does every other object placed upon the ground for the purpose of marking it or otherwise, if it in fact does help to mark it. McCleary vs. Broaddus, *supra*.

In Willeford vs. Bell, 5 Cal. Unrep. 679, 49 Pac. 6, the supreme court approved the following instruction: "The jury are instructed by the court that the mining claim of the defendant, in order to be valid, must have been distinctly marked upon the ground, so that its boundaries could be readily traced, on or before the 28th day of February, 1895. The law requires this marking of the claim upon the ground to be done in such a manner that any person of reasonable intelligence may go upon the ground and readily trace the claim out, and readily find the boundaries and limits of the claim, without instructions, advice, or information from any one or thing other than the marking upon the ground; and it is not necessary or required that such person shall have a copy of the notice of location or necessarily use it in the tracing of the boundaries of the claim, but where such notice is posted upon the claim, and constitutes a part of the marking of the claim, it may be used as a part of the means by which the boundaries of the claim can be traced. And if you believe from the evidence that the defendant, prior to the 28th day of February, 1895, failed to so mark his claim upon the ground so that any person of reasonable intelligence could go upon the ground, either with or without a copy of the notice of location, and readily trace the claim out, and find its boundaries and limits, your verdict should be that the claim was not so marked on the ground that its boundaries could be readily traced." See, also, Pollard vs. Shively, 5 Colo. 317.

See Location Notices.

§ 522. Excessive Boundaries.

Where the exterior boundaries of a mining location include an area in excess of the maximum amount permitted by the statute the location in the absence of fraud, or when made in good faith and mistakenly or inadvertently excessive is not void [5] as the defect may be remedied by abandoning the excess, not including the discovery.[6] A reasonable time is allowed within which to select the portion to be retained.[7] The courts are not harmonious as to when the excess is open to adverse location.[8]

§ 523. Overlapping Boundaries.

The fact that one mining claim is marked with stakes or monuments upon the ground of another mining claim does not invalidate such overlapping claim. In fact, part or all of the boundary marks of a lode location may be placed upon adjoining ground whether patented or unpatented, although adversely held by another, if openly and peaceably done.[9] The express consent of the owner of the invaded

[5] Richmond Co. vs. Rose, 114 U. S. 576, aff'g. 17 Nev. 25, 27 Pac. 1105; Waskey vs. Hammer, 223 U. S. 90, aff'g. 170 Fed. 31; Walton vs. Wild Goose Co., 123 Fed. 218, McIntosh vs. Price, 121 Fed. 718; Zimmerman vs. Funchion, 161 Fed. 859; Jones vs. Wild Goose Co., 177 Fed. 98; Cardoner vs. Stanley Co., 193 Fed. 517; McElligott vs. Krogh, 151 Cal. 132, 90 Pac. 823; Gobert vs. Butterfield, 23 Cal. A. 1, 136 Pac. 516. *But see* Haws vs. Victoria Co., *supra* [1]; Ledoux vs. Forester, *supra* [2]; Nicholls vs. Lewis & Clark Co., 18 Ida. 232, 109 Pac. 816. See Madeira vs. Sonoma Co., *supra* [1] A mining claim located in excess of the width allowed by law may be valid as to the legal width and void as to the excess. Jupiter Co. vs. Bodie Con. Co., *supra* [1]; Golden Reward Co. vs. Buxton Co., 79 Fed. 877; Flynn Group Co. vs. Murphy, 18 Ida. 269, 109 Pac. 851; Hawley vs. Romney, *supra* [2]; see Glacier Co. vs. Willis, 127 U. S. 471; Gohres vs. Illinois Co., 40 Or. 516, 67 Pac. 666. In Adams vs. Yukon Co., 251 Fed. 226, it is held that where a placer location is voidable, because excessive, another may not locate on the excess without giving notice to the prior locator to select the authorized area; should he fail to do so he becomes a trespasser, and he can not profit by his pretended location. See Swanson vs. Koeninger, 25 Ida. 361, 137 Pac. 891; see McPherson vs. Julius, 17 S. Dak. 98, 95 N. W. 429, where excess was abandoned and relocation made under another name before initiation of intervening rights. McIntosh vs. Price, *supra*; Zimmerman vs. Funchion, *supra*; Jones vs. Wild Goose Co., *supra*. See Thompson vs. Barton Gulch Co., *supra* [2]. Flynn Group Co. vs. Murphy, *supra*, holds that where the notices posted furnish *data* for measurements and these when made show the excess plainly, such excess may be located at once. Cardoner vs. Stanley, *supra*; McPherson vs. Julius, *supra*; Gohres vs. Illinois Co., *supra*; Nelson vs. Smith, 42 Nev. 302, 176 Pac. 264. In Nelson vs. Lewis & Clark Co., *supra* a location was held to be entirely void, because excessive in extent. This ruling is approved in Flynn Group Co. vs. Murphy, *supra*. In Conway vs. Hart, 129 Cal. 480, 62 Pac. 44, the court, itself, drew a new end line for the location fifteen hundred feet from the location notice.

See *infra*, note 26.

[6] Waskey vs. Hammer, *supra* [5]. Gohres vs. Illinois Co., *supra* [5]. Thompson vs. Barton Gulch Co., *supra* [2].

See *supra*, notes 5 and 6.

[7] Zimmerman vs. Funchion, *supra* [5].

[8] McIntosh vs. Price, *supra* [5]; Zimmerman vs. Funchion, *supra* [5]; Adams vs. Yukon Co., *supra* [5]; Jones vs. Wild Goose Co., *supra* [5]; Gohres vs. Illinois Co., *supra* [5]; see Walsh vs Henry, 38 Colo. 393, 88 Pac. 450; Thompson vs. Barton Gulch Co., *supra* [2]; Nelson vs. Smith, *supra* [3]. In this case it is said that with the discovery as the initial point the boundaries of a mining location must be so definite and certain that they can be readily traced and they must be within the limits authorized by law, as otherwise their purpose and object will be defeated. The area bounded by a location must be within the limits of the grant, and no one would be required to look outside such limits for the boundaries of a location. Boundaries beyond the maximum extent of a mining location would not impart notice and would be equivalent to no boundaries at all. See Hauswirth vs. Butcher, 4 Mont. 299, 1 Pac. 714; Legatt vs. Stewart, 5 Mont. 107, 2 Pac. 320.

Both of these cases are cited with approval upon this point in Thompson vs. Barton Gulch Co., *supra* [2].

See *supra*, notes 5 and 6.

[9] Del Monte Co. vs. Last Chance Co., *supra* [1] Bunker Hill Co. vs. Empire State Co., 134 Fed. 268, aff'd. 131 Fed. 561; Hidee Co., 30 L.D. 420; Alice Claim, 30 L. D. 481; *but see* Grassy Gulch Claim, 30 L. D. 191; case of a placer claim, Doe vs. Tyler, 73 Cal. 21, 14 Pac. 375; Davis vs. Shepherd, 31 Colo., 72 Pac. 59.

In making a lode mining location its locator may lay his surface boundary lines upon or across portions of prior existing mining claims in order to obtain parallelism of end lines and thus secure for himself extralateral rights. Jim Butler Co. vs. West End Co., 247 U. S. 453, aff'g. 39 Nev. 375, 158 Pacific 876; Silver King Co. vs. Conkling Co., 256 U. S. 26, rev'g. 230 Fed. 553.

ground is not essential; and subsequent objection by him is unavailing.[10] No rights are initiated to the ground within such overlap.[11]

§ 524. Rule Not Applicable to Placer Locations.

The above rule has no application to placer locations, as, in these latter claims the surface of the ground is the thing located.[12] The possession of the surface is essential to mining operations, and, in order to obtain the surface that is open to location it is not necessary to invade the surface of other mining claims, nor to place boundary lines thereon.[13]

§ 525. Boundaries of Placer Claims.

Placer locations may be located substantially in the same manner as lode claims,[14] except when taken up by legal subdivisions within the states of California,[15] Nevada,[16] and Washington.[17] In those states, except in Washington, by local statutory provisions, a placer location, if upon surveyed land, is sufficiently marked by merely posting a notice of location thereon containing a reference to the United States survey which has been extended over the land embraced within the location. Such description is deemed the equivalent of marking the lines of the claim.

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[10] Del Monte Co. vs. Last Chance Co., *supra* (1); Bunker Hill Co. vs. Empire State Co., *supra* (9); Jim Butler Co. vs. West End Co., *supra* (9).

[11] Id. Swanson vs. Sears, 224 U. S. 180. See Biglow vs. Conradt, 159 Fed. 870; Hall vs. McKinnon, 193 Fed. 580 and *supra* note 9.

[12] Stenfjeld vs. Espe, *supra* (2); see Grassy Gulch Claim, *supra* (9); Mary Darling, 31 L. D. 64; Golden Chief Claim, 35 L. D. 557. Snow Flake Fraction, 37 L. D. 254. Kern Oil Co. vs. Crawford, overruling White & Lee, 78 Cal. 593, 21 Pac. 363.

[13] Id.

[14] See McKinley Creek Co. vs. Alaska United Co., *supra* (1); Worthen vs. Sidway, *supra* (1); Strickland vs. Commercial Co., 55 Or. 48, 104 Pac. 965. In McCann vs. McMillan, 129 Cal. 354, 62 Pac. 31, the court said: "Appellant further contends that plaintiff has not shown title, because 'there was no proof that the ground contained veins or lodes of mineral-bearing rock in place.' It is said that the ground contained a deposit of borate material or borax, and that such deposits can not be located as lode claims, but only as placer claims. The locations made by plaintiffs or their predecessors in interest do not profess to be lode claims, or that they contain veins or lodes of mineral-bearing rock in place. * * * But that point is immaterial. It is said in Lindley on Mines, § 432, 'that generally speaking, the acts required to be performed in order to complete a valid location under the federal laws applicable to placers are the same as required in cases of lode locations.'" The opinion in the foregoing case does not show whether or not the locations in suit were laid upon surveyed or unsurveyed land. See, also, § 2329 Rev. St. U. S.

The federal mining law, however, requires that placer locations upon surveyed lands must conform, when reasonably practicable, to the lines of the public survey. Mitchell vs. Hutchinson, 142 Cal. 404, 76 Pac. 55. If upon unsurveyed lands the locations should be in square form, or at least rectangular. Snow Flake Fraction, *supra* (12). See, generally, Temescal Co. vs. Salcido, 137 Cal. 211, 69 Pac. 1010, dist'g. White vs. Lee, *supra* (12).

[15] Cal. C. C. § 1426c. In Dripps vs. Allison's Co., 45 Cal. A. 95, 187 Pac. 451, the court, speaking of placer locations said: "It is the policy of the government to have mining locations in compact form. No shoestring claim will receive the government's sanction. Locations upon unsurveyed lands, as well as those upon surveyed lands, are within the purview of the statute. If the lands have been surveyed by the government, the location, in its exterior limits, must conform to the public survey, if reasonably practicable; if the land be unsurveyed, the location, as reasonably as practicable, must be rectangular in form, with east-and-west and north-and-south boundary lines, and otherwise approximating conformity to the public survey system within the limits of practicability. (Wood Placer M. Co. 32 L. D. 364; Snow Flake Placer, 37 L. D. 250." See, also, Mitchell vs. Hutchinson, *supra* (14).

See *infra*, § 534.

[16] Rev. Laws, 1912, § 2434.

[17] "Where such claim is located by legal subdivisions of the public surveys, such location shall, notwithstanding that fact, be marked by the locator upon the ground the same as other locations." Rem. & Ball. Codes of 1909, § 7367. As to state mineral lands see State vs. Savage, 104 Wash. 79, 175 Pac. 568.

§ 526. Adoption of Survey Lines Dangerous.

A danger in the adoption of the lines of the public survey as the boundary lines of the claim lies in the possible loss of corners, or the possible discrepancy between the official field notes and the *locus* of the ground.[18]

§ 527. Change of Boundaries.

The claimant of an unpatented mining claim may shift his boundaries or float his location upon the public domain, provided he does not interfere with the rights of others.[19] The position of all or any of the boundary marks upon a mining location may be changed so as to include land open to location and not originally embraced within the claim,[20] or to draw in the lines to avoid an excess,[21] or for the purposes of paralleling the end lines of a lode location.[22] But the lines can not be changed nor extended for the fraudulent purpose of obtaining possession of a subsisting location made in good faith,[23] nor so as to interfere with other mining claims subsequently located,[24] nor can the courts establish or make a new location.[25]

§ 528. Change by Stranger to Title.

The rights of a locator can not be affected nor defeated by a change of the monuments or posts by a stranger to the title; and a subsequent locator is bound to inquire or to take notice at his peril of any existing posts or monuments duly marked, lettered, and showing the name of a mining location.[26]

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[18] Goss vs. Golinsky, 12 Cal. A. 71, 106 Pac. 604; Brown vs. Yarrahan, 3 Cal. A. 474, 86 Pac. 744; see Kern Co. Oil Co. vs. Crawford, *supra* (1); Saxton vs. Perry, 47 Colo. 263, 107 Pac. 281.

[19] Croesus Co. vs. Colorado Co., 19 Fed. 81, Hall vs. McKinnon, *supra* (11); Golden Fleece Co. vs. Cable Con. Co., 12 Nev. 329; See Shoshone Co. vs. Rutter, 87 Fed. 896, see 177 U. S. 505; Tonopah Co. vs. Tonopah Co., 125 Fed. 396, dis. 129 Fed. 1007, cc 125 Fed. 400, 408; see, also, Waskey vs. Hammer, *supra* (5); Thompson vs. Barton Gulch Co., *supra* (2). Sanders vs. Noble, 22 Mont. 110, 55 Pac. 1037. The object of the law in requiring the location of the mining claim to be marked upon the ground is to fix the claim to prevent floating or swinging, so that the persons who in good faith are looking for unoccupied ground in the vicinity of the location may be enabled to ascertain what ground has been appropriated in order to make their locations upon the residue. Furthermore, it is contrary to the policy and spirit of the mining laws to permit a mining claim of excessive size to be staked and afford opportunity for the stakes to be shifted at the locator's pleasure and the claim swung so as to include ground proved to be rich in mineral through the development of other ore bodies. Swanson vs. Koeninger, *supra* (5).

The right to change location boundaries, provided no other property rights are invaded, exists independent of state statutes. Thompson vs. Spray, 72 Cal. 528, 14 Pac. 182; Daggett vs. Yreka Co., 149 Cal. 357, 86 Pac. 968.

[20] McPherson vs. Julius, *supra* (5); Adams vs. Yukon Co., *supra* (5).

[21] Batt vs. Stedman, 36 Cal. A. 608, 173 Pac. 99. See McElligott vs. Krogh, *supra* (5); Conway vs. Hart, *supra* (5), where the court, itself, drew in the lines of the locations to avoid excess.

[22] Doe vs. Sanger, 83 Cal. 203, 23 Pac. 365; Batt vs. Stedman, *supra* (21).

[23] Tombstone Townsite Cases, 2 Ariz. 272, 15 Pac. 26, dis. 145 U. S. 629; Bunker Hill Co. vs. Empire State Co., *supra* (9); Hall vs. McKinnon, *supra* (11).

[24] Hall vs. McKinnon, *supra* (11); see Biglow vs. Conradt, *supra* (11). The lines of a mining claim are fixed by the monuments upon the ground and can not be changed so as to interfere with other claims subsequently located. Golden Fleece Co. vs. Cable Con. Co., *supra* (19).

[25] Argentine Co. vs. Terrible Co., 122 U. S. 478; aff'g. 89 Fed. 583; King vs. Amy Co., 152 U. S. 222, rev'g. 9 Mont. 543, 24 Pac. 200; Del Monte Co. vs. Last Chance Co., *supra* (1); Fitzgerald vs. Clark, 17 Mont. 100, 42 Pac. 273, aff'd. 171 U. S. 92; see Daggett vs. Yreka Co., *supra* (19).

[26] Tonopah Co. vs. Tonopah Co., *supra* (19). A locator of a mining claim can not be deprived of his inchoate rights by the tortious acts of others; nor can an intruder or trespasser initiate any rights which will defeat those of a prior discoverer. Gobert vs. Butterfield, *supra* (5); *but see* Del Monte Co. vs. Last Chance Co., *supra* (1), holding that mere marking upon the surface of a location does not necessarily make the location valid and subsisting, and the ground may be entirely free for another location. The second locator is not required to wait until by judicial proceedings it is established that the prior location is invalid or has failed before he may make a location. He is at liberty to make his location at once, and he may then, in the manner provided by statute, test the validity of the other as well as that of his own location.

§ 529. Adoption of Boundary Marks.

Where existing monuments distinctly mark the location upon the ground so that its boundaries can be readily traced such markings may be adopted, or, rebuilt, if partially existing, by a subsequent locator. The use of such monuments for the purpose of marking the boundaries of a mining claim is a sufficient compliance with the statute and creates a valid relocation, on the performance of other requirements.[27]

§ 530. Destruction of Boundary Marks.

When a location is sufficiently marked upon the surface so that its boundaries can be readily traced, and all other acts of location are performed as required by law, the right of exclusive possession is fully vested in the locator and his grantees and they can not be divested of this right by the removal or obliteration or destruction of one or more of the monuments, stakes, marks or notices, done without their fault, while they continue to perform the annual labor upon the claim.[28]

§ 531. No Presumption.

It has been held that there is no presumption as to boundary marks upon an old claim.[29] So, if questioned, their former existence must be established.[30]

§ 532. Absence of Boundary Marks.

Where, as in California, there appears to be no statutory time fixed within which the boundaries of a location shall be marked or defined,[31]

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[27] Campbell vs. McIntyre, *supra* (2); Hagan vs. Dutton, 20 Ariz. 476, 181 Pac. 578; Conway vs. Hart, *supra* (5); Eaton vs. Norris, *supra* (1); Riverside Co. vs. Hardwick, 16 N. M. 479, 120 Pac. 325; Brockbank vs. Albion Co., 29 Utah 367, 81 Pac. 863; Perquist vs. W. Virginia Co., 18 Wyo. 479, 106 Pac. 673; see Rohn vs. Iron Chief Co., 186 Cal. 703; 200 Pac. 644; Miehliech vs. Tintic Co., 60 Utah 569, 211 Pac. 687; *but see* Miller vs. Chrisman, *supra* (1); Moffatt vs. Blue River Co., 33 Colo. 142, 80 Pac. 139.

[28] Jupiter Co. vs. Bodie Con. Co., *supra* (1); Book vs. Justice Co., *supra* (1); Walsh vs. Erwin, *supra* (1); Walton vs. Wild Goose Co., *supra* (5); Sturtevant vs. Vogel, *supra* (2); see Gillis vs. Downey, 85 Fed. 486; Tonopah Co. vs. Tonopah Co., *supra* (19); Gobert vs. Butterfield, *supra* (5). In this connection the language used in Dwinnell vs. Dyer, 145 Cal. 12, 78 Pac. 247, is as follows: "The working of a quartz lode inside of defined boundaries is not only a *pedis possessio* of all the ground within such boundaries, but is in itself the substance of everything required by law to constitute a valid location, * * * · It is actual possession, while a formal location is only constructive possession."

Eilers vs. Boatman, 3 Utah 159, 2 Pac. 66 aff'd. 111 U. S. 356, see Del Monte Co. vs. Last Chance Co., *supra* (1). The positive testimony of witnesses who saw the stakes marking a mining claim is of great weight, aside from any question of credibility, than negative testimony of witness who did not find any stakes. McEvoy vs. Hyman, 25 Fed. 596.

[29] Daggett vs. Yreka Co., *supra* (19); Temescal Co. vs. Salcido, *supra* (14); *but see*, Gobert vs. Butterfield, *supra* (5), holding that "if the evidence shows that the boundaries were originally marked, the fact that the stakes then set could not in later years be found raises no presumption against the validity of the original marking." It is not incumbent upon the owner of a mining location as a matter of law to preserve the standing of monuments against meddlesome persons or trespassers in order to preserve his rights as against subsequent locators seeking to acquire mining rights in the premises. Miehlich vs. Tintic Co., *supra* (27). See *infra*, note 30.

[30] Daggett vs. Yreka Co., *supra* (19). Where a mining claim has been properly located and stakes set by which the boundaries may be marked, the location will not be made invalid because one or more of the stakes as originally set have disappeared. Book vs. Justice Co., *supra* (1); Perego vs. Erwin, *supra* (2); Walton vs. Wild Goose Co., *supra* (5); Gibbons vs. Frazier, *supra* (2).

[31] DeWitt vs. Sides, *supra* (2).

after posting notice, demarcation should be done within a reasonable time,[32] and before adverse rights attach.[33]

§ 533. Form of Lode Location.

A lode location may be laid without in any manner corresponding with the lines of the government surveys.[34] It is valid although not in the form of a parallelogram.[35] But the extralateral right as applied to locations in that form, can not be extended to locations of irregular shape.[36]

§ 534. Form of Placer Locations.

Placer locations must conform as nearly as practicable with the United States system of public land surveys and the rectangular subdivisions thereof.[37] Where it may be impracticable to so make the location it may be laid as upon unsurveyed lands.[38]

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[32] Doe vs. Waterloo Co., *supra* [1]; Tonopah Co. vs. Tonopah Co., *supra* [19]; McCleary vs. Broaddus, *supra* [2]; DeWitt vs. Sides, *supra* [2]. Union Co. vs. Leitch, 24 Wash. 585, 64 Pac. 829. See Erhardt vs. Boaro, 113 U. S. 527. "A claim may be marked at any time prior to the acquisition of an intervening right, regardless of the question as to whether the time within such marking was made is reasonable or not." Gobert vs. Butterfield, *supra* [5].

[33] Sharkey vs. Candiani, 48 Or. 112, 85 Pac. 219; 7 L. R. A. N. S. and notes 791 to 834; and see, Crown Point Co. vs. Crismon, 39 Or. 364, 65 Pac. 87.

Where notice is properly posted, but the locator does not remain in possession of said claim or distinctly mark the same on the ground so that its boundaries can be readily traced, the location is invalid as against a subsequent locator who complies with the requirements of the statute. Holland vs. Mount Auburn Co., *supra* [1]; Funk vs. Sterrett, 59 Cal. 613; Donahue vs. Meister, *supra* [2]; Eaton vs. Norris, *supra* [1]. In other words, as said in Funk vs. Sterrett, *supra*, a party can show a right to the possession of a mining claim (when no patent has issued) only by showing an actual *pedis possessio* as against a mere wrongdoer, or by showing a compliance with the requirements of law. A subsequent locator can not object that a prior location was not sufficiently marked upon the ground at the time of the original location, provided such prior location was sufficiently marked upon the ground before the subsequent locator made any location or acquired any rights in such claim. North Noonday Co. vs. Orient Co., *supra* [1]; Jupiter Co. vs. Bodie Con. Co., *supra* [1]; Perego vs. Erwin, *supra* [2]; Sharkey vs. Candiani, *supra;* see, McGinnis vs. Egbert, 8 Colo. 41, 5 Pac. 652; Crown Point Co. vs. Crismon, *supra*.

In Union Co. vs. Leitch, *supra* [32], the locator delayed for eight days the marking of his boundaries after posting his notices of location; meanwhile another party located part of the ground. The latter was held to have acquired no rights as eight days was not too long to allow for marking boundaries. See, also, Kirkpatrick vs. Curtiss, 138 Wash. 333, 244 Pac. 571, where, under a statute allowing both an amended notice and ninety days for recording the notice, and it was held an amended certificate of location, filed within the ninety days, though after suit brought, sufficed to hold the claim against the plaintiff. No change of boundaries was made. But the statute allowing such change, the ruling in case of such change would necessarily have been the same. See, also, McEvoy vs. Hyman, *supra* [28]. In Doe vs. Waterloo Co., *supra* [1], there was no local law or local rule fixing the time within which to complete the location and twenty days was held to be a reasonable time; *compare* Newbill vs. Thurston, 65 Cal. 419, 4 Pac. 409.

See 7 L. R. A. N. S. 791, 834, note; which is exhaustive.

[34] Del Monte Co. vs. Last Chance Co., *supra* [1]; Davis vs. Shephard, *supra* [9].

[35] Iron Co. vs. Elgin Co. (Horse Shoe Case), 118 U. S. 196; aff'g. 14 Fed. 377; Walrath vs. Champion Co., 171 U. S. 293; aff'g. 63 Fed. 557; Gibson vs. Hjul, 32 Nev. 360, 108 Pac. 759. See Doe vs. Sanger, *supra* [22]. Each locator should be entitled to make his location so as to reach as much of the unappropriated and previously discovered vein as possible. Del Monte Co. vs. Last Chance Co., *supra* [1]; see, also, Hidee Co., 30 L. D. 428.

[36] Iron Co. vs. Elgin Co., *supra* [35]; Montana Co. vs. Clark, 17 Mont. 118, 42 Pac. 277; Gibson vs. Hjul, *supra* [35]. Under the statute locators acquire no extralateral rights unless their end lines have not only been marked upon the surface, but have been made parallel. Daggett vs. Yreka Co., *supra* [25].

[37] Miller Placer Claim, 30 L. D. 226; Mitchell vs. Hutchinson, *supra* [14]; Dripps vs. Allison's Co., *supra* [15]; Strickland vs. Commercial Co., *supra* [14].

[38] Reynolds vs. Iron Co., 116 U. S. 694. The requirement of the law as to location of placer claims upon unsurveyed land is met by locating the claims in rectangular form with proper dimensions and with eastern and western and northern and southern lines. Wood Placer Co., 32 L. D. 365; Hogan and Idaho Claims, 34 L. D. 42. Rehearing denied. p. 178. See Dripps vs. Allison's Co., *supra* [15].

See § 525.

§ 535. Monuments Are Not Boundaries.

Monuments at the corners of a location do not mark the boundaries.[39] They only are the means by which the boundaries can be traced, and are sufficient for that purpose.[40] They must be so placed upon the ground that the surface lines of the location can be traced with reasonable certainty and without any practical difficulty.[41] Under some circumstances setting permanent stakes or stones at the four corners of a location may be sufficient,[42] and, under other circumstances, so marking the claim may not, of itself, be sufficient.[43]

§ 536. Monuments Control Distances.

The stakes and monuments set, from which the boundaries of a mining claim may be marked or traced, will control the courses specified in the notice of location,[44] or patent.[45]

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[39] Gleeson vs. Martin White Co., *supra* [4]; see, also, Book vs. Justice Co., *supra* [1]; Walsh vs. Irwin, *supra* [1].

[40] Gleeson vs. Martin White Co., *supra* [4]. All objects or monuments placed upon the ground, either at the time of the location or subsequently, whether intended as monuments or not, may be considered if, in fact, they help to mark it. Eaton vs. Norris, *supra* [1].

[41] Haws vs. Victoria Co., *supra* [1]; McKinley Creek Co. vs. Alaska Co., *supra* [1]; Book vs. Justice Co., *supra* [1]; Gleeson vs. Martin White Co., *supra* [4].

[42] Holt vs. Hazard, *supra* [4]; see, Oregon King Co. vs. Brown, *supra* [1]; Green vs. Gavin, *supra* [1]; Gleeson vs. Martin White Co., *supra* [4]; Berquist vs. W. Virginia Co., *supra* [27].

[43] Eaton vs. Norris, *supra* [1]; see, Taylor vs. Middleton, 67 Cal. 656, 8 Pac. 594. What might be sufficient marking of a location in one place would not be in another, by reason alone of the difference in the character and surface of the ground; some places being level and practically clear of brush, trees, or any kind of obstruction, so that a prospector, standing at a corner or center stake, might very readily see the opposite end or corner stake, while in the mountains or hills there may be cuts, ravines and knolls covered with timber, in some places so close together in their growth that it would be practicably impossible for the prospector or miner to readily trace the boundary of a location, from the fact that corner or center stakes alone were used. Myers vs. Lloyd, *supra* [7]. See, also, Book vs. Justice Co., *supra* [1].

See *supra*, note 4.

[44] Book vs. Justice Co., *supra* [1]; Treadwell vs. Marrs, 9 Ariz. 333, 83 Pac. 350. In this case it was said: "The well settled rule is that, where the monuments are found upon the ground, or their position or location can be determined with certainty, the monuments govern, rather than the location certificate; but where the courses and distances are not with certainty defined by monuments or stakes, the calls in the location notice must govern and control." See, McEvoy vs. Hyman, *supra* [28]; Pollard vs. Shively, *supra* [4], cited with approval in Duncan vs. Eagle Co., 48 Colo. 581; 111 Pac. 588; Cullacott vs. Cash Co., 8 Colo. 179, 6 Pac. 211; Williamson vs. Pratt, 37 Cal. A. 368, 174 Pac. 114; San Miguel Co. vs. Bonner, 33 Colo. 212, 79 Pac. 1025. The description of the location as recorded is binding on the locator, but if the calls as to distance and courses set out vary from the markings actually made upon the ground, the latter will prevail. Meydenbauer vs. Stevens, *supra* [1]; Sturtevant vs. Vogel, *supra* [2]; Price vs. McIntosh, *supra* [36]. See, Bennett vs. Harkrader, 158 U. S. 441; Steen vs. Wild Goose Co., 1 Alaska 255. In case of a conflict between the location notice and the boundaries of the claim as marked upon the surface by the stakes or monuments, the rule that the stakes or monuments control applies only so far as there is no substantial variance between such stakes or monuments and the notice of location; but where the course and distance are not with certainty defined by monuments or stakes, the clause in the location notice must govern. Where there is doubt as to the monuments or stakes, there can be no reason for the rule that the monuments or stakes should prevail. Swanson vs. Koeninger, *supra* [5]. In descriptions of mining claims, courses and distances must yield to objects and monuments, and these can not be rejected as false and mistaken in favor of a mere course or distance, but a false or mistaken particular in a conveyance may be rejected where there are definite particulars sufficient to locate the grant. Garrard vs. S. P. Mines, 82 Fed. 585; see, Book vs. Justice Co., *supra*. The omission of one of the courses in the location notice is not necessarily fatal. Mitchell vs. Hutchinson, *supra* [15]. The absolute position of every mining claim and the relative positions of different mining claims must be determined as the claims are defined and established upon the ground. All errors of description of the position of either claim and of conflicts between them, must give way to the descriptions as so defined and established upon the ground. Wasatch Mines Co., 45 L. D. 11. Where there is a variance between the calls of a location notice of a mining claim and the lines of the claim as actually staked upon the ground, and the monuments and stakes fully comply with all statutory requirements and are in place, the locator, in the absence of fraud, is not limited to the claim as described of record, unless a subsequent locator has knowledge of the description contained in such location notice and act thereon, as in such case, it is the same as if no location notice had been made or recorded. Cardoner vs. Stanley Co., *supra* [5]; Sturtevant vs. Vogel, *supra* [2].

§ 537. Marking Not Conclusive.

It does not follow that a valid mining claim exists from the mere marking upon the surface.[46]

§ 538. Estoppel.

In Sharkey vs. Candiani[47] two of the owners of the Louise and the Lucky Boy No. 4 mining claims, marked out a claim for the defendant which he located as the Doctor lode. The defendant worked this claim for a time with the knowledge of the owners of the two first named claims and without objection on their part. After the defendant discovered a valuable body of ore an investigation was made and it was found that the Doctor claim encroached upon the Louise and Lucky Boy No. 4 claims. The court found that all parties had labored under a mistake as to the true boundaries of the Louise and Lucky Boy No. 4 claims, but that the owners of those claims nevertheless were estopped to assert title to the property in dispute.

§ 539. Pedis Possessio.

The working of a mining claim inside of defined boundaries is not only a *pedis possessio* of all the ground within such boundaries but is in itself, the substance of everything required by law to constitute a valid location and gives a good title to a mining claim (not excessive in extent) regardless of local law providing for the posting and recording of notices. It is actual possession; while a formal location is only constructive possession.[48]

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[45] Cardoner vs. Stanley Co., *supra* (5). "All authorities on the subject assign courses and distances the lowest scale in evidence as being the least reliable. Gailbraith vs. Shasta Co., 143 Cal. 94, 76 Pac. 901"; cited in Williamson vs. Pratt, *supra* (13). The Act of April 28, 1904, 5 U. S. Comp. St., p. 5653, § 4626, making the monuments the highest authority, to which inconsistent descriptions must give way, simply made more explicit, or, at most, carried a little further, the previous policy of the law. Hence, the monuments as fixed upon the ground control the courses and distances of the patent and exclude therefrom land outside the monuments though comprehended by the courses and distances. Silver King Co. vs. Conkling Co., 255 U. S. 151 s. c. on rehearing, 256 U. S. 18; see, also, Plummer vs. McLain, ___ Tex., C. A. 192 S. W. 575. In Thallman vs. Thomas, 102 Fed. 935, it is said: "That in any case in which the parties claim that they shall hold by monuments, rather than by the description given in the patent, they must maintain the monuments in the position in which they were placed."

[46] Del Monte Co. vs. Last Chance Co., *supra* (1). The boundary lines of a mining location as marked upon the ground, after the locator's failure to complete the location for any cause, are not evidence either of a right of possession nor of the extent thereof. McKenzie vs. Moore, 20 Ariz. 1, 176 Pac. 569. A person who enters upon the public domain and locates land for its mineral contents though he may erect appropriate monuments and post and properly file location notices, if he makes no discovery of minerals, he acquires no right of any nature against the government nor any private individual, save the right to proceed with diligence to effect an actual discovery of mineral. U. S. vs. McCutchen, 238 Fed. 579. Persons who proceed in good faith to make such explorations and enter upon vacant public lands for that purpose are not treated as trespassers, but as licensees or tenants at will. The exploration must precede the discovery of mineral, and some occupation of the land is necessary for adequate and systematic exploration, and, it must follow that legal recognition of the *pedis possesio* of a bona fide prospector is regarded as a necessity. Such a prospector may hold the place in which he may be working against all others, having no better right, and while he remains in possession diligently working toward discovery, he is entitled for at least a reasonable time to be protected against forcible, fraudulent, and clandestine intrusions upon his possession. Union Oil Co. vs. Smith, 249 U. S. 337, aff'g. 166 Cal. 217, 135 Pac. 966; Cole vs. Ralph, 252 U. S. 296, rev'g. 249 Fed. 81; U. S. vs. California Midway Oil Co., 259 Fed. 355; Jose vs. Utley, 185 Cal. 663, 199 Pac. 1040; Hullinger vs. Big Sespe Co., 28 Cal. A. 69; 151 Pac. 369. See, also, Hanson vs. Craig, 170 Fed. 65; Omar vs. Soper, 11 Colo., 380, 18 Pac. 443, and see Dower vs. Richards, 151 U. S. 658, aff'g. 81 Cal. 44. For instances of insufficient markings see Doe vs. Waterloo Co., *supra* (1); Maderia vs. Sonoma Co., *supra* (1).

[47] 48 Or. 112, 85 Pac. 219. This case is not to be distinguished from Grand Prize Mines vs. Boswell, 83 Or. 1, 162 Pac. 1062.

[48] Dwinell vs. Dyer, *supra* (28); Little Sespe Co. vs. Bacigalupi, 167 Cal. 381, 139 Pac. 802; *but see*, Thallmann vs. Thomas, *supra* (45); see, also Costigan Min. Law, p. 156, § 44 and cases cited.

§ 540. Question of Fact.

Whether or not the location of a mining claim has been distinctly marked upon the ground so that its boundaries can be readily traced ordinarily is a question of fact to be determined by the court or jury upon the evidence presented upon that issue.[49]

§ 541. Nonmineral Land.

The boundaries of a mining claim may include open nonmineral land.[50]

§ 542. End Lines.

The location as made on the surface by the locator determines the extent of his rights below the surface. The end lines as he marks them on the surface, except where the location is placed not along, but across the course of the vein, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike.[51] The existence of parallel end lines is essential to the extralateral right.[52] There can be but two end lines[53] laid crosswise of the vein or lode at the surface;[54] otherwise they are side lines.[55] They must be straight, parallel lines, neither broken nor curved,[56] nor necessarily of equal length[56a] placed at any angle or variation from the true dip.[57] They extend downward continued in their own direction,

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[49] Eilers vs. Boatman, 111 U. S. 356, aff'g. 3 Utah 159, 2 Pac. 66; Hammer vs. Garfield Co., 130 U. S. 291, aff'g. 6 Mont. 53, 8 Pac. 153; Book vs. Justice Co., *supra* [(1)]; Meydenbauer vs. Stevens, *supra* [(1)]; Taylor vs. Middleton, *supra* [(43)]; Eaton vs. Norris, *supra* [(1)]; Gleeson vs. Martin White Co., *supra* [(4)]; see Snowy Peak Co. vs. Tamarack Co., 17 Ida. 641, 107 Pac. 60; Wells vs. Davis, 22 Utah 327, 62 Pac. 3; Bonanza Co. vs. Golden Head Co., *supra* [(1)]. As to when the question becomes one of law, see Grand Trunk Co. vs. Ives, 144 U. S. 408; Souter vs. Maguire, 78 Cal. 543, 21 Pac. 183; Upton vs. Larkin, 7 Mont. 449, 17 Pac. 728, aff'd. 144 U. S. 19.

[50] Deer Creek Co., 46 L. D. 272.

[51] Del Monte Co. vs. Last Chance Co., *supra* [(1)]; see, Silver King Co. vs. Conkling Co., *supra* [(9)].

End lines in the sense of the statute are those which are laid across the vein or lode to show how much of it, in point of length is appropriated and claimed by the miner. Jim Butler Co. vs. West End Co., *supra* [(9)].

The end lines are not necessarily those which are marked or so called, but they may be projected at the extreme point where the apex leaves the location as marked upon the surface. Quilp Co. vs. Republic Corp. 96 Wash. 439, 165 Pac. 57. The remaining part of an end line of a patented mining location excluding a triangle at the corner is an end line. Jim Butler Co. vs. West End Co., *supra*.

[52] Flagstaff Co. vs. Tarbet, 98 U. S. 463; Iron Co. vs. Elgin Co., *supra* [(35)]; Silver King Co. vs. Conkling Co., *supra* [(9)].

See § 549.

[53] Clark-Montana Co. vs. Butte & S. Co., 233 Fed. 571; aff'd. 248 Fed. 609, aff'd. 249 U. S. 12, *certiorari* denied 247 U. S. 516; see, Iron Co. vs. Elgin Co., *supra* [(35)]; Walrath vs. Champion Co., *supra* [(35)]; Northport Co. vs. Lone-Pine Co., 271 Fed. 105. End lines must have a substantial existence. It has been held that an end line two-tenths of a foot in length is not an end line within the meaning of the mining act; neither is one over eight hundred feet in length. Jack Pot Claim, 34 L. D. 470; Belligerent Claims, 35 L. D. 22.

[54] Walrath vs. Champion Co., *supra* [(35)]; Silver King Co. vs. Conkling Co., *supra* [(9)]; Flagstaff Co. vs. Tarbet, *supra* [(52)]; Daggett vs. Yreka Co., *supra* [(25)]; S. C. R. Co. vs. O'Donnell, 3 Cal. A. 382, 85 Pac. 932.

[55] Flagstaff Co. vs. Tarbet, *supra* [(52)]; Del Monte Co. vs. Last Chance Co., *supra* [(1)]; see, also, Jim Butler Co. vs. West End Co., *supra* [(9)]; Silver King Co. vs. Conkling Co., *supra* [(9)]; Empire State Co. vs. Bunker Hill Co., 131 Fed. 601; Tombstone Co. vs. Way Up Co., 1 Ariz. 462, 25 Pac. 794; Watervale Co. vs. Leach, 4 Ariz. 61, 33 Pac. 418; S. C. R. Co. vs. O'Donnell, *supra* [(54)]; Stewart Co. vs. Ontario Co., 23 Ida. 739, 132 Pac. 787, aff'd. 237 U. S. 350; Fitzgerald vs. Clark, *supra* [(25)]; Eilers vs. Boatman, *supra* [(28)].

Where the lines of a mining claim are drawn inaccurately or irregularly, the mine claimant only has such rights as his imperfect location warrants under the mining statute. The court can not make a new location for him, and thereby enlarge his rights. King vs. Amy Co., *supra* [(25)].

[56] Walrath vs. Champion Co., *supra* [(35)].

[56a] Jack Pot Claim, *supra* [(53)]; Belligerent Lodes, *supra* [(53)].

[57] Jim Butler Co. vs. West End Co., *supra* [(9)]; Bunker Hill Co. vs. Empire State Co., *supra* [(9)]. It is well settled that the rights of the miner to the surface ground of his location are dependent upon his discovery, and upon the relation which the vein or lode, in its course and direction, bears to the surface. The grant of the

either way, horiontally.[58] They may be changed by relocation,[59] or by survey,[60] or be judicially constructed,[61] or be acquiesced in,[62] or be fixed by conveyance,[63] or by agreement between conflicting claimants.[64]

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vein or lode has always been held to be the principal thing, and the surface but an incident, which, as to its extent, is entirely determined by the course of the principal thing granted, to wit: the vein or lode. Wolfley vs. Lebanon Co., 4 Colo. 112; Colorado Co. vs. Croman, 16 Colo. 381, 27 Pac. 256. See, also, St. Louis Co. vs. Montana Co., 194 U. S., 238, aff'g. 113 Fed. 900.

[58] Rev. St. § 2322; Flagstaff Co. vs. Tarbet, *supra* [52]; Tyler Co. vs. Last Chance Co., 71 Fed. 848; see, Jim Butler Co. vs. West End Co., *supra* [9].

[59] Tyler Co. vs. Last Chance Co., *supra* [58].

[60] Del Monte Co. vs. Last Chance Co., *supra* [1]; Doe vs. Sanger, *supra* [22]; Batt vs. Stedman, *supra* [21].

[61] Bunker Hill Co. vs. Empire State Co., *supra* [9]. If the vein "crosses an end line and a side line, he will be given a new side line for purposes of determining the extent of his extralateral rights." Jim Butler Co. vs. West End Co., *supra* [9].

With reference to the right of a court to draw an intermediate end line at a point where the lode crosses a side line the court said in Del Monte Co. vs. Last Chance Co., 66 Fed. 215, that: "It is said that we can not make a new end line at the point of divergence or elsewhere, because the court cannot make a new location, or in any way change that made by the parties. Iron Silver Min. Co. vs. Elgin Min. & Smelting Co., 118 U. S. 196. This, however, is not necessary. We can keep within the end lines fixed by the locator in respect to any extralateral right that may be recognized without drawing any line; and if there be magic in the word 'line,' it will be better not to use it;" cited approvingly in Republican Co. vs. Tyler Co., 79 Fed. 736.

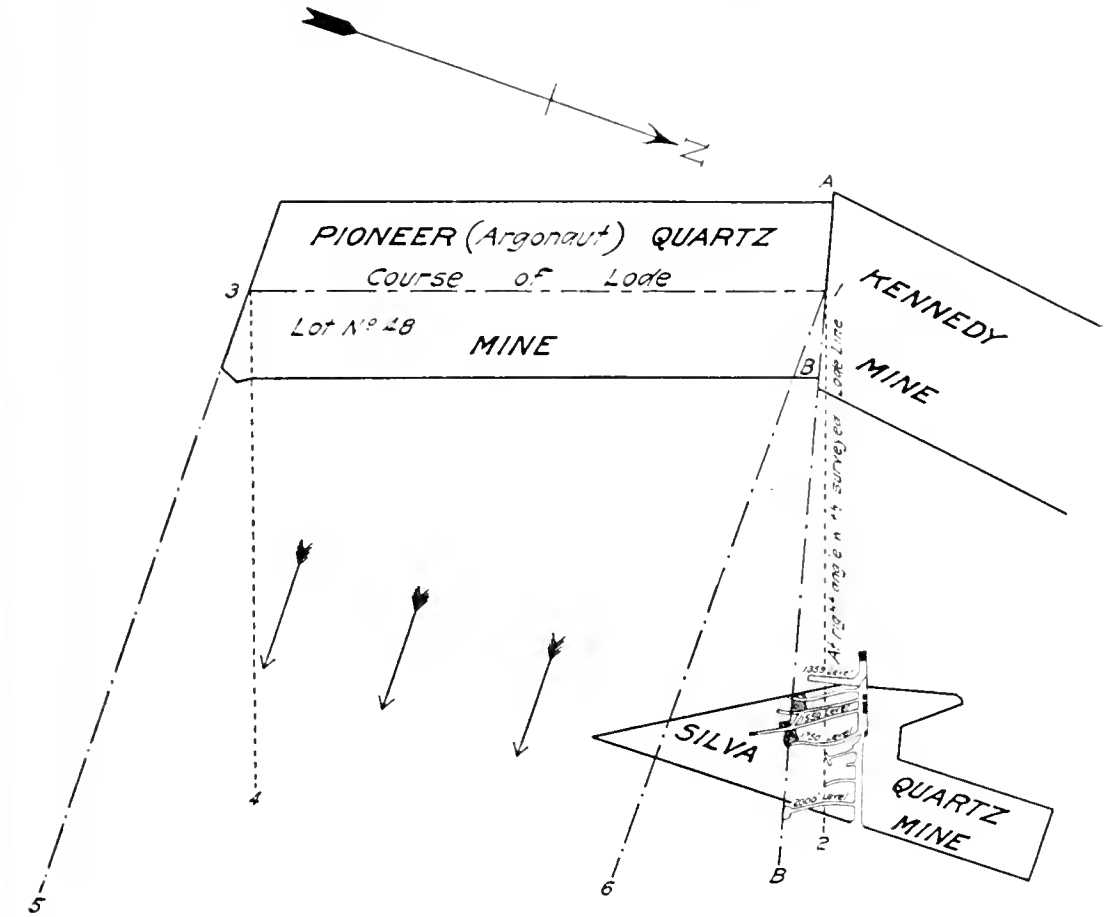
See infra. Note 76.

[62] Montana Co. vs. St. Louis Co., 183 Fed. 51.

[63] Montana Co. vs. Boston Co., 27 Mont. 288, 70 Pac. 1114.

[64] Kennedy Co. vs. Argonaut Co., 189 U. S. 1, aff'g. 131 Cal. 15, 63 Pac. 148. See, Montana Co. vs. St. Louis Co., *supra* [62].

Diagram—Kennedy-Argonaut Case.



The common boundary is the line A-B, crossing the lode at the point marked 1 on this diagram. The line A-B-B' is this end line produced indefinitely in the direction of the dip or downward course of the vein. During patent proceedings the respective parties entered into a compromise agreement which provided that "the dividing line between the claims of the respective companies shall be one drawn at right angles with the course of the lode or lead, and surface ground thereto

§ 543. Parallel End Lines.

Parallel end lines were not required by the act of 1866,[65] as a prerequisite to the exercise of the extralateral right; but, under the provisions of the present mining act,[66] a lode location may be valid although irregular in form, as, say, in the shape of a horseshoe,[67] or of an isosceles triangle;[68] but the absence of parallel end lines therein prohibits the locators from following the vein or lode underground into adjoining territory.[69]

§ 544. Converging End Lines.

Where the end lines converge the extralateral right is confined to the area embraced by such lines.[70] Beyond the end lines of a location the vein can not be followed; it is subject to further discovery and appropriation.[71]

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appurtenant, and at the point hereinbefore designated." The line thus agreed upon was the line from A to B in the foregoing diagram.

The court said: "We think, then, that the Kennedy Mining & Milling Company is estopped from asserting any right to the ore body in dispute, which it was also agreed was extracted by the Kennedy Mining & Milling Company from the vein south of the vertical plane drawn through the line A B produced in the direction B', and which was the same vein which had its top or apex in the Kennedy quartz mine, and in the Pioneer quartz mine, and was continuous from the apex of both properties downward to the lowest depths. The boundary line agreed on fixed the rights of the parties in length on the lode, and so involved the extralateral right as between them."

For a cognate case see Richmond Co. vs. Eureka Co., 103 U. S. 839.

[65] 14 Stats. 251; Iron Co. vs. Elgin Co., *supra* [35]; Argonaut Co. vs. Kennedy Co., *supra* [64]. In many other cases the same thing is implied. See Del Monte Co. vs. Last Chance Co., *supra* [1]; Walrath vs. Champion Co., *supra* [35]. In the Argonaut Case, *supra*, it is held that where end lines of the lode or vein diverge from each other extralateral rights are not measured upon the dip by plane coincident with first end line of the surface location and one drawn parallel thereto at the end of the lode or vein, but exist between vertical planes drawn perpendicularly to general strike of the lode or vein through extreme parts of its length.

[66] Rev. St. § 2322; Tonopan Co. vs. Tonopah Co., *supra* [19]; Bunker Hill Co. vs. Empire State Co., *supra* [9]; see, Northport Co. vs. Lone-Pine Co., *supra* [53]. End lines need not be exactly parallel, if length of location substantially follows vein or lode. Del Monte Co. vs. Last Chance Co., *supra* [1]; Fitzgerald vs. Clark, *supra* [25].

[67] Iron Co. vs. Elgin Co., *supra* [35].

[68] Montana Co. vs. Clark, *supra* [36]; Price vs. McIntosh, 1 Alaska 291; Catron vs. Old, 23 Colo. 439; 48 Pac. 687.

[69] See *supra*, notes 36 and 51; see, also, Kennedy Co. vs. Argonaut Co., *supra* [64]; Gibson vs. Hjul, *supra* [35]. In Montana Co. vs. Clark, *supra* [36]; the court said: "Does the fact that defendants can not follow the lode out of the boundaries of their claim on its dip entitle the plaintiff to a judgment against them for so doing? Before the plaintiff would be entitled to a judgment, it must show that it is the owner of the vein upon which the defendants entered its ground. The plaintiff received a grant from the United States of all lodes the top or apex of which was within the limits of their mining claims. It did not receive a grant to any lode which had its apex or top outside its claims. This case is disapproved in Doe vs. Waterloo Co., 54 Fed. 935, aff'd. 82 Fed. 45, citing Duggan vs. Davey, 4 Dak. 110, 26 N. W. 887."

[70] Carson City Co. vs. North Star Co., 73 Fed. 597, aff'd. 83 Fed. 658, *certiorari* denied 171 U. S. 687. This case involved the question of extralateral rights arising under the provisions of the Act of 1866, 14 Stats. 252. The case is discussed in Argonaut Co. vs. Kennedy Co., *supra* [64]. See, also, Central Eureka Co. vs. East Central Eureka Co., 146 Cal. 153, 79 Pac. 834, aff'd. 204 U. S. 266; Kennedy Co. vs. Argonaut Co., *supra* [64]. Where two claims overlap along the apex of a lode or vein, although the end lines of the senior location converge, and meet within the other claim, so as to terminate the rights of its owner at that point, the owner of the junior claim can not take up the vein or lode in its downward course beyond such point, and continue to follow it within the limits of his own end lines, but his underground ownership of the vein or lode is bounded by the extension of the plane passng through the line of the senior claim, which bounds his rights along the apex, where such line and his own end line, which marks his other boundary, converged in the direction of the dip of the vein or lode. Bunker Hill Co. vs. Empire State Co., *supra* [9].

[71] Elgin Co. vs. Iron Co., 14 Fed. 377, aff'd. 118 U. S. 196; Watervale Co. vs. Leach, *supra* [55]; Swanson vs. Koeninger, *supra* [5]; Parrott Co. vs. Heinze, 25 Mont. 145, 64 Pac. 326, see, Flagstaff Co. vs. Tarbet, *supra* [52]; Harper vs. Hill, 159 Cal. 257, 113 Pac. 162; see, also, *infra*, note 73. The owner of a lode claim can not follow the course of a vein beyond the end lines of his claim extended perpendicularly downward, but he may follow the dip to an indefinite distance in its downward course outside of his side lines. Whildin vs. Maryland Co., 33 Cal. A. 270, 164 Pac. 908, citing Tarbet vs. Flagstaff Co., *supra*; McCormick vs. Varnes, 2 Utah 355.

§ 545. Immutability of End Lines.

Where end lines are established they become the end lines for all veins found within the surface boundaries.[72] For instance, while the top or apex of more than one vein may lie within the surface lines of the location, and the veins may have different courses and dips, yet the right of the locator to follow them outside of the side lines of his location is bounded by the planes drawn vertically through the same end lines. The plane of the end lines can not be drawn at right angles to the courses of all the veins if they are not identical. In such case, the end lines must be those which are crosswise of the general course of the vein on the surface.[73] In other words, the course of the primary or discovery vein definitely determines the end lines and side lines for all veins having their apexes within the exterior boundaries of the location.[74]

§ 546. Sinuosity of Veins.

If the apex of a vein crosses one end line and one side of a lode mining claim, as located thereon, the locator of such vein can follow it upon its dip beyond the vertical side line of his location. In such case the extralateral right is bounded by the vertical plane of such end line, and a parallel plane passing downward through the point where the top or apex crosses the side line.[75] Where the vein or lode, upon its strike crosses one end line, departs from the claim through a side line and at some distance reenters the claim and passes through the complemental end line of the claim so as to curve beyond the side line into adjacent territory, the extralateral right to such vein or lode is bounded by each end line and the several points at which the vein or

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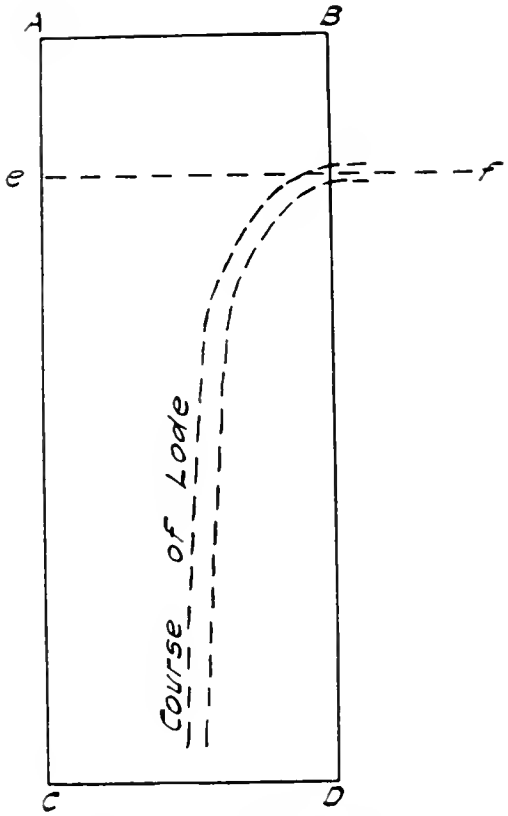
[72] Del Monte Co. vs. Last Chance Co., *supra* (1); Silver King Co. vs. Conkling Co., *supra* (9); Cosmopolitan Co. vs. Foote, 101 Fed. 518; Clark-Montana Co. vs. Butte & S. Co., *supra* (53); Jefferson Co. vs. Anchoria Co., 32 Colo. 176, 75 Pac. 1070.

[73] Iron Co. vs. Elgin Co., *supra* (35); Walrath vs. Champion Co., *supra* (35); see South End Co. vs. Tinney, 22 Nev. 63, 35 Pac. 89.

[74] Walrath vs. Champion Co., *supra* (35); Silver King Co. vs. Conkling Co., *supra* (9); Clark-Montana Co. vs. Butte & S. Co., *supra* (53); Stewart Co. vs. Ontario Co., *supra* (55); see Cosmopolitan Co. vs. Foote, *supra* (2).

[75] Lawson vs. U. S. 207 U. S. 1, aff'g. 134 Fed. 769. Jim Butler Co. vs. West End Co., *supra* (9). Where a vein or lode in an established mining claim is found to have a certain course so far as disclosed, an inference may be drawn that it will continue in the same direction. If a vein crosses an end line and for some distance the strike is parallel to the side lines, it is not unreasonable to conclude that the vein will continue in that direction. But where a vein enters a claim by intersecting a side line instead of an end line, and so far as it is definitely determined its course is more nearly parallel with the end lines than with the side lines, if any inference is to be drawn, it must be to the effect that the vein intersects the other side line rather than the other end line. But where a vein on entering a claim crosses a side line at an angle and its direction is unknown or is irregular, there is no more reason to infer that it passes out of the claim through an end line than through the other side line. No presumption on this subject will be indulged where there is no substantial basis on which an intelligent estimate of the probability can be made. Bourne vs. Federal Co., 243 Fed. 469. The rule stated in the text is so well established by the decided cases that in the latest cases on the subject, involving this point, Moulton Co. vs. Anaconda Co., 23 Fed. (2d) 811, modifying 20 Fed. (2d) 1008, the rule was enforced without citation of authorities, being treated as a recognized canon of the mining law, not to be disputed or questioned. An end line may be drawn at the point where the lode abruptly terminates within the surface lines, or at the point where the apex of the lode crosses the side line of the surface location This is exemplified in the following diagram from the decision in Tyler Co. vs Sweeney, 79 Fed. 279.

When the lode, for instance, leaves one side line only, the rule is that for the purpose of defining the claimant's right to follow his lode on the dip a new end line will be drawn through the point where the lode intersects the side line and passes from the claim, parallel with the other end line, as indicated by the end line e-f on the subjoined diagram:



See King vs. Amy Co., *supra* [25]; see *supra*, note [61].

lode intersects such side line.[76] It is not essential that the apex should on its course pass through both end lines of the claim. Consequently, whether the apex extends through the entire, or through but a part of the location, the locator owns an equal length of the vein or lode to its utmost depth.[77]

§ 547. Conflicting Lode Locations.

Where there are two conflicting lode locations, within each of which there is a portion of the apex of the same lode or vein, the doctrine of extralateral rights has no application, as the rights of the junior locator cease at the point where the vein or lode passes a surface boundary line of the senior location.[78]

§ 548. End Lines Within Patented Area.

Where the boundaries of the surface of a patented claim are so irregular in shape as not to present parallel end lines across its whole width, due to exclusion of conflicts and consequent diagonal corners, extralateral rights are not lost.[79]

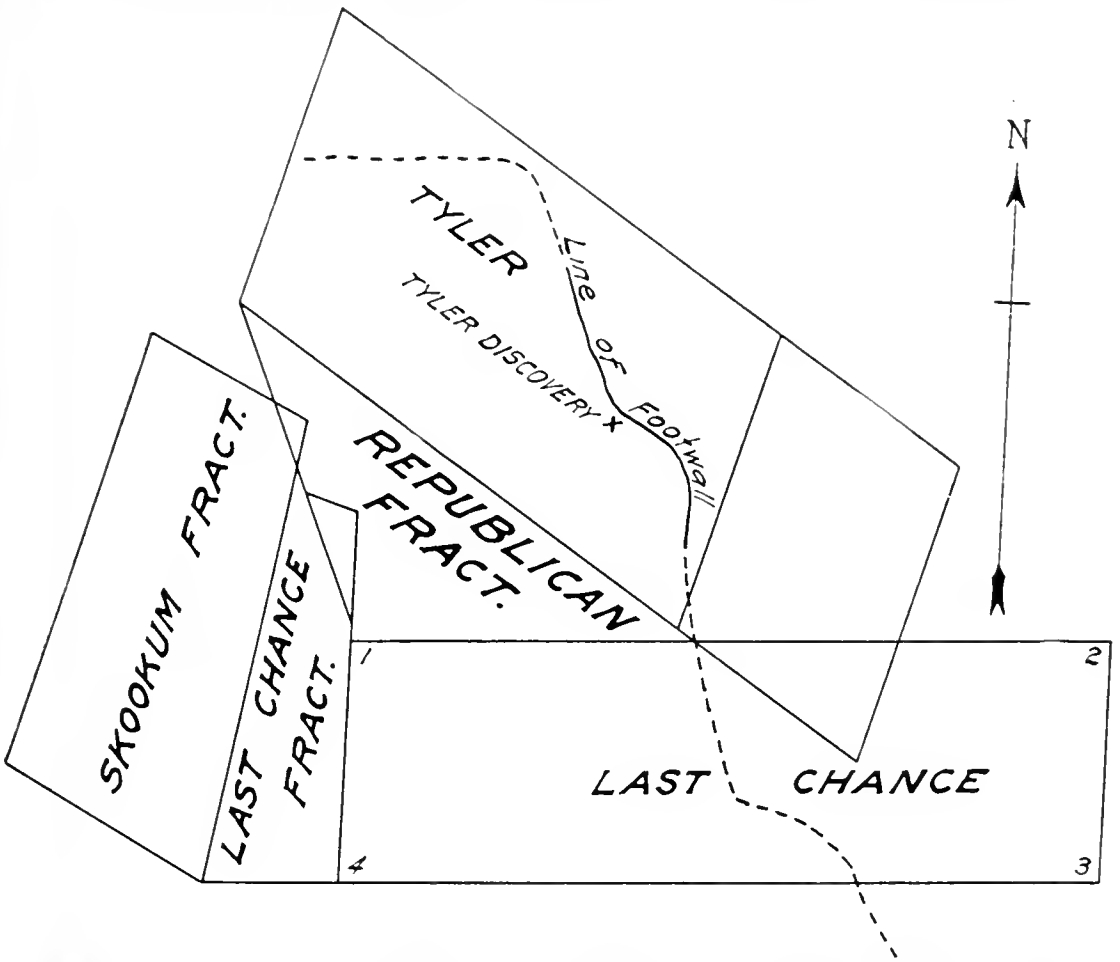
§ 549. Presumption from Patent.

The legal presumption arises from the patent that the end lines, as established on the ground, are the true lines for all purposes of the case.[80] The extralateral right can not be defeated by showing the surface end lines of the original location were not parallel, where a patent has been issued showing the surface location and the parallelism of the end lines.[81]

§ 550. Overlapping Locations.

Where lode locations are so placed as to leave between them an irregular parcel of ground the lines of a junior lode location may be laid within, upon or across the surface of a valid senior location for the purpose of defining or securing to such junior locator underground or extralateral rights not in conflict with any right of the senior location.[72] It is immaterial whether or not the underlying location be

From the following diagram it appears that the lode in its course lengthwise crosses the side lines of the Last Chance location at nearly right angles, and, under the rules laid down by the Supreme Court of the United States, the side lines of that location as marked upon the surface of the ground are to be treated as its end lines, and the owners thereof would have the exclusive right of possession and enjoyment of such portion of the lode throughout its entire depth, the top or apex of which is inside the surface lines of the location, as lies between vertical planes drawn downward through such end lines. It therefore appears that both locations were made in such form and shape as has been recognized by the adjudicated cases upon these questions to entitle them to certain fixed and definite rights to follow the lode in its downward course, and the rights of the Tyler Company and of the Last Chance Company in this respect depend upon the question of their priority.



[70] Waterloo Co. vs. Doe, *supra* [69]; see, McElligott vs. Krogh, *supra* [5]; Bullion Beck Co. vs. Eureka Co., 5 Utah 3, 71, 11 Pac. 515. See, dissenting opinion in Wakeman vs. Norton, 24 Colo. 197, 49 Pac. 283.

[71] Del Monte Co. vs. Last Chance Co., *supra* [1]; Tyler Co. vs. Last Chance Co., *supra* [58]; Montana Co. vs. St. Louis Co., 102 Fed. 434; see Hustler Lode, 29 L. D. 672.

[72] Tyler Co. vs. Sweeney, 79 Fed. 280; see Lawson vs. U. S. Co., *supra* [75]; Cosmopolitan Co. vs. Foote, *supra* [72]; Star Co. vs. Federal Co., 265 Fed. 881; Tom Reed Co. vs. United Eastern Co., 24 Ariz. 269, 209 Pac. 283.

[73] Jim Butler Co. vs. West End Co., *supra* [9].

See § 545.

[80] Stewart Co. vs. Ontario Co., *supra* [55].

[81] Waterloo Co. vs. Doe, *supra* [69]; Doe vs. Sanger, *supra* [22].

[82] Del Monte Co. vs. Last Chance Co., *supra* [1]; Jim Butler Co. vs. West End Co., *supra* [9]; Bunker Hill Co. vs. Empire State Co., *supra* [9]; Empire State Co. vs. Bunker Hill Co., 114 Fed. 419; Id. *supra* [55]; see, also, Tonopah Co. vs. Tonopah Co., *supra* [19]. See, Calhoun Co. vs. Ajax Co., 182 U. S. 499, aff'g. 27 Colo. 25, 59 Pac. 617.

patented or unpatented,[83] or that the junior locator places his monuments thereon by consent or openly and without any forcible, clandestine, surreptitious or otherwise fraudulent entry.[84] Subsequent objection by the senior locator is unavailing.[85]

§ 551. Question of Fact.

Whether or not the end lines are substantially parallel is a question of fact,[86] of which the patent is conclusive evidence.[87]

§ 552. Side Lines.

The side lines of a mining location are those which are laid along the course or strike of a vein or lode.[88] If placed across a vein or lode they become end lines[89] whether so intended by the locator or not.[90] Side lines may be irregular and of unequal width;[91] have angles and elbows, and be converging or diverging, so long as their general course is along the vein or lode and the statutory restriction of the width of the claim, that is, three hundred feet on either side of the center of the vein or lode at the surface, is respected.[92] Coincidence of lines does not necessarily make them side lines nor end lines.[93] A side line common to two claims can not be considered an end line of another claim.[94]

§ 553. Surface Limitations.

The locator of a mining claim is not authorized to enter upon the surface,[95] nor the subsurface[96] of a mining claim owned or possessed by another, in claiming to follow a vein or lode outside of his side lines for the purpose of exploring, reaching, or developing other claims, nor to acquire a right of way, or, in such subsurface for any other purpose.[97] Hence, a locator would not be permitted to construct a tunnel or drift from his own claim through an adjoining claim adversely held, in order to reach a vein apexing within his surface boundaries.[98]

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[83] Id. Grassy Gulch Claim, *supra* (9); McPherson vs. Julius, *supra* (5).

[84] Stenfjeld vs. Espe, *supra* (2); Clark vs. Mitchell, 35 Nev. 464, 130 Pac. 760, 134 Pac. 449.

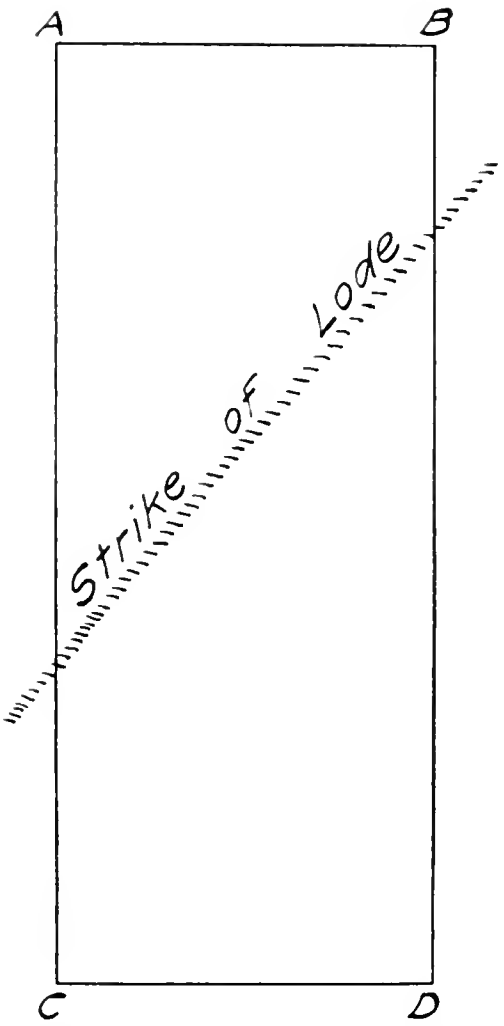
[85] Bunker Hill Co. vs. Empire State Co., *supra* (9).
See *supra*, notes 9, 10 and 11.
See Form No. 46 (diagram).

[86] Cheesman vs. Hart, 42 Fed. 98. In McElligott vs. Krogh, *supra* (5), the findings recited that the end lines were parallel to each other, as appeared by the map attached, but the map showed that such lines were not parallel and the case was reversed.

[87] Waterloo Co. vs. Doe, *supra* (69).

[88] Flagstaff Co. vs. Tarbet, *supra* (52); Argentine Co. vs. Terrible Co., *supra* (25); King vs. Amy Co., *supra* (25); Del Monte Co. vs. Last Chance Co., *supra* (1); Silver King Co. vs. Conkling Co., *supra* (9); Last Chance Co. vs. Tyler Co., 61 Fed. 560; Last Chance Co., vs. Bunker Hill Co., 131 Fed. 579.
Where the strike of the lode is, as indicated in the following diagram, the side lines A-B, C-D are the real end lines.

[89] Id. Jim Butler Co., vs. West End Co., *supra* (9); Silver King Co. vs. Conkling Co., *supra* (9); Bunker Hill Co. vs. Empire State Co., *supra* (9); S. C. R. Co. vs. O'Donnell, *supra* (54). The respective functions of the side and end lines are so different that one may not be made to perform the duty of the other, nor will a locator be permitted to have the lines which cross the ledge treated as side lines, though the form of his boundary line indicates that to have been his intent, because he would by that means, if allowed to acquire the right to follow the vein or lode along the strike indefinitely, enjoy advantages not given nor contemplated by the statute. Arizona Co. vs. Iron Cap Co., 27 Ariz. 202, 232 Pac. 549.
See *infra*, note 101.



[90] King vs. Amy Co., *supra* [25]; Del Monte Co. vs. Last Chance Co., *supra* [1]; Clark vs. Fitzgerald, 171 U. S. 92, aff'g. 17 Mont. 118, 42 Pac. 277; Walrath vs. Champion Co., *supra* [35]; Cosmopolitan Co. vs. Foote, *supra* [72]. Bunker Hill Co. vs. Empire State Co., *supra* [9].

[91] Del Monte Co. vs. Last Chance Co., *supra* [1]; Meydenbauer vs. Stevens, *supra* [1]; see, also, Quilp Co. vs. Republic Corp, *supra* [51].

[92] Del Monte Co. vs. Last Chance Co., *supra* [1]; Jim Butler Co. vs. West End Co., *supra* [9]; Belligerent Claims, *supra* [53]. No rule can well be applied governing courses and distances of the side lines of mining claims other than they shall not be so laid as to increase the statutory width or length of a location. Jim Butler Co. vs. West End Co., *supra* [9].

[93] Walrath vs. Champion Co., *supra* [35].

[94] St. Louis Co. vs. Montana Co., 104 Fed. 667. The dissenting opinion of Ross, J., in the case leaves the point still open to argument.

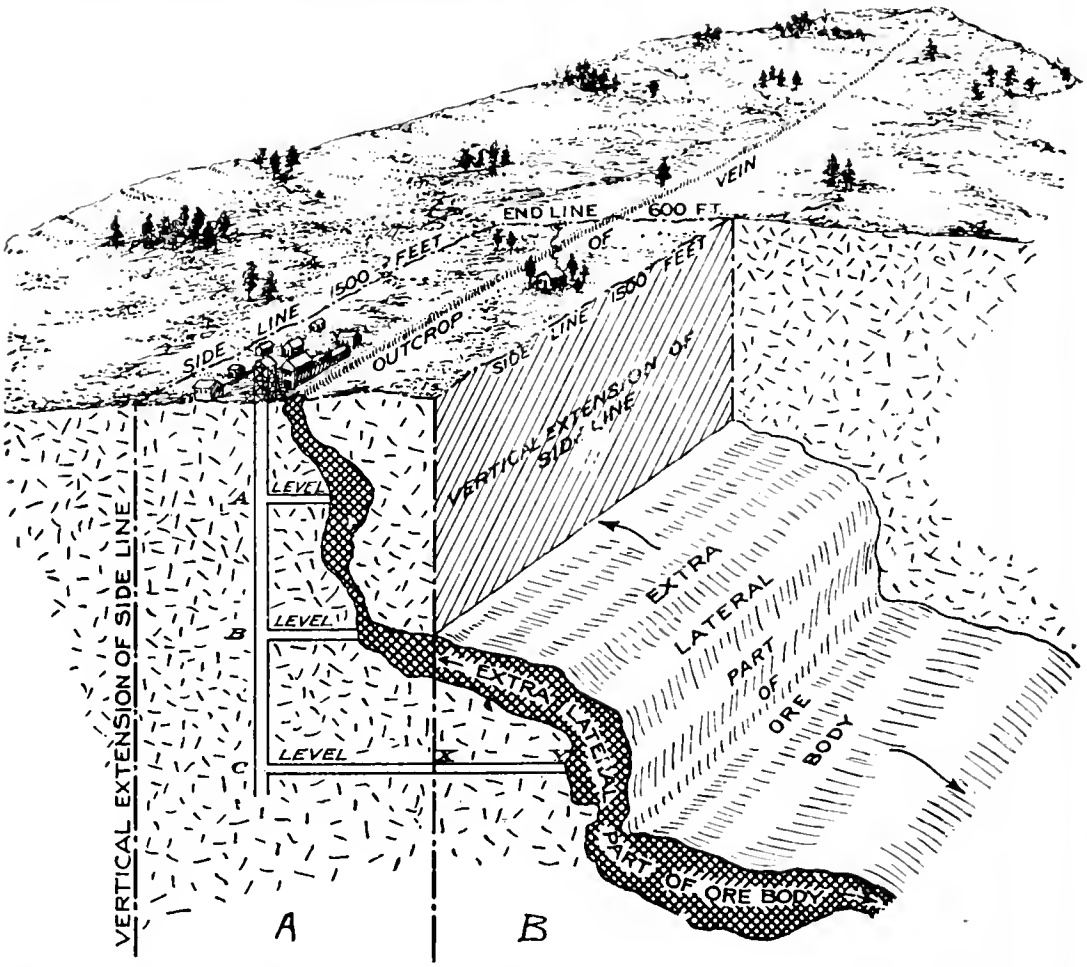
[95] Clipper Co. vs. Eli Co., 194 U. S. 230, aff'g. 29 Colo. 377, 68, Pac. 286; Waterloo Co. vs. Doe, *supra* [69]; St. Louis Co. vs. Montana Co., 113 Fed. 901; aff'd. 194 U. S. 235; Correction Lode, 15 L. D. 68.

[96] St. Louis Co. vs. Montana Co., *supra* [95]; Mammoth Co. vs. Grand Central Co., 213 U. S. 72, dis. 29 Utah 490, 83 Pac. 648. Patten vs. Conglomerate Co., 35 L. D. 617; Tom Reed Co. vs. United Eastern Co.

[97] Id., *but see* Twenty-one Co. vs. Original Sixteen Mine, 265 Fed. 547. See, also, 260 Fed. 724, aff'd. 265 Fed. 469.

[98] Id.

The doctrine of the text is shown by the subjoined diagram.



NOTE.—Level "C" has passed beyond the limits of the claim "A" at "X", and being driven through country rock along the line X-Y, is trespassing until it reaches the orebody at "Y"—in "B." See St. Louis Co. vs. Montana Co., *supra* [95]; *but see* Twenty-one Co. vs. Original Sixteen Mine, *supra* [97], holding that the right of possession and enjoyment of a vein outside the boundaries of the claim on which it apexed, given by Rev. St. 2322, involves the right to excavate the necessary workings in the country rock, where the vein is so crooked or so narrow that it can not be economically worked within its own confines, so that the owner of the surface upon which the vein dips can not restrain the excavation of such shafts and of stations, ore pockets, and chutes necessary to the working of the vein.

§ 554. Underground Exploration.

In order to follow a vein or lode beyond the side line, a locator must show that the vein or lode is continuous and in place throughout its whole course from its origin in his own location to the place in which he claims it.[99] A locator can not pursue a vein or lode outside of the side line of his location unless it is the same vein which has its apex within his surface location; but such vein need not be a straight line nor of uniform dip or thickness or richness of mineral matter throughout its course and length.[100]

[99] Leadville Co. vs. Fitzgerald, Fed. Cas. 99; Doe vs. Waterloo Co., *supra* [69]; Carson City Co. vs. North Star Co., 83 Fed. 663; aff'g. 73 Fed. 597; Stewart Co. vs. Ontario Co., *supra* [55]; see St. Louis Co. vs. Montana Co., *supra* [95]. Grand Central Co. vs. Mammoth Co., 29 Utah 490, 84 Pac. 648, dis. 213 U. S. 72 in Davis vs. Shepherd, *supra* [84], the court said: "That a portion of the vein has been removed does not change the fact that the vein below the point of such removal is the same one as the one apexing within the Refugee (appellee's ground)."

For a discussion of the legal identity or continuity of a vein on its downward course, see Butte & B. Co. vs. Societe, 23 Mont. 177, 58 Pac. 113; and Moulton Co. vs. Anaconda Co., *supra* [75].

[100] Cheesman vs. Shreeve, 40 Fed. 793; see Iron Co. vs. Cheesman, 116 U. S. 531; Collins vs. Bailey, 22 Colo. A. 163; 125 Pac. 543; South End Co. vs. Tinney, *supra* [73].

§ 555. Side Lines and Extralateral Rights.

Where a lode or vein passes through both side lines on its course or strike, the side lines become the end lines, and the rights of the adjoining claimants are determined accordingly.[101] But where a lode or vein passes through both side lines on its dip and the other elements of the extralateral right are present, the vein or lode may be followed beyond either side line, depending upon the direction which the departing vein or veins take in their downward course.[102] Where the vein or lode crosses only one side line, or crosses the same side line twice, or where it crosses neither end line, or crosses one end line and one side line the vein or lode can be followed upon its dip beyond the vertical side line of the location.[103] A vein may be followed upon its dip beyond the side lines if it enters at an end line but terminates half way across the location. In such a case it is a vein, the apex of which lies inside the surface lines extended vertically downward.[104] Where a vein or lode crosses the side line of a location but not extending to the end line, as marked on the surface, the strike is terminated by the plane of such side line and the right to follow the vein on its dip is then terminated by a vertical plane parallel to the end lines drawn downward and which takes effect at the point where the apex intersects such side line.[105] The extralateral right ceases when the strike passes through either a side line[106] or an end line.[107] If the vein runs more nearly parallel with the end lines than with the side lines as marked upon the ground then the courts must consider the end lines of the location as the side lines and the extralateral rights are preserved and maintained.[108]

§ 556. Broad Lode.

Where two or more mining claims longitudinally bisect or divide the apex of a vein the senior claim takes the entire width of the vein on its dip, if it is in other respects so located as to give the right to pursue the vein downward outside of the side line.[109] In other words, a broad lode bisected by the division side lines between two mining claims belongs to the claim having the prior location.[110]

§ 557. Presumptions.

Where a vein or lode is found to have a certain course, so far as it is disclosed, the inference may be drawn that it will continue in the

[101] Flagstaff Co. vs. Tarbet, *supra* [52]; King vs. Amy Co., *supra* [20]; Last Chance Co. vs. Tyler Co., 157 U. S. 696; rev'g. 61 Fed. 557; Montana Co. vs. Boston Co., 85 Fed. 868.

[102] Jim Butler Co. vs. West End Co., *supra* [9].

[103] Del Monte vs. Last Chance Co., *supra* [1]; Clark vs. Fitzgerald, 171 U. S. 93, aff'g. 17 Mont. 130 *supra* [25]; Parrott Co. vs. Heinze, *supra* [71]; State vs. District Court, 25 Mont. 514, 65 Pac. 1020; Rico-Argentine Co. vs. Rico Con. Co., 74 Colo. 444, 223 Pac. 31.

[104] Del Monte Co. vs. Last Chance Co., *supra* [1]; Calhoun Co. vs. Ajax Co., *supra* [82].

[105] Tyler Co. vs. Sweeney, 54 Fed. 292; Republican Co. vs. Tyler Co., 79 Fed. 735; see, Montana Co. vs. St. Louis Co., 147 Fed. 905.

[106] Beik vs. Nickerson, 29 L. D. 665; Whildin vs. Maryland Co., *supra* [71]; Butte & B. Co. vs. Societe, *supra* [99]. Where the vein in the course of its strike passes out of the side line of the location, and so continues for some distance and then returns within the side line, no extralateral rights are acquired in the segment of the vein which is outside of such line. McElligott vs. Krogh, *supra* [5].

[107] Watervale Co. vs. Leach, *supra* [55]; see, Flagstaff Co. vs. Tarbet, *supra* [52].

[108] Con. Wyoming Co. vs. Champion Co., 63 Fed. 549; see, Catron vs. Old, *supra* [68]; *compare* Rico-Argentine Co. vs. Rico Con. Co., *supra* [103].

[109] U. S. Co. vs. Lawson, 134 Fed. 769; aff'd. 207 U. S. 1; Star Co. vs. Federal Co., *supra* [78]; Tom Reed Co. vs. United Eastern Co., *supra* [75].

[110] Lawson vs. U. S. Co., *supra* [75]; Star Co. vs. Federal Co., *supra* [78]. Tom Reed Co. vs. United Eastern Co., *supra* [75].

same direction. Hence, if it crosses an end line and for some distance the strike is parallel to the side lines, it is not unreasonable to conclude that it continues in that direction.[111] In the location of a mining claim the presumption is that the vein runs lengthwise and not crosswise of the claim as located.[112]

§ 558. Trespass.

The right to follow a vein or lode outside the side lines of a location does not authorize nor justify a trespass.[113] A person entering within the side lines of the mining claim of another to mine the same is *prima facie* a trespasser[114] and liable for the value of the ore taken therefrom.[115] The owner of a mining claim charged with trespass may justify such trespass by showing he brought himself within the provisions of the mining act and reached the point of the alleged trespass, by pursuing and excavating a vein or lode which had its apex within the side lines of his location having parallel end lines. The right to follow the dip outside of the side lines[116] depends upon priority of location[117] and not upon priority of patent[118] except where the lode location is made subsequent to the patenting of the adjoining land under the general land laws.[119]

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[111] Bourne vs. Federal Co., 203 Fed. 469.

[112] Enterprise Co. vs. Rico-Aspen Co., 167 U. S. 115; see, also, Campbell vs. Ellet, 167 U. S. 116 aff'g. 18 Colo. 510, 33 Pac. 521. Work Co. vs. Dr. Jack Pot Co., 194 Fed. 620.

In Campbell vs. Ellet, *supra*, the case of Enterprise Co. vs. Rico-Aspen Co., *supra* is affirmed and applied, and the court further decides that the failure of the tunnel owner to mark upon the surface of the ground the point of discovery and the boundaries of the tract claimed does not destroy his rights to the vein he discovers in the tunnel. See Calhoun Co. vs. Ajax Co., *supra* [82], holding blind veins within prior lode location belong to its claimant and not to the tunnel owner. See, also, Bonner vs. Meikle, 82 Fed. 699; Butte Co. vs. Barker, 35 Mont. 341, 90 Pac. 177; 53 L. R. A. 795, 799, note, and see Brewster vs. Shoemaker, 28 Colo. 181, 63 Pac. 310; Murray vs. Polglase, 23 Mont. 417, 59 Pac. 442.

[113] Del Monte Co. vs. Last Chance Co., *supra* [1]; Bluebird Co. vs. Murray, 9 Mont. 475, 23 Pac. 1022.

[114] Con. Wyoming Co. vs. Champion Co., *supra* [108]. Waterloo Co. vs. Doe, *supra* [66]; Keely vs. Ophir Co., 169 Fed. 601; Red Wing Co. vs. Clays, 30 Utah 242, 83 Pac. 841.

[115] Flagstaff Co. vs. Tarbet, *supra* [52]. For measure of damages see Morrison's Mining Rights, (15th ed.) p. 446 et seq.

[116] Cheesman vs. Shreeve, *supra* [100]; see, Lawson vs. U. S. Co., *supra* [75]; Daggett vs. Yreka Co., *supra* [13]; see, also, Central Eureka Co. vs. East Central Eureka Co., *supra* [70].

[117] Colorado Central Co. vs. Turck, 50 Fed. 895, Jefferson Co. vs. Anchoria Co., *supra* [72]; see, Colorado Central Co. vs. Turck, 70 Fed. 294.

[118] Butte & S. Co. vs. Clark-Montana Co., 249 U. S. 12, aff'g. 248 Fed. 609, aff'g. 233 Fed. 547; *certiorari* denied 247 U. S. 516. In this case the court held as between two patented mining claims, priority of right to the vein of the one where it dips beneath, and unites with the vein of the other is not determined by the dates of entries and patents, but by priority of discovery and location. See Gibbons vs. Frazier, *supra* [2].

[119] In Reeves vs. Oregon Co., 127 Or. 686, 273 Pac. 389, the court citing approvingly Amador Median Co. vs. South Spring Hill Co., 36 Fed. 668, said that it appears that the land in controversy was patented in 1909, under the Stone and Timber Act. That the contending lode mining claim was located in 1919 on public lands adjoining said patented land. As located the claim contains the apex of a vein which on its downward course extends laterally through one of its side lines and penetrates into the patented land. "The patent in this case was issued under the Timber and Stone Act. Prior to its issuance the United States was the absolute owner of the land and of all minerals contained in it, and when it parted with its title to the land, it conveyed all minerals not known to exist at the time of the grant. In this respect there is no difference between a patent issued under the Timber and Stone Act and one issued under either the homestead, preemption, desert land, or townsite laws. In each instance the title which the patent purports to convey is a fee-simple title, and if the land contained minerals which were known to exist at the time the patent was issued, the title conveyed by the patent is conclusive upon all third parties whose rights did not attach before a patent was issued. In such case only the government or a party whose rights had attached prior to the issuance of the patent can question the title conveyed by the patent. * * * Upon reaching a plane drawn vertically through one of the boundaries of the patented land, a subsequent locator had no right to pursue the vein into the patented land. The right of the locator terminated upon reaching that plane, and he could not pass beyond it into the patented land."

CHAPTER XXIV.

COMMINGLING OF ORES.

§ 559. Intermingling of Ores.

The doctrine of confusion of goods applies where the ores of one owner are, by the wrongful act of another owner, indistinguishly mingled. In such case the latter can not recover for his proportion, nor for any part of the intermixture, but the entire property rests in him whose right was so invaded.[1] Under such circumstances, the person who caused the admixtion can obtain the benefit of that proportion of the mass which was originally his own. But it rests with him to show the proportion which belongs to him; if he can not do so he must lose it.[2]

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[1] Schouler on Pers. Pro. § 47, Finan vs. State, 29 Fed. (2d) 770; Stone vs. Marshall, 208 Pa. St. 85, 57 Atl. 183. As to tortious mingling or confusion of goods, see notes to Ayre vs. Hixson, 53 Or. 19, 98 Pac. 515, Ann. Cases 1913 E. 665 and Gurney vs. Tenney, 226 Mass. 277, 115 N. E. 313, Ann. Cas. 1918 A. 740; for notes on admixture by accident or mistake, see Norman vs. Rose Lake Lumber Co., 22 Ida. 711, 128 Pac. 86, Ann. Cases 1913 E. 673; and Hobbs vs. Monarch Ref. Co., 277 Ill. 326, 115 N. E. 534, Ann. Cas. 1918 A. 743; and for note on the effect of the admixture by consent of the owners of goods see Jennings-Heyward Oil Co. vs. Houissere-Latreille Oil Co., 127 La. 971, 54 So. 318, Ann. Cases 1913 E. 679. For a general discussion of confusion of goods, see 101 Am. St. Rep. 913.

Lightner Co. vs. Lane, 161 Cal. 689, 120 Pac. 779, was an action in trespass. The court found that the plaintiff's ore was taken by the defendant's employees in charge of the mine secretly and knowingly. It was carried to defendant's mill, along with their own ore, and indistinguishly mingled with that ore. That it mattered not that the defendant's employees knowingly mingled the ore without the actual knowledge of the defendants themselves, and that the plaintiff was entitled to recover for the entire amount taken, citing Dillingham vs. Smith, 30 Me. 383. Little Pittsburg Co. vs. Little Chief Co., 11 Colo. 223, 17 Pac. 760. This case is almost exactly similar to the facts in the Lightner case. See, also, Dean vs. Thwaite, 21 Beav. 621.

"When the nature of a wrong is such that it not only inflicts injury but takes away the means of proving the nature and extent of the loss, the law will aid the remedy against the wrongdoer and supply deficiencies of proof caused by his misconduct by making every reasonable intendment against him and in favor of the person he has injured." Armory vs. Delamire, 1 Smith Lead. Cas. pt. 1, 679.

It was certainly incumbent on appellee to show that appellant had unlawfully entered and removed ore. This it did and proved its value to be $37,125 and rested. To meet this and avoid the force of this proof appellant confessed and avoided, *id est* it showed that notwithstanding that it took all this ore, that appellee was not the owner of all of it; but a "large part" was the property of appellee's grantor. This was an affirmative defense which appellant was bound to make good, by showing not only that some of the ore did not belong to appellee but how much." Where a mining corporation works a claim in which it has a minority interest against the will of a majority interest, and mingles with the gold extracted therefrom a portion of gold from its own claim without the consent of the other party, and the quantity and value of such portion is unknown, the whole will go to the innocent party. Little Pittsburg Co. vs. Little Chief Co., *supra*. In Hawkins vs. Spokane Co., 3 Ida. 650, 33 Pac. 40, the court said:

"Each owner is entitled to reclaim what belonged to him if the mixed articles are of equal value, or if the owner's can be distinguished and separated from the rest, but if the intermixture has so combined and blended the different portions that they can no longer be identified, the property can not be recovered. Smith vs. Sanborn, 6 Gray 134; Hesseltine vs. Stockwell, 30 Me. 237; Goff vs. Brainerd, 58 Vt. 468, 5 Atl. 393. If the mixture is not distinguishable, nor an aliquot division possible, then the party who occasions, or through whose neglect or fraud occurs the wrongful mixture, must bear the whole loss. 3 Lawson's R. & R. & Pr. Sec. 1318; Robinson vs. Holt, 39 N. H. 557.

The *status quo* here was described by the court in the following brief sentence: "It is a remediless confusion of goods." The opinion concludes "We can not indulge in *guess* work and we are therefore compelled to hold that the defendant can not recover the portion (of gold) taken from the Rosa claim, and so mingled with that taken from the Niagara as to leave it an unknown quantity." It was only because of lack of evidence to warrant any other judgment that this rule was enforced and this judgment rendered.

Where ores belonging to one person were mingled with ores mined by him with knowledge that the ores belonged to another, so that the same could not be separated,

the latter can maintain replevin for all of the ore. Meeks vs. Clear Jack Co., 141 Mo. A. 648; 124 S. W. 1084; *but see* Maloney vs. King, 30 Mont. 158, 76 Pac. 4, where, in an action for damages for removal of ore from underneath the mining claims of plaintiffs by an adjoining owner, who claimed the right to a portion of the ores removed with which they had mixed the plaintiffs' ores, an instruction that the plaintiffs were entitled to recover the value of all the ores shown to have been taken beneath plaintiffs' claim with which plaintiffs' ores were mixed, was held erroneous for the reason that it might make defendants liable for more ore than was ever extracted from the plaintiffs' ground.

"All the inconvenience of the confusion is thrown on the party who produces it, and generally it is for him to distinguish his own property or lose it." 6 Am. & Eng. Ency. of Law, 596, Brainard vs. Cohen, 8 Fed. (2d) 13, Lehman vs. Sutter, 60 Mont. 97, 198 Pac. 1100. See National Bank vs. Insurance Co., 104 U. S. 67; Cheesman vs. Shreeve, 40 Fed. 788, U. S. vs. Carter, 172 Fed. 1 aff'd. 217 U. S. 54; Israel vs. Woodruff, 299 Fed. 454; Graham vs. Plate, 40 Cal. 593; Little Pittsburg Co. vs. Little Chief Co., *supra* [1]; Page vs. Savage, 42 Ida. 458, 246 Pac. 309.

This makes the rule one of evidence, or lack of evidence. And in Holloway Seed Co. vs. C. N. Bank, 92 Tex. 187, 191; 47 S. W. 95,516, rev'g. 47 S. W. 77, the Chief Justice in his opinion, uses this language. "The rule as to confusion of goods is merely a rule of evidence. The wrongful mingling of one's own goods with those of another, when the question of identification of the property arises, throws upon the wrongdoer the burden of pointing out his own goods; and if this can not be done, he must bear the loss which results from it. It is but an application of the principle that all things are presumed against the spoliator, that is to say against one who wrongfully destroys or suppresses evidence; 1 Smith's Lead. Cas. Am. note to Armory vs. Delamire, p. 689. See, also, Bethel vs. Lynn, 63 Mich. 464," 30 N. W. 84.

In an action to recover for ore taken under a mistake as to ownership, where it appears that such ore was mingled with ore to which defendant was legitimately entitled, so that plaintiff was entirely unable to separate it, defendant must show how much came from plaintiff's vein and how much from his own, or plaintiff may recover the value of all the ore shown by his own evidence to have been taken out. St. Clair Co. vs. Cash Co., 9 Colo. A. 235, 47 Pac. 466; *but see* Maloney vs. King, *supra* [1]. A natural gas company wrongfully drilled a well upon the land of another and took gas therefrom and conducted it into a pipe line in which gas from 60 other wells was mingled, taking no measures to determine the quantity or value of the gas so wrongfully taken. The court held that it must fully compensate the p'aintiff. That having taken no steps by which it can account for the property of plaintiff, it must submit to every inconvenience in ascertaining that compensation and all reasonable doubts which arise in that accounting. That an aliquot part of the gross proceeds of all the sixty wells of the company will not be an unjust compensation. Great Southern Co. vs. Logan Co., 155 Fed. 115; *certiorari* denied 207 U. S. 590.

CHAPTER XXV.

CONDITIONAL SALES.

§ 560. Conditional Sales Defined.

A conditional sale is one in which possession is delivered to the buyer, but the seller retains the title until some condition is performed, usually the payment of the purchase price.[1]

§ 561. Contract.

There is no prescribed form for a conditional sale contract.[2]

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[1] First Nat. Bank vs. Marlowe, 71 Mont. 461, 230 Pac. 374. Under a conditional sales contract which stipulates that the chattels shall remain the property of the seller until paid for, title does not pass to the buyer obtaining and retaining possession, but not paying the price. Ditton & West vs. Grutt, 38 Nev. 46, 144 Pac. 741, *but see* Tague vs. Guaranty Bank, 82 Okla. 197, 202 Pac. 510. In Jeffrey Co. vs. Mound Co., 215 Fed. 225, aff'd. 240 Fed. 412, the court said: "It can not be doubted that, by the terms of the contract, the sale of this machinery, made by the plaintiff to the copartnership, was a conditional one, and that title to such machinery and the right to reclaim it in case of default in payment of the purchase money, were clearly reserved."

[2] First Nat. Bank vs. Marlowe, *supra* [1]; Cretor's Co. vs. McMillan, 106 Okla. 260, 234 Pac. 189.

Whether an agreement under which one party obtains possession from another of a chattel in which the latter seeks to reserve some kind of title, shall be construed to be a hiring a conditional sale or a mortgage, depends altogether upon its effect and not at all upon what the parties call it. Hervey vs. Rhode Island Works, 93 U. S. 664; Heryford vs. Davis, 102 U. S. 235; Chicago Railway Co. vs. Merchants' Bank, 136 U. S. 268; Manson vs. Dayton, 153 Fed. 264; Corbett vs. Riddle, 209 Fed. 814; Stern vs. Drew, 285 Fed. 927.

The owner of land on which there were dumps of slag and smelter products entered into a contract denominated a 'lease' by which he purported to lease the land for a stated period, with the right to remove the dumps on payment of a series of notes maturing at intervals through a portion of the term. The contract in effect provided that removal of the dumps should proceed only in proportion as payments were made, and that when all the dumps were removed the lease should terminate, and on payment of all the notes before maturity the lessee should be entitled to a bill of sale of the dumps with the right to remove the same within a specified time. It provided also that it is mutually agreed that all work on the said above described slag, slag dumps and materials and smelter products shall be performed in a thoroughly workmanlike manner, and that any failure of the said party of the first part to do or keep any of the agreements herein * * * or any failure to pay immediately when due any one or more of the said 100 promissory notes * * * shall work a forfeiture of all rights of the said party of the first part under this agreement, and the said party of the second part shall have the right * * * to declare each and every one and all of the said promissory notes or whatever number of said notes may remain unpaid * * * immediately due and payable, and * * * to collect the same, * * * and in case of forfeiture as aforesaid, all work done and money expended by the said party of the first part, shall inure to the party of the second part, as liquidated damages * * * and the said party * * * may thereupon * * * enter upon and dispossess all persons occupying the same. Such transaction was held not to be a lease but a conditional sale of the material in the dumps which gave the owner alternative remedies for breach of the contract, and that where he declared a forfeiture and took possession because of default in payment of notes, he could not also collect the notes thereafter maturing. Manson vs. Dayton, *supra*. See Atlantic G. P. S. Co., 289 Fed. 145; *but see* Western Rope Co. vs. Overland Petroleum Co., 98 Okl. 5 223 Pac. 659, where a purchase order for a gas engine sold on sixty days trial, to be returned if not satisfactory, was destroyed by fire after notice to vendor of its failure to do the work, in an action to recover the purchase price the same was held to be an executory contract the court saying: "the purchase order herein does not evidence a conditional sale, but a sale upon condition and is in the nature of a bailment."

In the case of Tague vs. Guaranty Bank, *supra* [1], where a seller delivered to an oil and gas company certain casing and pipe under a contract of sale, a portion of the consideration being paid and deferred payments evidenced by notes, the agreement being that the title should remain in the seller until purchase price fully paid, the same was held to be a conditional sale and not being recorded (under the Oklahoma laws, requiring conditional contracts to be recorded), until after the execution and recordation of a chattel mortgage by the oil and gas company covering the casing sold, a judgment in favor of the mortgagee intervening in a mechanic's lien action by a third party brought against the oil and gas corporation, in which the seller also intervened, was upheld, the mortgagee having no notice of the lien

§ 562. Conditional Sales Favored.

The law of California favors conditional sales, and it should be the policy of the courts to afford every protection to uphold their conditions.[3]

§ 563. Bona Fide Purchaser.

A *bona fide* purchaser from a vendee under conditional sale contract gets no valid claim to the property.[4]

§ 564. Assignees.

An assignee of a conditional sale contract is substituted to all rights of the assignor.[5]

§ 565. Realty or Chattel.

The subject of a conditional sale may, by agreement of the parties, retain as to them, its character as a chattel although affixed to the soil or be treated as a fixture by those without notice of such agreement.[6]

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of the said vendor. The court said: "the defendant in error agrees in his brief that the pivotal question in the case is whether the transaction between the plaintiff in error (the seller) and the Logan Oil and Gas Co. (the buyer) relative to the sale and delivery of the pipe was a conditional sale, or was a sale upon a condition and in the nature of a bailment? The distinction between these two kinds of contracts as to the sale of personal property is a very narrow one. * * * The distinction between a conditional sale and a sale upon condition or an executory contract of sale is that in the conditional sale the title to the property and the right to the possession passes to the vendee at the time of the transaction. Even though it may specify that the title is reserved in the vendor and is upon condition that the title does not pass until the agreed purchase price is paid, the same constitutes a conditional sale; and in the event that the purchase money is not paid, and as between the vendor and the vendee, the vendor can reclaim the property and title vest in the vendor, and in its nature is sometimes in the law of real property called a fee conditional and the condition not being complied with the title reverts in the seller."

[3] Marker vs. Williams, 39 Cal. A. 674, 179 Pac. 735; McConnell vs. Redd, 86 Cal. A. 785, 261 Pac. 506; Hedger vs. Hogle, 89 Cal. A. 358, 264 Pac. 807.

[4] Bice vs. Harold L. Arnold, 75 Cal. A. 629, 243 Pac. 468; see Marker vs. Williams, *supra* [3].

[5] Neitzel vs. Bean, 42 Ida. 411, 245 Pac. 936; Ditton & West vs. Grutt, *supra* [1].

[6] In the case of C. W. Raymond Co. vs. Ball, 210 Fed. 219, referring to the following citation from 2 Kent's Comm., p. 343, the court said: "The law of fixtures is in derogation of the common law, which subjected everything affixed to the freehold to the law governing the freehold; and it has grown up into a system of judicial legislation so as almost to render the right of removal of fixtures a general rule, instead of being an exception.

"While departure from the ancient rule has thus received judicial sanction in England and in this country, the courts of the several states have differed in the extent of such departure, ranging the states substantially in to two, lines of ruling upon the present inquiry: In one line (exemplified in Campbell vs. Roddy, 44 Eq. 244, 14 Atl. 279, and Binkley vs. Forkner, 117 Ind. 176, 19 N. E. 753), the intention of the parties to the transaction that annexation to the realty shall not deprive the chattel of its character as personalty, prevails to that end, as against a prior mortgagee of the realty and allied interests, whenever it appears that it can be removed without material injury to the freehold or to its usefulness as a chattel. The other line (exemplified in Fuller-Warren Co. vs. Hartner, 110 Wis. 80, 85 N. W. 698 cited in support of the decree) not only rejects the above mentioned test of removability, but adopts the doctrine generally referred to as the 'Massachusetts rule,' in substance, that an agreement between the mortgagor and his vendor of chattels to be attached to the freehold, for retention, of title in the vendor, can not, bind or affect the mortgagee of the realty,' and that annexation of the chattel passes title 'to the mortgagee as a part of the realty.' Thus the last mentioned line of authorities excludes in favor of a prior mortgagee of the realty, both of the tests of severability upheld and applied against the mortgagee by the other line, and their divergence in doctrine is plainly marked."

An agreement that chattels sold to be subsequently paid for, shall not be deemed part of any real estate can not have any legal effect against a prior mortgagee's right who is not a party to said agreement. New York Security Co. vs. Capital Ry. Co., 77 Fed. 529; but where chattels are sold under an agreement that title shall not pass until full payment and are delivered to the vendee after he has made a mortgage covering after acquired property of which the vendor has constructive knowledge, through its record, the vendor's lien on such chattels for their price will prevail as against such mortgagee, provided the same are separate and distinct personalty and do not become a part of the realty but if the consent of the vendor implied by his knowledge of the mortgage, such chattels become a part of the realty, they are then subject to the lien of the mortgage.

"Against a prior mortgagee, an agreement between the owner of the land and his vendor, that articles annexed to the freehold shall remain chattels until paid

for has been upheld chiefly upon the ground that the mortgagee has parted with nothing upon the faith of the annexation, and that therefore the vendor has the stronger equity. This is true, generally, where the mortgagee has notice, actual or constructive, of the agreement, and where the chattels may be removed without injury to the freehold. In the case of a subsequent mortgage, for a present valuable consideration, the rule is otherwise. Such mortgagee parts with his property upon the faith of the apparent security. Generally, however, if we have notice, actual or constructive, of the reserved personal character of what otherwise would be a fixture passing with the land, he must be bound thereby, because he dealt with knowledge of the situation. The rule that fixtures pass with the land and inure to the benefit of mortgagees against secret liens and title reservations is more strictly adhered to in states where the legal title to land is vested in the mortgagee. Jones on Real Property, Vol. 2, par 1744. Such is the estate recognized in Arkansas. * * * The following are among the many authorities which announce in their various phases, the foregoing principles: Jones on the Law of Real Property, Vol. 2, pars. 1668, 1680-1773, 1744, 1748, 1755; Bronson on Fixtures (1904), pp. 75, 98, 99, 147 and 154 to 162; Wickes Bros. vs. Hill, 115 Mich. 333, 73 N. W. 375, 376; Watson et al. vs. Alberts et al., 120 Mich. 508, 79 N. W. 1048; Campbell vs. Roddy et al., 44 N. J. Eq. 244, 14 Atl. 279, 282; Ridgway Stove Co. vs. Way, 141 Mass. 557, 560, 6 N. E. 714; William Firth Co. vs. South Carolina Loan & Trust Co. (C. C. A.), 122 Fed. 569-578; Phoenix Iron Works Co. vs. N. Y. Security & Trust Co. (C. C. A.), 83 Fed. 757; Evans vs. Kister (C. C. A.), 92 Fed. 836, 837; In re Sunflower State Refining Co. (C. C. A.), 195 Fed. 180." Triumph Co. vs. Patterson, 211 Fed. 250.

In Arnold vs. Goldfield Co., 32 Nev. 447, 109 Pac. 718, it appears that where a buyer of chattels, under a contract stipulating that the same shall be regarded as the personal property of the seller with the right of removal until paid for, attaches the property to real estate so as to make the same fixtures, the chattels are fixtures against every one except the seller, and a judgment creditor of the buyer and a purchaser at an execution sale may not claim the property as personal property by virtue of the contract. The court said: "The motion to set aside and vacate the sheriff's sale under execution was based upon the ground that all of said property, or at least the greater portion thereof, constituted fixtures, and hence could not be sold as personalty. The question involved here is whether or not the buildings, hoist, motor, and transformer, or any of them, constitute "fixtures" as the term is understood in the law. If they, or any of them, are fixtures, then the sheriff's sale was void, and the order of the trial court should be reversed. * * *"

"It is well established that a mining claim is real property, and it can not be disputed that a lode mining claim can not be successfully operated without the use of buildings or machinery of a character similar to that involved in said sale. * * * At the time of the execution sale, the hoist was firmly bolted to the substructure upon which it rested. So firmly was it bolted that subsequently when the power company assumed to exercise its right of removal, it apparently found it necessary to cut the nuts from the bolts. It is quite manifest that the hoist, including the superstructure and the engine house surrounding it, were as firmly affixed to the soil as their necessities required, and sufficiently so, considering the purpose for which they were used, to constitute the same fixtures. * * * The order appealed from is reversed, and the cause remanded, with directions to the trial court to enter an order vacating the sheriff's sale;" *but see* the case of Jordan vs. Myers, 126 Cal. 565, 58 Pac. 1061, where it appears that the Joshua Hendy Machine Works leased an engine and other machinery to one Berry, who was operating a mine belonging to the defendant, Berry obtaining the machinery from the Joshua Hendy Machine Works under a conditional sale, title not to pass until the purchase price had been paid. The machinery was attached to the mine. Payment of the purchase price was not made. Thereafter, in an action to foreclose a mechanic's lien, it was held that the character of the propertry had not changed from personalty to realty so as to render the rights of the Joshua Hendy Machine Works to recover the same subject to the rights of the lienholders.

See, also, Byron Jackson Works vs. Hoge, 49 Cal. A. 700, 194 Pac. 45, where owners of mining premises leased the same with right to lessees to install machinery thereon. Lessees made a conditional sales contract with title reserved in seller until completion of purchase price. Failing to pay for the machinery and vacating the premises, although machinery was affixed to the mine, it was held that as to the owner of the mine having notice of the conditional sale, it remained personalty and in a suit to recover the purchase price judgment was rendered for a return of the property to the vendor. C. J. B. 676, § 39 *et seq.*, page 689, § 60.

See Washburn vs. Inter-Mountain Co., 56 Or. 578, 109 Pac. 382, where the agreement recited that the first party "does hereby sell, assign, transfer and set over unto the said party of the second part, * * *" and provides that the title to said mill and all machinery thereinbefore described shall be and remain in the party of the first part, clearly indicating a conditional sale. The court said:

"No doubt it was the intention of both Vinson and the defendant company to make the building and mill a permanent accession to the purchase. But the agreement amounts to a stipulation that as between the parties to the agreement, it shall remain personalty until the principal was fully paid. Laudigan vs. Mayer, 32 Or. 245, 51 Pac. 649; Hershberger vs. Johnson, 37 Or. 109, 60 P. 838. However, when the mill is affixed to the soil, the situation is changed as to the right of third parties who are without notice of the terms of the agreement. When the chattel which was sold for that purpose is attached to the soil, a party dealing with referenee to the realty upon which the mill is situated, without notice of the reservation in the agreement, will not be affected thereby; but as to him, the mill will be treated as a fixture. The reason for the rule is that to hold otherwise would render uncertain land titles, endanger the right of purchasers, and afford opportunities for fraud."

In Ritchey vs. Southern Gem Corp., 12 Fed. (2d) 605, where certain machinery for equipment of a mine tipple was sold to be used in a coal mining plant, title

§ 566. Presumption.

The *prima facie* presumption is that chattels affixed to the freehold are a part of the realty and that the unconditional title thereto is in the owner of the realty. In other words, it will not be presumed that they are the subject of a conditional sale or that the title has been retained by the vendor.[7]

§ 567. Burden of Proof.

The burden of proof rests upon him who asserts the conditional sale and that the chattel had not become a part of the realty.[8]

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being reserved in the vendor until payment of purchase price, and an agreement made that no machinery so furnished should become a fixture by reason of being attached to the real estate; it was held that the placing of said machinery in the mine deprived it of its individual characteristics as it became an integral part of the mine without which the mine would be practically useless for the purpose of mining coal, and when the mining corporation subsequently executed a trust deed or mortgage, an application by the vendor to reclaim said machinery as against the trustee and the bondholders, they being without notice of reservation in the sale, the same was denied and the vendor's right was held to be inferior to those of the mortgagee so without notice. In this case the court further said that whether the rights of a conditional sale vendor are superior to the rights of a person holding a mortgage on the premises in which the vendee has installed the purchased article will be determined according to the law of the state within which the case arises. See, also, First National Bank vs. Bank, 262 Fed. 754. See Puzzle Co. vs. Reduction Co., 24 Colo. A. 74; 131 Pac. 791.

[7] Wheat vs. Otis Co., 23 Fed. (2d) 153. See interesting exposition of law questions involved as to when chattels become fixtures in Roseburg Bank vs. Camp, 89 Or. 67, 173 Pac. 313; see, also, Reeder vs. Smith, 118 Wash. 505; 203 Pac. 951.

[8] Id. In every jurisdiction it is possible that the vendor by conditional sale or other legal device for retaining title until payment made may, even under an agreement *per se* entirely lawful, permit his chattels to become thoroughly a part of real property that they can no longer be severed therefrom, wherefore in common parlance they "become realty." Under exactly what circumstances this phrase is applicable the courts of different states are not agreed. Seward Co., 242 Fed. 225.

CHAPTER XXVI.

CORPORATIONS.

§ 568. Ultra Vires Location.

An *ultra vires* location,[1] as well as a location made by an alien corporation, is not void but voidable[2] and is not subject to attack except by the government in direct proceedings termed "inquest of office found."[3]

§ 569. Not a Cotenant.

A corporation and its stockholders are not cotenants[4] and it can not give valid notice for contribution for annual assessment work to a stockholder thereof.[5]

§ 570. Limitations.

A stockholder of a mining corporation can not validly relocate a mining claim to the prejudice of the corporation. He will be required by appropriate instruments, to convey or transfer his right, title and interest to the corporation.[6]

§ 571. Oil and Gas Lands.

A corporation may become a member of an association and thus acquire an indirect interest in a permit subject only to the acreage

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[1] Rose Claim, 22 L. D. 83; see Union Bank vs. Mathews, 98 U. S. 628.

[2] See *infra*, note 6.

[3] See Manuel vs. Wulff, 152 U. S. 505; McKinley Creek Co. vs. Alaska United Co., 183 U. S. 563; Lone Jack Co. vs. Megginson, 82 Fed. 89; Thornases vs. Melsing, 109 Fed. 710; Shea vs. Nilima, 133 Fed. 209; Ginaca vs. Peterson, 262 Fed. 904; McEvoy vs. Megginson, 29 L. D. 164; Allyn vs. Schultz, 5 Ariz. 152, 48 Pac. 960; Perley vs. Goar, 22 Ariz. 146, 195, Pac. 532; Ferguson vs. Neville, 61 Cal. 356; Harris vs. Kellogg, 117 Cal. 484, 49 Pac. 708; Lee Doon vs. Tesh, 68 Cal. 43, 6 Pac. 97; Keeler vs. Trueman, 15 Colo. 113, 25 Pac. 311; Duncan vs. Eagle Rock Co., 48 Colo. 569, 111 Pac. 588; Wilson vs. Triumph Co., 19 Utah 66, 56 Pac. 300; Stewart vs. G. & C. Co., 29 Utah 443, 82 Pac. 475; Davis vs. Dennis, 43 Wash., 54; 85 Pac. 1079. See, also, St. Louis Co. vs. Kemp, 104 U. S. 626; West vs. Minneapolis Co., 68 Mont. 253, 217 Pac. 342; Sharkey vs. Candiani, 48 Or. 1121, 85 Pac. 219.

[4] Repeater Claims, 35 L. D. 54. See Yard, 38 L. D. 68.

[5] Id.; see Van Sice vs. Ibex Co., 173 Fed. 895. A stockholder in a mining corporation has such a beneficial interest in the corporate property that any work done by him upon an unpatented mining claim of such corporation must be counted as assessment work. Such work will inure to the benefit of the corporation as against a denial of such intention on the part of the stockholder performing the work where he seeks to gain a personal advantage by denying the intention. Wailes vs. Davies, 158 Fed. 674, aff'd. 161 Fed. 399. Musser vs. Fitting, 26 Cal. A. 746; 148 Pac. 538.

[6] Gammon vs. Ramsey, 13 Fed. (2d) 743. For an attempted abandonment of the mining ground of a corporation by one of its stockholders, see Thornton vs. Phelan, 65 Cal. A. 480, 224 Pac. 259. In Fortuna Co. vs. Miller, 29 Ariz. 104, 239 Pac. 789, the declarations of the president of a mining corporation as to its intention to abandon certain of its mining property by a failure to do the assessment work, was held admissible on an issue of abandonment. A corporation deed unauthorized by the stockholders is void only as to stockholders and those connected with the corporation's title. Galbraith vs. Shasta Co., 143 Cal. 94, 76 Pac. 903. See Royal Co. vs. Royal Mines, 157 Cal. 737, 110 Pac. 123.

A stockholder, as such, does not represent the corporation, and only under exceptional circumstances may he act in its behalf. For instance, should he file an "adverse claim" in behalf of the corporation without its agreement, express or implied, he does so at his peril. Hartman vs. Oatman Co., 22 Ariz. 476, 198 Pac. 717.

In Dunfee vs. Terwilliger, 15 Fed. (2d) 523, it is said: "One of the principal stockholders in a mining corporation could not secretly take a lease on mining property to himself at expense of the corporation and his associates. But the lease of a mine taken in his own name by one of two stockholders, after expiration of lease to the corporation, would not inure to benefit of the corporation."

limitation of section 27 of the act of February 25, 1920,[7] but the mere conveyance to a corporation of an individual interest in a permit will not, of itself, accomplish that result.[8]

§ 572. General Manager.

The very term implies a general supervision of the affairs of the corporation in all its departments.[9] The knowledge of a manager is, in respect to others, the knowledge of the company.[10]

§ 573. Corporate Securities Act.

The California Corporate Securities Act does not attempt to prohibit one from selling his privately owned corporate securities without a permit or license, provided his transactions do not bring him within the classification of a "dealer" or "broker."[11]

§ 574. Defunct and Suspended Corporations.

Under the former law in California when the charter was forfeited all of the property of a defunct corporation belonged to the persons who were its stockholders at the time it ceased to be a corporation, but the right of possession passed to the directors in office by force of the statutory provision which made them trustees for the stockholders and creditors to settle the corporate affairs.[12] But under the present law[13] the charter is not forfeited, the corporation does not become defunct and there are no trustees.[14]

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[7] 41 Stats. 448.

[8] Associated Oil Co., 51 L. D. 241, 308.

[9] Spangler vs. Butterfield, 6 Colo. 356; Manufacturing Co. vs. Dawson, 57 Wis. 404, 15 N. W. 398.

[10] Oro Co. vs. Kaiser, 4 Colo. A. 219, 35 Pac. 677. See Clark vs. Buffalo Hump Co., 122 Fed. 243. In Union Co. vs. Rocky Mt. Nat. Bank, 2 Colo. 248, it was said: "If an officer of a corporation is allowed to exercise general authority in respect to the business of the corporation, or a particular branch of it, for a considerable time, in other words, if he is held out to the world as having authority in the premises, the corporation is bound by his acts, in the same manner as if the authority were expressly granted;" *but see* Victoria Co. vs. Fraser, 2 Colo. A. 14, 29 Pac. 667.

A general manager of a mining corporation who employed men to open his own mine and construct a wagon road and ore chute therefrom to the reduction works of the company, transferred mines and tools from the company's mine to his own, reduced his ore in the company's mill and sold it mixed with ore from the company's mine, acted within the scope of his employment though without the knowledge and in fraud of the company, the company was liable for the wages of men employed by him in the name of the company and who thought they were serving the company when working for him. Oro Co. vs. Kaiser, *supra*.

Where practically all tailings from the mining plant of a corporation were cast for two years upon adjoining land to a height of twenty-five feet, and where it appeared that the machinery of mill operated by the mining corporation was so constructed and operated by those having charge of the mining opeartions as to deliberately pile the tailings on such land, the managers of the corporation who did not claim to be ignorant of the wrong being done, and who, although requested to do so, did not stop the wrongful acts, were held jointly liable in damages with the corporation for the injuries caused thereby. Robinson vs. Moak-Nemo Co., 178 Mo. A. 531, 163 S. W. 885.

[11] People vs. Main, 75 Cal. A. 471, 242 Pac. 1078. See People vs. Pace, 73 Cal. A. 548, 238 Pac. 1089; Clover vs. Jackson, 81 Cal. A. 59, 253 Pac. 187. If not owned, as stated in the text, selling such securities without having secured a license is an indictable offense. Brandenburg vs. Miley Pet. Co., 16 Fed. (2d) 933.

[12] Rossi vs. Caire, 174 Cal. 81, 161 Pac. 1161; Id., 186 Cal. 549, 199 Pac. 1042; Van Landingham vs. United Packers, 189 Cal. 367, 208 Pac. 973; Jones vs. Peck, 63 Cal. A. 397, 218 Pac. 1023.

[13] Stats. 1917, pp. 331–377; Pol. C. § 3669c, Subd. 2.

[14] Usher vs. Henkel, 205 Cal. 413, 271 Pac. 494. In this case it was held that where a deed had been executed by a corporation while its powers were suspended for failure to pay its license tax, the deed passed no title from the corporation.

CHAPTER XXVII.

COSTS.

§ 575. Definition of Costs.

The word "costs," when used in relation to the expenses of legal proceedings, means the sum prescribed by law as charges for the services enumerated in the fee bill.[1] The word has a generally accepted meaning throughout the country.[2]

§ 575a. Right to Recover Costs.

The right to recover costs is purely statutory and warrant for their recovery must be found in some statute.[3] The measure of the statute is the measure of the right.[4]

§ 576. No Costs Allowed.

Under the provisions of the act of March 3, 1881,[5] where, in an adverse suit, the title to the ground in controversy shall not be established by either party, no costs are allowed to either party.

§ 577. Land Office Costs.

It has been held that a state statute allowing costs does not contemplate costs occasioned by proceedings in the United States land office.[6]

§ 578. Experts.

Witnesses called as experts are entitled to fees for daily attendance, and for mileage as witnesses. As a rule they are not entitled to be paid as experts, nor for the expenses incurred by them in making surveys or preparing maps.[7]

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[1] City of St. Louis vs. Mentz, 107 Mo. 611, 18 S. W. 301. See Purdy vs. Johnson, 100 Cal. A. 416, 280 Pac. 181.

[2] City of Los Angeles vs. Vickers, 81 Cal. A. 740, 254 Pac. 687.

[3] Danley vs. Merced Dist., 76 Cal. A. 52, 242 Pac. 676. Costs *eo nomine* were not recoverable by either party at common law. They are the creations of statute, and the right to recover costs must be made to depend upon statutory provisions. Sime vs. Hunter, 55 Cal. A. 157, 202 Pac. 967; Albrecht vs. Albrecht, 83 Mont. 37, 269 Pac. 161.

In equity cases and in other cases where there are no statutory provisions or rules of practice, the award of costs, as well as the taxation thereof, rests in the sound discretion of the trial court, and will not be reviewed in an appellate court, except in cases of a manifest abuse of such discretion. Kittredge vs. Race, 92 U. S. 121; Woodward vs. Baird, 43 Neb. 317, 61 N. W. 612; Cole vs. Logan, 21 Or. 314, 33 Pac. 568. But in actions at law it is a general rule that the losing parties, or the parties against whom judgment is rendered, are to pay the costs, and no apportionment of the costs is made between them. Each is liable for all, whatever may be their respective interests in the subject matter of the suit. Kittredge vs. Race, *supra*.

[4] Estate of Johnson, 198 Cal. 469, 245 Pac. 1089.

[5] 21 Stats. 505, 6 Fed. St. Ann. [2d. ed.], p. 599.

[6] Golden Marguerite Co. vs. National Copper Co., 98 Ida. 290, 154 Pac. 207.

[7] See Bathgate vs. Irvine, 126 Cal. 135, 58 Pac. 442, cited in City of Los Angeles vs. Vickers, *supra* (2); Crabtree vs. Houghton, 191 Cal. 24, 214 Pac. 846; City of Los Angeles vs. Vickers, *supra* (2); Mark vs. City of Buffalo, 87 N. Y. 189. On the general question of taxing experts' fees see Faulkner vs. Hendy, 79 Cal. 265, 21 Pac. 754.

In California the court *sua sponte* or on motion of any party may appoint one or more experts to investigate and testify at the trial, etc. In all civil actions and proceedings such compensation shall, in the first instance, be apportioned and

§ 579. Receivers.

Midland Oil Co. vs. Turner,[8] was an action in trespass. Therein it was said that the properties have been for some time and now are being operated by a receiver, and the oil extracted by him should be awarded to the complainant; but if he has used or now is using any tools, appliances or equipment belonging to the defendants, he should be required to account to the owner for the fair value of such use, and for the value of such parts thereof, if any, which have been consumed, destroyed or worn out by him, and the defendants should not be charged with any part of the compensation or expenses of the receiver, or the costs of these suits.

§ 580. Cost Bill.

A verified memorandum of costs and disbursements is *prima facie* evidence that the amounts therein named were necessarily expended.[9]

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charged to the several parties in such proportion as the court or judge may determine and may thereafter be taxed and allowed in like manner as other costs. C. C. P., § 1871.

In the William Branfoot, 52 Fed. 395, the court held that the compensation of experts called by the party in his own behalf can not be taxed against the losing party as costs or as extra allowances and disbursements they not having been incurred under any action of the court. See, also, Carolina Co., 96 Fed. 604. These two last cited cases reflect the general law of the country upon this question. Bone vs. Walsh, 235 Fed. 904; Wendell vs. Willetts, 183 Fed. 1014 and Anderson vs. Railway Co., 103 Minn. 184, 114 N. W. 744 both allowed as costs payment for services of experts.

In *In re* Commissioners, 144 N. Y. Supp. 782, it was decided that the fees of experts are properly chargeable as costs in eminent domain proceedings.

[8] 179 Fed. 74. See, also, U. S. vs. Midway Northern Oil Co., 232 Fed. 633.

For an interesting case on receivership see Thornases vs. Melsing, 106 Fed. 775; c. c. 180 U. S. 536.

[9] Kelly vs. City of Butte, 44 Mont. 115, 119 Pac. 171.

CHAPTER XXVIII.

DEEDS.

§ 581. Characteristics.

A mining claim being real estate it can be transferred only by operation of law[1] or by an instrument in writing,[2] but a discoverer of mineral may transfer his right of location by parol.[3] It should be clear from the language used in the deed that the grantor intended to pass the title to the property and whatever is incident and appurtenant thereto.[4] A deed gains no additional force by the insertion of a clause

[1] Lohman vs. Helmer, 101 Fed. 178; O'Connell vs. Pinnacle Co., 131 Fed. 106; aff'd. 140 Fed. 854; Moore vs. Hammerstag, 109 Cal. 122, 41 Pac. 805; Grand Prize Mines vs. Boswell, 83 Or. 1, 162 Pac. 1063; Mecum vs. Metz, 32 Wyo. 79, 229 Pac. 1105; 30 Wyo. 495, 222 Pac. 576.

[2] An oral agreement can not act as a transfer. Craig vs. White, 187 Cal. 497, 202 Pac. 648; Garthe vs. Hart, 73 Cal. 541, 15 Pac. 93; Doe vs. Waterloo Co., 70 Fed. 455, aff'g. 56 Fed. 11. An oral agreement can not create a trust in a mining claim. Cascaden vs. Dunbar, 2 Alaska 408; Moore vs. Hammerstag, *supra* [1]; Mecum vs. Metz, *supra* [1]. It seems now to be established that wherever parties under valid consideration, make delivery of instruments, such as deeds, certificates of stock, or securities of other sorts, conditioned upon the payment of money or the rendering of further consideration to the grantor or vendor, they may, as a part of the transaction, create a valid escrow. Feisthamel vs. Campbell, 55 Cal. A. 779, 205 Pac. 25. The placing of a deed in escrow does not change the situation of the parties in any particular. It is not a conveyance in the legal sense of the word, because it is not an unconditional and unqualified delivery. It is not intended to pass the title *in praesenti;* but only to pass title upon the contingency of the grantee paying over for the use of the grantee of the first part the amount of money designated as the purchase price of the property. The rights acquired by such grantee are the rights designated in the contract, and not by reason of the execution and placing of the deed in escrow. Fitch vs. Bunch, 30 Cal. 208; Holland vs. McCarthy, 173 Cal. 602; 160 Pac. 1069; Thomas vs. Bird, 178 Cal. 483, 173 Pac. 1102; Craig vs. White, 187 Cal. 497, 202 Pac. 648. North Confidence Co. vs. Morrice, 56 Cal. A. 145, 204 Pac. 851. A deed can not be delivered to the grantee as an escrow. If it be delivered to him it becomes an operative deed, freed from any condition not expressed in the deed. It is and will vest the title in him, although this may be contrary to the intention of the parties. Blackledge vs. McIntosh, 85 Cal. A. 475, 259 Pac. 773, citing Riley vs. North Star Co., 152 Cal. 549, 93 Pac. 194. The delivery of any instrument contrary to the conditions of the escrow under which it is held is void, and confers no right upon the recipient. Zoharopulos vs. Hamilton, 108 Or. 201, 216 Pac. 184; 21 Cor. Jur., p. 893, § 29, particularly as against those who take with notice. Feisthamel vs. Campbell, *supra*. See Bone vs. Dwyer, 89 Cal. A. 539, 265 Pac. 292.

[3] Doe vs. Waterloo Co., *supra* [2]. As to incomplete and irregular locations see, Tonopah Co. vs. Tonopah Co., 125 Fed. 389, dis. 129 Fed. 1007. Miller vs. Chrisman, 140 Cal. 140, 73 Pac. 1083, 74 Pac. 441, aff'd. 197 U. S. 313; Weed vs. Snook, 144 Cal. 439, 77 Pac. 1023; Sparks vs. Mount, 29 Wyo. 1, 207 Pac. 1099.

[4] Meyers vs. Farquharson, 46 Cal. 190; Stinchfield vs. Gillis, 96 Cal. 33, 30 Pac. 839, s. c. 107 Cal. 8, 40 Pac. 98; writ of error denied 159 U. S. 658. McFarland vs. Walker, 40 Cal. A. 508, 181 Pac. 248; Montana Co. vs. St. Louis Co., 204 U. S. 204; Montana Co. vs. St. Louis Co., 183 Fed. 51; Nolan vs. Coon, 1 Alaska 36; Las Vegas Co. vs. Summerfield, 35 Nev. 229, 129 Pac. 303; Quilp Co. vs. Republic Corp., 96 Wash. 139, 165 Pac. 57.

In the absence of restrictive words a deed of a whole or a part of a mining claim, though silent as to extralateral rights, operates to convey the lateral extension of any vein apexing within the deeded area. Midwest-Butte Co. vs. Butte West Side Co., 32 Fed. (2d) 841, and cases therein cited.

In Morrison's Mining Rights (15th ed.) 336, it is pointed out that "The word 'mine' is a dangerous term and to be avoided as often an entire group might pass, and, in fact, might be intended to pass by the use of such sweeping term. Smith vs. Sherman Co., 12 Mont. 524, 31 Pac. 72; Phillips vs. Salmon River Co., 9 Ida. 149, 72 Pac. 886." The granting clause in a deed substantially was, as follows: twenty-one hundred feet on the Chatauqua lode," and also all the real estate of the grantor acquired and which may be acquired in Summit county, Colorado, whether the same is particularly described herein or otherwise. "The general description prevails over the particular description where there is a clear intent to have the general control. Such is the situation in the instant case. The grantor owned the entire three thousand feet of the Chatauqua lode and by the conveyance there is a clear intent to have the general description control, and the same should be given effect." The deed "therefore conveyed the entire three thousand feet of the lode in question and the grantee received a good and merchantable title to the same."

conveying the "dips, spurs and angles" of the lode or vein conveyed.[5] All parts of a deed conveying mining property must be construed together without regard to its mere formal divisions.[6]

§ 582. Descriptive Name.

A mining claim which has a known descriptive name may be sufficiently described by such name.[7]

§ 583. Creation of Estates.

Independent estates may be carved out of the same land, as where the owner of the surface grants only the right to the underlying minerals.[8]

A deed conveyed to the grantee the surface of a certain described tract of land, but reserved to the grantor the minerals therein. Under such a deed the grantee and those claiming under him are estopped to

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Sutton, Steele Co. vs. McCulloch, 64 Colo. 415, 174 Pac. 302. If the description be so indefinite and inaccurate as to exclude doubt, it must be applied as found, notwithstanding a different construction may be indicated by the acts and declarations of the parties.

Where the deed contains a reference to a natural object, that is, a road, and the deed itself does not make it plain what road is intended, it is proper to show by parol evidence the identity of this object. In Colton vs. Seavey, 22 Cal. 497, it was held that "parol evidence is admissible to explain the location of the objects mentioned in the description of a deed, and thus fix the boundary lines of the tract conveyed." Where monuments mentioned in a deed are identified, they control both courses and distances given, whether they are seen by the parties to the deed or not. Anderson vs. Richardson, 92 Cal. 623, 28 Pac. 679. Williamson vs. Pratt, 37 Cal. A. 368, 174 Pac. 114. This rule is adopted because it is most likely to lead to the discovery of the intent of the parties. Piercy vs. Crandall, 34 Cal. 334.

All authorities on the subject assign courses and distances as being least reliable. Galbraith vs. Shasta Co., 143 Cal. 94, 76 Pac. 901. Williamson vs. Pratt, *supra*. Quantity is the least certain of all elements of description which usually are found in a deed. Calls for monuments, metes and bounds, courses and distances all are superior to the elements of quantity. Ewell vs. Weagley, 13 Fed. (2d) 714. See Gragg vs. Culp, 198 Cal. 579, 246 Pac. 43. Where there is uncertainty in specific description, the quantity named may be of decisive weight. Ainsa vs. U. S. 161 U. S. 229; Producers Co. vs. Hanzen, 238 U. S. 338.

[5] Montana Co. vs. St. Louis Co., 204 U. S. 204; Montana Co. vs. Montana Co., 27 Mont. 288, 70 Pac. 1114; Bogart vs. Amanda Co., 32 Colo. 32, 74 Pac. 882; *but see* Clark-Montana Co. vs. Butte & Boston Co., 233 Fed. 512; and see Clark-Montana Co. vs. Butte & S. Co., 247 U. S. 12, distinguishing Montana Co. vs. St. Louis Co., *supra*, and Bogart vs. Amanda Co., *supra*.

[6] Brier Hill Co. vs. Gernt, 131 Tenn. 542, 175 S. W. 560. See Hughes vs. Scott, 47 Cal. A. 264, 190 Pac. 643.

[7] Glacier vs. Willis, 127 U. S. 471; Harris vs. Equator Co., 8 Fed. 863; Reed vs. Munn, 148 Fed. 737; *certiorari* denied 207 U. S. 588; Shrewsbury vs. Pocahontas Co., 219 Fed. 142; Veronda & Ricoletto vs. Dowdy, 13 Ariz. 265, 108 Pac. 482, and cases therein cited; Carter vs. Bacigalupi, 83 Cal. 187, 23 Pac. 363; Murray vs. Tulare Co., 120 Cal. 311, 49 Pac. 563; King Solomon Co. vs. Mary Verner Co., 22 Colo. A. 528, 127 Pac. 129. Collins vs. McKay, 136 Mont. 123, 92 Pac. 295. Berquist vs. W. Virginia Co., 18 Wyo 234, 106 Pac. 673. That a claim is known by several names and only one of them is given is immaterial. Lebanon Co. vs. Con. Republic Co., 6 Colo. 371; Collins vs. McKay, 36 Mont. 123, 92 Pac. 295; Phillpotts vs. Blasdell, 8 Nev. 61; Weill vs. Lucerne Co., 11 Nev. 200; see Shoshone Co. vs. Rutter, 87 Fed. 801; Wemple vs. Yosemite Co., 4 Cal. A. 78, 87 Pac. 280; Shreve vs. Copper Bell Co., 11 Mont. 309, 28 Pac. 315.

The property in a deed or mortgage may be sufficiently described by appropriate reference to any duly recorded document or public record containing the required description and proof of the description is complete by the introduction in evidence of such document or record. Wemple vs. Yosemite Co., *supra*.

[8] Catron vs. South Butte Co., 181 Fed. 941; Stinchfield vs. Gillis, *supra* [4]; Bronson vs. Jones, 89 Iowa, 380; Smith vs. Jones, 21 Utah, 270, 60 Pac. 1104; Williams vs. South Penn Co., 52 Va. 181, 43 S. E. 214. Yellow Poplar Co. vs. Thompson, 108 Va. 612, 62 S. E. 358. When the surface of the land is owned by one and the mineral beneath, with the right to extract the same, is owned by another, it is immaterial whether the two interests have been created by a conveyance of the surface, with a reservation of the mineral, or by a grant of the mineral, with a reservation of the surface. In either case the obligation to protect the surface is the same. And it is well settled that the grant of the surface, with a reservation of the minerals, and a right to extract the same, does not permit the destruction of the surface, unless the right to do so has been expressed in terms so plain as to admit of no doubt. Catron vs. South Butte Co., *supra*. For rights of owner of surface as against owner of minerals thereunder, see West Pratt Co. vs. Dorman, and monographic note, 135 Am. St. Rep. 127. See, also, Marquette Co. vs. Oglesby, 253 Fed. 111.

deny the title of the grantor and those claiming under him to the minerals so reserved.[9]

A conveyance of ground "lying east of the grantor's patented mining ground" carries no right to the vein or lode which may dip under the ground conveyed, as the deed does not purport to grant any part of the patented ground, which, of course, includes the extralateral right.[10]

A conveyance of an undivided interest in one lode claim conveys no rights in an adjoining lode claim although owned by the same grantor, nor does it denude the latter claim of the extralateral rights conferred by law upon it by virtue of a prior valid location. In other words, such a conveyance does not preclude the grantor from subsequently following on their dip all veins or lodes apexing within his retained claim into and through the claim which he had so conveyed.[11]

A conveyance of a lode claim, or a definite portion thereof will, in the absence of an express reservation, vest the extralateral rights to all veins apexing within the granted premises.[11a]

A deed for a specific portion of an unpatented mining claim renders each an independent claim, subject to all the incidents of separate ownership as to discovery (if not previously made) and annual expenditure.[12]

A conveyance of a placer claim, as a matter of law, includes all known veins and lodes of quartz within its limits.[13]

A conveyance of a mining location before discovery, and while its claimant complies with the statutes of the United States, the state and local rules and regulations, is valid.[14]

A deed conveying real property "together with the appurtenances thereunto belonging" is a sufficient conveyance of the water rights as appurtenant to the land.[15]

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[9] Morse vs. Smythe, 225 Fed. 981.

[10] Central Eureka Co. vs. East Central Eureka Co., 146 Cal. 147, 79 Pac. 834. See Riley vs. North Star Co., *supra* (2).

[11] Butte & S. Co. vs. Clark-Montana Co., 249 U. S. 12, aff'g. 248 Fed. 609, aff'g 233 Fed. 547. When mining ground is conveyed by deed without express limitation, the grantee takes subject to the character of mining property given to it by prevailing customs and laws, and not with the absolute dominion which flows from a conveyance in fee of ordinary land. The mining land thus granted is subject to all mining laws and customs which are applicable, but the provisions of § 2336 Rev. St. (5 U. S. Comp. St., p. 5687, § 4614), that, where two or more veins intersect "priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection" can not possibly be applied to the case where A conveys part of his mining claim to B, for in such a case there is no "prior location." Therefore, in such a case, the ordinary rules which govern tracts must of necessity apply; and, if the intersection takes place on part of the claim conveyed, the grantee takes all the mineral within the space of intersection. Stinchfield vs. Gillis, *supra* (9); see, also, Boston Co. vs. Montana Co., 89 Fed. 529.

[11a] Montana Co. vs. Boston & M. Co., 27 Mont. 288, 70 Pac. 1111; see, also, Midwest-Butte Co. vs. Butte West Side Co., *supra* (9).

[12] Merced Co. vs. Patterson, 153 Cal. 624, 96 Pac. 90, see *Id.* 162 Cal. 358; 122 Pac. 950; Zeckendorf vs. Hutchinson, 1 N. M. 476; see Little Pittsburg Co. vs. Amie Co., 17 Fed. 57. The rights of a purchaser of a part of an unpatented mining claim will terminate upon the abandonment of the location of the grantee and relocation by another. Conn. vs. Oberto, 32 Colo. 313, 76 Pac. 369.

[13] Wilbur vs. Everhardy, 176 Cal. 142, 167 Pac. 861; *but see*, Barnard Co. vs. Nolan, 215 Fed. 999.

[14] Rooney vs. Barnette, 200 Fed. 710; Con. Mutual Oil Co. vs. U. S., 245 Fed. 525; Doe vs. Waterloo Co., *supra* (2); Miller vs. Chrisman, *supra* (3); *see* Weed vs. Snook, *supra* (3); Swanson vs. Kettler, 17 Ida. 321, 105 Pac. 1059, aff'd. 224 U. S. 180; *compare* Bay vs. Oklahoma Co., 13 Okla. 425, 73 Pac. 936. The possessory right of the owner of a mining claim after discovery of mineral therein is a property right in the full sense, unaffected by the fact that the paramount title to the land is in the United States, and such right is capable of being transferred by conveyance. Union Oil Co. vs. Smith, 249 U. S. 337, aff'g. 166 Cal. 217, 135 Pac. 966.

[15] U. S. vs. Havenor, 209 Fed. 989; Montana Co. vs. Ringeling, 65 Mont. 249, 211 Pac. 333.

§ 584. Void Deed.

A conveyance of a mining claim to an "officer, clerk, or employee of the general land office," or to a mineral surveyor is void.[16]

§ 585. Imperfect Deed.

A conveyance made to a person whose name is mentioned together with the words "& Co." vests the legal title of the same in the person specifically named alone, in trust, however, for his partners.[17]

§ 586. Effect of Quitclaim Deed.

Ordinarily a quitclaim deed conveys only the present title of the grantor, but if executed during the pendency of patent proceedings in behalf of the grantor the title acquired by the issuance of patent inures to the benefit of the grantee named in the quitclaim deed.[18]

§ 587. Adverse Possession.

The owner of the surface of the land, when the underlying minerals have been separately conveyed, can acquire no title to the minerals by his exclusive and continued possession of the surface.[19]

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[16] Witherill vs. Brehm, 74 Cal. A. 295, 240 Pac. 529.

[17] See 1 A. L. R. 564; Winters vs. Stock, 29 Cal. 407; Woodward vs. McAdam, 101 Cal. 441, 35 Pac. 1016; Ricksford vs. Zeigler, 150 Cal. 438, 88 Pac. 435; Fresno Co. vs. Fruit Co., 101 Fed. 828; *but see* Kentucky Co. vs. Sewell, 249 Fed. 840, and cases therein cited. A deed to a fictitious person, or to one who is dead at the time, or to a corporation having no legal existence passes no title. Copeland vs. Fairview Co., 165 Cal. 148, 131 Pac. 119, *but see* Cochran vs. O'Keefe,, 34 Cal. 554, holding that a deed to an unincorporated mining company is not void for want of a grantee therein capable of taking under it. See Schade vs. Stewart, 205 Cal. 658, 264 Pac. 750; superseded in ___ Cal. ___, 272 Pac. 567.

[18] Crane vs. Salmon, 41 Cal. 63; 3 A. L. R. 940; see, also, Ketchum Co. vs. Pleasant Valley Co., 257 Fed. 276; *certiorari* denied 250 U. S. 668, dis. 254 U. S. 616; Liddia Claim, 33 L. D. 127; Wholey vs. Cavanaugh, 88 Cal. 132, 25 Pac. 1112; Bradbury vs. Davis, 5 Colo. 265; Holleman vs. Cushing, 84 Okla. 156, 202 Pac. 1029; Slothower vs. Hunter, 15 Wyo. 189, 88 Pac. 36. It is the general rule that the grantee in a quitclaim deed takes only the interest of his grantor in the premises. Lindblom vs. Rocks, 146 Fed. 660. In 18 C. J. 314, it is said: "But the fact that a deed purports to convey the grantor's interest is not conclusive of an intention to convey only that interest. The intention to be gathered from the whole instrument must prevail," read in the light of the facts and circumstances under which it was executed. Wise vs. Watts, 239 Fed. 107. Where a deed, by its terms, conveyed "all the estate, right, title, interest, property, possession, claim, and demand whatever, as well in law as in equity of the grantors" it has a greater efficacy than a mere quitclaim. Yjosevig vs. Donohoe, 162 Fed. 916. See Spaulding vs. Bradley, 79 Cal. 449, 22 Pac. 47. A deed in escrow prior to patent entry passes no title. Brady's Mortgagee vs. Harris, 29 L. D. 89. A transfer of title by an applicant for a patent during the pendency of the application for a patent has the effect of making him a trustee and as such holds the title only for the purposes of such application and where patent is issued the title immediately reverts to his grantee. Wholey vs. Cavanaugh, *supra*; Slothower vs. Hunter, *supra*; 44 A. L. R. 1280, notes. See, also, 10 R. C. L. 680; 16 Cyc. 695, note 35; 35 R. L. A. (new series) 1188. This conclusion is founded on the law of estoppel as well as on the doctrine of relation. Wholey vs. Cavanaugh, *supra*; Landes vs. Brant, 10 How. 348; Massey vs. Papin, 21 How. 364; Cagle vs. Sabine Valley Co., ___ Tex. ___, 202 S. W. 942.

As to effect of a "grant" deed upon title to government land subsequently acquired see Cecil vs. Gray, 170 Cal. 137, 148 Pac. 935.

[19] Con. Coal Co. vs. Yonts, 25 Fed. (2d) 406. See *supra* note 8. The surface owner setting up the statute of limitations must establish a possession of the mine, as such, independently of his possession of the surface. The question of adverse possession of the mine is tried just as would be the question of the adverse possession of the surface. Hooper vs. Bankhead, 171 Ala. 626, 54 So. 551; Gordon vs. Park, 219 Mo. 600, 117 S. W. 1166. The adverse possession can not be accomplished by secret trespass upon the owner's rights. Gill vs. Fletcher, 74 Ohio St. 295, 78 N. E. 435.

A subsequent grantee is bound to take notice of prior deeds in his chain of title, and is thereby charged with notice of an exception of mineral rights in an earlier deed in such chain as respects the question of adverse possession. Grayson McLeod Co. vs. Duke, 160 Ark. 56; 254 S. W. 350.

§ 588. Attack by Grantor.

A grantor can not attack the validity of the location conveyed by him [20] nor relocate the claim upon the failure of the grantee to make the necessary annual expenditure upon the claim.[21]

§ 589. Community Property.

The wife of the owner of an unpatented mining claim has no dower rights as against the grantee of her husband.[22] It has been held that a code section requiring husband and wife to join in a conveyance of realty does not apply to unpatented mining locations.[23]

§ 590. Tax Deeds.

The rule is firmly established that the proceedings on tax sale are *in invitum*, that every essential step leading to the execution of a tax deed must be strictly followed, or the deed executed pursuant thereto will be void.[24]

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[20] Blake vs. Thorne, 2 Ariz. 317, 16 Pac. 270; Drake vs. Gilpin, 16 Colo. 231, 27 Pac. 708; McCarthy vs. Speed, 12 S. Dak. 50, 80 N. W. 135. See Philes vs. Hickies, 2 Ariz. 407, 18 Pac. 595; Shreve vs. Copper Co., *supra* (5). Where, after the location of a placer claim, a lode claim was located by the owner of the placer claim so as to conflict with the placer claim a deed purporting to convey a portion of the lode claim, conveyed so much of the placer claim as was within the part of the lode claim conveyed. Collins vs. McKay, *supra* (5).

[21] Drake vs. Gilpin, *supra* (20). See Alexander vs. Sherman, 2 Ariz. 326, 16 Pac. 45.

[22] Black vs. Elkhorn Co., 163 U. S. 450 aff'g. 52 Fed. 859, distinguished in Bradford vs. Morrison, 212 U. S. 389, aff'g. 10 Ariz. 214, 86 Pac. 6.

[23] Phoenix vs. Scott, 20 Wash. 52, 54 Pac. 778; McAllister vs. Hutchinson, 12 N. M. 111, 75 Pac. 41. See, also, Shepley vs. Cowan, 91 U. S. 330; Benson Co. vs. Alta Co., 145 U. S. 428.

See Separate Property.

[24] Numitor Co. vs. Katzer, 83 Cal. A. 161, 256 Pac. 464; Scott vs. Warden, ___ Cal. A. ___, 296 Pac. 95. The tax deed for an unpatented mining claim conveys merely the right of possession without affecting the interest of the United States. Elder vs. Wood, 208 U. S. 226.

A tax deed to or from the state does not exempt the claim from the statutory annual expenditure, which the state never makes. It follows that the grantee of the state may not thereby acquire the "possessory right" to the claim, if default has been made thereon.

CHAPTER XXIX.

DISCOVERY.

§ 591. Discovery Essential.

The term "discovery" has a technical meaning in mining.[1] It may be defined as knowledge of the presence of the precious metals within the lines of the location or in such proximity thereto as to justify a reasonable belief in their existence.[2] But in all cases there must be a discovery of mineral, in both lode and placer claims,[3] as distinguished from mere indications of mineral.[4] In other words, in a lode location there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode of rock in place carrying the precious mineral; or, if it be claimed as placer ground, that it is valuable for such mining.[5]

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[1] Upton vs. Larkin, 7 Mont. 449, 17 Pac. 728, aff'd. 144 U. S. 19. Discovery of mineral in its broad and comprehensive sense is the doing or accomplishing of that thing with respect to the land sought to be appropriated which serves to impress upon it the quality of being land which is open to appropriation or exploration in the manner and pursuant to the law sought to be made use of. U. S. vs. McCutchen, 238 Fed. 584. "The mining laws, Rev. Stats. 2320, 2329, U. S. Comp. Stats. 1901, pp. 1424, 1432, make the discovery of mineral 'within the limits of the claim' a prerequisite to the location of a claim whether lode or placer, the purpose being to reward the discoverer and to prevent the location of land not found to be mineral." Waskey vs. Hammer, 233 U. S. 85, aff'g. 170 Fed. 31.

[2] See *infra* note 7, Erhardt vs. Boaro, 113 U. S. 536; Diamond Coal Co. vs. U. S., 233 U. S. 236, aff'g. 191 Fed. 786; U. S. vs. S. P. R. Co., 251 U. S. 1; Waterloo Co. vs. Doe, 56 Fed. 685, aff'd. 70 Fed. 455; see Mason vs. Washington-Butte Co., 214 Fed. 35; *but see* S. P. R. Co. vs. U. S., 249 Fed. 798; Jose vs. Utley, 185 Cal. 656, 199 Pac. 1037. The necessary knowledge of the existence of mineral may be obtained from the outcrop. Diamond Coal Co. vs. U. S., *supra*; S. P. Co. vs. U. S., 260 Fed. 511, and location be based upon the croppings. Davidson vs. Bordeaux, 15 Mont. 245, 38 Pac. 1075. A vein or lode need not necessarily crop out upon the surface in order that a location may properly be laid upon it; but where a vein does crop out along the surface or is so slightly covered by foreign matter, that the course of the apex can readily be ascertained, this course should be substantially followed in laying locations upon it. Flagstaff Co. vs. Tarbet, 98 U. S. 463.

A belief in the existence of mineral not based upon any discovery or tracing does not amount to a discovery, and does not meet the requirements of the mining law. Iron Co. vs. Reynolds, 124 U. S. 374; Sullivan vs. Iron Co., 143 U. S. 431; Castle vs. Womble, 19 L. D. 455; East Tintic Co., 43 L. D. 79; Cataract Co., 43 L. D. 248; Caseaden vs. Bartolis, 3 Alaska 209; Noyes vs. Clifford, 37 Mont. 152, 94 Pac. 842; see Migeon vs. Montana Co., 77 Fed. 249, aff'g. 68 Fed. 811; Casey vs. Thieviege, 19 Mont. 341, 48 Pac. 394, *but see* Erhardt vs. Boaro, *supra*; Diamond Coal Co. vs. U. S., *supra* (2); U. S. vs. S. P. Co., 251 U. S. 1. A location made "in the hope of finding some ore in it at some time" does not constitute a valid location where there has been no actual discovery of mineral. Waterloo Co. vs. Doe, *supra*.

[3] Steele vs. Tanana Co., 148 Fed. 679; Hall vs. McKinnon, 193 Fed. 572; U. S. vs. Ohio Oil Co., 240 Fed. 996, aff'g. U. S. vs. Grass Creek Oil Co., 236 Fed. 481. The discovery must be within the boundaries of the location and be upon unappropriated mineral lands of the United States. Shattuck vs. Costello, 8 Ariz. 22, 68 Pac. 529; Kirk vs. Meldrum, 28 Colo. 453, 65 Pac. 633; see Goldberg vs. Bruschi, 146 Cal. 708, 81 Pac. 23. A valid mining location can be made only upon lands some part of which are shown by a discovery to be valuable for minerals. Deer Creek Co. vs. Paris, 46 L. D. 272. Indications of the existence of a thing is not the thing itself. Nevada Sierra Oil Co. vs. Home Oil Co., 98 Fed. 675.

[4] Lange vs. Robinson, 148 Fed. 799; see, also, Cole vs. Ralph, 252 U. S. 286, rev'g. 249 Fed. 81.

[5] Chrisman vs. Miller, 197 U. S. 323; aff'g. 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444; Cole vs. Ralph, *supra* (4); U. S. vs. Stockton Midway Oil Co., 240 Fed. 1006; U. S. vs. Sherman, 288 Fed. 498. See Caseaden vs. Bartolis, 162 Fed. 268, aff'g. 146 Fed. 741.

For an unique case involving a lode location laid upon a deposit of building stone and upheld on the ground of adverse possession for the statutory period see Springer vs. S. P. Co., 67 Utah 590, 248 Pac. 819.

See § 715*a*.

§ 592. Condition Precedent.

Discovery is a condition precedent to the valid location of a mining claim[6] but it does not, necessarily, precede the marking of the claim upon the ground.[7] The federal mining law is silent as to the quality and quantity of the mineral deposit that shall constitute a discovery,[8] the amount that shall be expended in money or labor to effectuate the same,[9] or the particular part of the location within which discovery must be made.[10]

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[6] Rev. St. § 2320; 6 Fed. St. Ann., p. 512, § 2320. This section on its face applies only to claims for veins or lodes situated in rock in place but by § 2329, 6 Fed. St., p. 575, § 2329, it and all other provisions for the entry, location, and patent of vein or lode claims are made applicable also to placer location. Smith vs. Union Oil Co., 166 Cal. 217, 135 Pac. 966; aff'd. 249 U. S. 337. See, also, Cole vs. Ralph, *supra* [4]. In the matter of discovery, the first essential to a valid location under the mining statutes, the extreme liberality of the courts in the construction and application of the statute has been manifested in hundreds of cases. Jim Butler Co. vs. West End Co., 247 U. S. 450, aff'g. 39 Nev. 375, 158 Pac. 876. The local rules and customs of miners all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. Jennison vs. Kirk, 98 U. S. 457. See O'Reilly vs. Campbell, 116 U. S. 418. There being no discovery within a location it is not valid and acts of location or the doing of assessment work confer no right to the ground. Clark, 52 L. D. 431, and cases therein cited.

[7] Section 2320, *supra* [6] is interpreted to mean that the fact of discovery shall exist prior to the vesting of the right of exclusive possession which follows from a valid location, and not that the discovery shall be made before any of the other steps are taken. Creede Co. vs. Uinta Co., 196 U. S. 351, aff'g. 119 Fed. 164; Cole vs. Ralph, *supra* [4]; U. S. vs. Hurst, 2 Fed. (2d) 77; Brethour vs. Clack, 31 Ariz. 24, 250 Pac 253. See, also, Erhardt vs. Boaro, *supra* [2]; Union Oil Co. vs. Smith, 249 U. S. 337, aff'g. 166 Cal. 217, 135 Pac. 996; North Noonday Co. vs. Orient Co., 1 Fed. 531; Jupiter Co. vs. Bodie Con. Co., 11 Fed. 666; Erwin vs. Perigo, 93 Fed. 611; Sutherland vs. Purdy, 234 Fed. 601; Con. Mutual Oil Co. vs. U. S., 215 Fed. 524; Mitchell 2 L. D. 752; Thompson vs. Spray, 72 Cal. 533, 14 Pac. 182; Weed vs. Snook, 144 Cal. 139, 77 Pac. 1023; Tonopah Co. vs. Mt. Oddie Co., 49 Nev. 420, 248 Pac. 833; Strepy vs. Stark, 7 Colo. 614, 5 Pac. 111; see, also, Tuolumne Co. vs. Maier, 134 Cal. 385, 66 Pac. 863. See Pitcher vs. Jones, 71 Utah 453, 267 Pac. 184.

"With reference to oil land at least, arising out of the necessities of the case, discovery may if not must, follow location. Upon discovery however, whenever attained in the absence of intervening rights of a superior nature, the same rights and results flow as if discovery had preceded location, and pending discovery, the locator after location possesses all of the substantial rights consequent upon discovery itself, as long as he continuously engages himself with diligence in seeking for oil upon the claim. But in the absence of a discovery, and in the absence of a diligent prosecution of work leading to a discovery, even though in actual possession of the property as against the government at least, he is subject at any time to the possibility of a withdrawal of the privilege offered to him and consequent termination of his rights. His *status* is in the nature of a tenancy at sufferance." U. S. vs. McCutchen, *supra* [1].

[8] Chrisman vs. Miller, *supra* [5]; Book vs. Justice Co., 58 Fed. 106; Bonner vs. Meikle, 82 Fed. 703; Rough Rider Claims, on rehearing, 41 L. D. 251, 255; see U. S. vs. Iron Co., 128 U. S. 573; U. S. vs. Lavenson, 206 Fed. 763; Burke vs. McDonald, 3 Ida. 296, 29 Pac. 98.

The law does not intend that the locator of a mining claim shall determine the precise extent and character of the mineral or the continuity of the ore, and the existence of the rock in place bearing mineral before he can make a valid location. Book vs. Justice Co., *supra*; Shoshone Co. vs. Rutter, 87 Fed. 807; aff'd. 177 U. S. 505; see Cascaden vs. Bartolis, *supra* [5]. It is not necessary, in order to constitute a valid discovery, that the mineral in its present situation can be disposed of at a profit. Narver vs. Eastman, 34 L. D. 125; Freeman vs. Summers, 52 L. D. 201.

[9] Union Oil Co., 23 L. D. 221. Location expenditure is a matter usually regulated by local statute or local rule.

[10] Lowe vs. Dickson, 274 U. S. 28; Wight vs. Tabor, 2 L. D. 738; Harrington vs. Chambers, 3 Utah 94, 1 Pac. 376, aff'd. 111 U. S. 350.

"There is no rule of place of discovery, except that laid down in the statute that the discovery must be within the limits of the claim located. It may be on a mountain top, on the side hill, or in the valley; on the surface of the ground, on bed rock, or at any midway point. So that discovery is actually made within the limits of the claim located, and is sufficient to justify a prudent man in spending his labor, time or money in further work, it is sufficient without regard to the altitude or depth of its location." Overgaard vs. Westerberg, 3 Alaska 182; U. S. vs. Ohio Oil Co., *supra* [3]. In other words, discovery may be made upon the surface. Wight vs. Tabor, *supra;* Score vs. Griffin, 9 Ariz. 295, 80 Pac. 331; Davidson vs. Bordeaux, 15 Mont. 245, 38 Pac. 1075; Fox vs. Myers, 29 Nev. 169, 86 Pac. 793; Harrington vs. Chambers, *supra;* Columbia Co. vs. Duchess Co., 13 Wyo, 244, 79 Pac. 385, or in a tunnel, Pelican Co. vs. Snodgrass, 9 Colo. 339, 12 Pac. 206; see Creede Co. vs. Uinta Co., *supra* [7]; Brewster vs. Shoemaker, 29 Colo. 176, 63 Pac. 309, or in a shaft, Enterprise Co. vs. Rico-Aspen Co., 167 U. S. 108, aff'g. 66 Fed. 200. See Larkin vs. Upton, 144 U. S. 19, aff'g. 7 Mont. 449, 17 Pac. 728, or be deep in the ground, Hayes vs. Lavagnino, 17 Utah 185, 53 Pac. 1029. A secret underground discovery will not

§ 593. Discovery Must Not Be Imaginary.

A location of either placer or lode locations must be made in good faith and not simply upon a conjectural or imaginary existence of mineral.[11]

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prevail against a previously located surface discovery. McMillen vs. Ferrum Co., 32 Colo. 38, 74 Pac. 461, app'l. denied, 197 U. S. 343. "The fact that the discovery points were not in the center of the claim would not invalidate them." Hawley vs. Romney, 42 Ida. 645; 247 Pac. 1069.

The discovery may be original or adopted. Book vs. Justice Co., *supra* (8); Nevada Sierra Oil Co. vs. Home Oil Co., *supra* (3); Zerres vs. Vanina, 134 Fed. 614, aff'd. 150 Fed. 564; Hagan vs. Dutton, 20 Ariz. 476, 181 Pac. 580; Willeford vs. Bell, 5 Cal. Unrep. 679, 49 Pac. 6; McMillen vs. Ferrum, *supra;* Hayes vs. Lavagnino, *supra;* Pitcher vs. Jones, *supra* (7); and must be upon unappropriated government land which is open to location. Erwin vs. Perego, *supra* (7); Butte Oil Co., 40 L. D. 602; McKenzie vs. Moore, 20 Ariz. 11, 176 Pac. 568; Tuolumne Co. vs. Maier, *supra* (7); Sharkey vs. Candiani, 48 Or. 12, 85 Pac. 219; Lockhart vs. Farrell, 31 Utah 159, 86 Pac. 1077, see Farrell vs. Lockhart, 210 U. S. 142, rev'g. 31 Utah 155, 86 Pac. 1077, and be shown, by a discovery to be valuable for mineral. Deer Creek Co. vs. Paris, *supra* (3).

The recital of discovery in the location notice is a mere *ex parte,* self-serving declaration on the part of the locator, and is not evidence of discovery. Cole vs. Ralph, *supra* (4); Mutchmor vs. McCarty, 149 Cal. 607, 87 Pac. 85. This rule is recognized and applied in Fox vs. Myers, *supra*; Round Mt. Co. vs. Round Mt. Co., 36 Nev. 560, 138 Pac. 71. In Board of Supervisors, 52 L. D. 380, it is said: "It has been held that where mining locations have been unchallenged for years, and development work has been done upon them, the certificate of location creates presumption of discovery. Vogel vs. Warsing, 146 Fed. 949; Cheesman vs. Hart, 42 Fed. 98. Anyone seeking rights under other public-land laws adverse to those of the mining claimants should assume the burden of controverting the *prima facie* title of the mineral claimants."

Discovery of the vein or lode has no fixed meaning, and this of necessity, owing to widely varying conditions to which the term must be applied. U. S. vs. Safe Inv. Co., 258 Fed. 876; in Hedrick vs. Lee, 39 Ida. 42, 227 Pac. 27, it is said: "Appellant contends there is no evidence to show a discovery by respondents of the vein or lode within the limits of the claims. Respondents attempted to locate a deposit of barium. If, as conceded by both parties, this deposit is the subject of a lode location, it must be on the theory that the deposit takes the place of a lode. It can not be said that the record is barren of evidence that a deposit of this mineral was discovered by respondents within the limits of their claims. On the contrary, there is some competent evidence of such a discovery, and this, under the established rule, is all that is required to support the findings and judgment in that regard."

[11]King vs. Amy Co., 152 U. S. 227; rev'g. 9 Mont. 543, 24 Pac. 200; Lange vs. Robinson, *supra* (4); Ambergris Co. vs. Day, 12 Ida. 108, 85 Pac. 109. In Erhardt vs. Boaro, *supra* (2), the court said: "There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as a discovery of the presence of the precious metals in it, or in such reasonable proximity to it as to justify a reasonable belief in their existence." See, also, Larkin vs. Upton, *supra* (10); Diamond Coal Co. vs. U. S., *supra* (2); U. S. vs. S. P. Co., *supra* (2); Waterloo Co. vs. Doe, *supra* (2); Star Co. vs. Federal Co., 265 Fed. 381; *certiorari* denied, 254 U. S. 651; Cook vs. Johnson, 3 Alaska 506; Emerson vs. Akin, 26 Colo. A. 40, 140 Pac. 481; Copper Globe Co. vs. Allman, 23 Utah 410, 64 Pac. 1019. The attitude of the locator himself toward the sufficiency of his discovery is a potent factor in the determination of the question as to justification of location. Book vs. Justice Co., *supra* (8); Shoshone Co. vs. Rutter, *supra* (8).

For an instance of a location lacking good faith see Chrisman vs. Miller, *supra* (5).

Discovery can not be presumed from lapse of time. Cole vs. Ralph, *supra* (4); Humphreys vs. Idaho Co., 21 Ida. 126, 120 Pac. 823; Law vs. Fowler, 45 Ida. 1, 261 Pac. 667, but it is presumed by the issuance of patent. Uinta Co. vs. Creede Co., 119 Fed. 164, citing Calhoun Co. vs. Ajax Co., 182 U. S. 499; King vs. McAndrews, 111 Fed. 860. See, also, Work Co. vs. Doctor Jack Pot Co., 194 Fed. 620; Davis vs. Shepherd, 31 Colo. 146, 72 Pac. 58; Talbott vs. King, 6 Mont. 76, 9 Pac. 434. It can not be stipulated to exist. Garibaldi vs. Grillo, 17 Cal. A. 540, 120 Pac. 425. It can not be bisected nor parceled out among the discoverers or others. Poplar Creek Mine, 16 L. D. 2; Healey vs. Rupp, 28 Colo. 102, 86 Pac. 1018; McKinstry vs. Clark, 4 Mont. 393, 1 Pac. 759; Reynolds vs. Pascoe, 24 Utah 219, 66 Pac. 1064; *but see* Tiggeman vs. Mrzlak, 40 Mont. 19, 105 Pac. 77; Larkin vs. Upton, *supra* (4). Two separate mining locations can not be located with a common end line passing through the center of the discovery as the basis of discovery in both locations as a discovery of mineral must be treated as an entirety and the proper basis of but one location and not susceptible of division. Poplar Creek Mine, *supra.* See Reiner vs. Schroeder, 146 Cal. 411, 80 Pac. 517; Debney vs. Iles, 3 Alaska 450; Weed vs. Snook, *supra* (7). In Phillips vs. Brill, 17 Wyo. 26, 95 Pac. 856, it was held that an oil placer mining claim is not invalidated by the fact that the discovery shaft or well bisects the boundary line of a claimant and is partly on the claim and partly on another. See McLemore vs. Express Oil Co., 158 Cal. 559, 112 Pac. 59.

A discoverer of any part of the apex gets the right to its entire width even where a portion of such width may be outside of the surface side lines of his claim extended downward vertically; though he has no right to the extralateral surface, he has a right to the extralateral lode beneath the surface. Lawson vs. U. S. Co., 207 U. S.

§ 594. Mere Indications Insufficient.

As previously stated, mere indications of mineral however strong do not constitute a discovery within the meaning of that term as used in the law.[12] Every seam or fissure which may be filled with matter containing traces of the precious metals, whether within or remote from mineral country, whether valuable or worthless as a mining claim,[13] or the seepage of oil upon an oil mining location,[14] do not constitute a discovery. But a valid location of a ledge deep in the ground, and appearing at the surface, not in the shape of ore, but in vein matter only,[15] or petroleum oil, or other mineral found in or upon the ground, and so situated as to constitute a part of it, is a sufficient discovery within the meaning of the statute, to justify a location under the law without waiting to ascertain by exploration whether the ground

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15, aff'g. 134 Fed. 769; St. Louis Co. vs. Montana Co., 104 Fed. 664; rev'd. 204 U. S. 204; Empire State Co. vs. Bunker Hill Co., 114 Fed. 417. For opinion below see 106 Fed. 471; s. c. 131 Fed. 591; see Utah Con. Co. vs. Utah Co., 277 Fed. 41, dis. 200 U. S. 683; Last Chance Co. vs. Bunker Hill Co., 131 Fed. 579; *certiorari* denied, 200 U. S. 617; *but see* Keeley vs. Ophir Co., 169 Fed. 604.

In U. S. vs. McCutchen, *supra* [1]; the court said: "With the reasoning as well as the conclusion of the court in Cook vs. Johnson, 3 Alaska 506, I concur, and although they concerned a placer location, *per se*, I can not conceive why they are not applicable in all their intensity and force to an oil location. Although the rule of diligence followed in oil locations apparently does not obtain in the Alaska placers, it nevertheless is the fact that in Cook vs. Johnson that the asserted 'discovery' upon which reliance was had, and the *good faith* of which the court held must be indubitably determined, occurred many months after the original location had been made." See, also, U. S. vs. Grass Creek Co., *supra* [5]. In Book vs. Justice Co., *supra* [5], the court directs attention to the element of good faith and the reliance upon the discovery claimed by the locator, as an inducement for him to expend his money. "But to what extent is his *bona fides* to be considered in determining the sufficiency of his discovery and the matter of justification? An examination of the books makes it evident that the *bona fides* of the locator is vital to the validity of his claim. Thus in the case just cited (Book vs. Justice Co.) stress is laid on the fact that the discovery in good faith induced the prospect—or to locate and expend large sums for the purpose of properly working or developing the ground and complying with the provisions of the law."

[12] Chrisman vs. Miller, *supra* [5]; Iron Co. vs. Mike & Starr Co., 143 U. S. 394; Waterloo Co. vs. Doe, *supra* [2]; Nevada Sierra Oil Co. vs. Home Oil Co., *supra* [3]; Olive Land Co. vs. Olmstead, 103 Fed. 572; Lange vs. Robinson, *supra* [4]; Charlton vs. Kelly, 156 Fed. 436; Cascaden vs. Bartolis, *supra* [5]; Steele vs. Tanana Co., *supra* [6]; Multnomah Co. vs. U. S., 211 Fed. 102; Cook vs. Johnson, *supra* [11]; Rough Rider Claims, *supra* [8]; Mutchmor vs. McCarty, *supra* [10]; Cleary vs. Skiffich, 28 Colo. 368, 65 Pac. 59; see King vs. Amy Co., *supra* [11]; Migeon vs. Montana Co., *supra* [2]; Brownfield vs. Bier, 15 Mont. 403, 39 Pac. 461; Gibbons vs. Frazier, 68 Utah 182, 249 Pac. 473.

[13] Montana Co. vs. Migeon, 68 Fed. 811, aff'd. 77 Fed. 249. In McShane vs. Kenkle, 18 Mont. 212, 44 Pac. 979, the court said: "If a prospector in a mining region discovers a seam with a well-defined wall, bearing indications of mineral sufficient to justify him in spending his time and money in following it, in expectation of finding a main body of ore of commercial value within the ground located, a valid location of a mining claim may be made, and the expectation need not be confined to finding paying mineral in the particular seam upon which the discovery is made." See, also, Shoshone Co. vs. Rutter, *supra* [8], wherein it is said: "The seams containing mineral-bearing earth and rock, which were discovered before the location was made, were similar in their character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district, which by continued developments therein had resulted in establishing the fact that the seams, as depth was obtained thereon, were found to be a part of a well-defined lode or vein containing ore of great value. The discovery made at the time of the Kirby location was, therefore, such as to justify a belief as to the existence of such a lode or vein within the limits of the ground located."

In Book vs. Justice Co., *supra* [5], the court said "It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts the veins, lodes and ore deposits are so well and clearly defined as to avoid any question being raised. In other localities the mineral is found in seams, narrow crevices, cracks, or fissures in the earth, the precise extent and character of which can not be fully ascertained until expensive explorations are made, and the continuity of the ore and existence of the rock in place, bearing mineral is established. It never was intended that the locator of a mining claim must determine all these facts before he would be entitled, under the law, to make a valid location." See, also, McShane vs. Kenkle, *supra*.

[14] Southwestern Co. vs. A. & P. Co., 39 L. D. 335; Butte Oil Co., *supra* [10]; Weed vs. Snook, *supra* [7] See U. S. vs. Ohio Oil Co., *supra* [3].

[15] Montana Co. vs. Migeon, *supra* [13]; Burke vs. McDonald, *supra* [8]; Harrington vs. Chambers, *supra* [10].

contains the mineral in sufficient quantities to pay.[16] To reiterate: there must be a discovery of mineral as distinguished from *mere indications* of mineral in both lode and placer claims.[17] Hence, in determining the question of the value of a vein or lode sufficient to constitute a discovery the size of the vein as disclosed, the quality of mineral it carries, its proximity to working mines and locations within an established mineral district, the geological conditions, the fact that similar veins in the particular locality have been successfully explored—these and like facts would naturally be considered by a prudent man in determining whether the vein or lode discovered warrants a further expenditure.[18]

§ 595. Parity of Decisions.

The decisions in relation to what constitutes a sufficient discovery upon which to base a valid location of a vein or lode claim are applicable, in principle, in determining whether there has been a suffi-

[16] Nevada Sierra Oil Co., vs. Home Oil Co., *supra* (3); Freeman vs. Summers, *supra* (8).

[17] Cole vs. Ralph, *supra* (4). The discovery of detached pieces of quartz or mere bunches of quartz, not in place, is not sufficient to support a lode location. Jupiter Co. vs. Bodie Con. Co., *supra* (7); see Book vs. Justice Co., *supra* (8); Waterloo Co. vs. Doe, *supra* (2); *but see* Erhardt vs. Boaro, *supra* (2). In case of a placer location the mere indications of mineral or petroleum oil is insufficient. Chrisman vs. Miller, *supra* (5); Steele vs. Tanana Co., *supra* (3); U. S. vs. Ohio Oil Co., *supra* (3). See Freeman vs. Summers, *supra* (8).

Gold in land does not characterize it as mineral unless it is in paying quantities. Multnomah Co. vs. U. S., *supra* (12); see Meyers vs. Pratt, 255 Fed. 765; Etling vs. Potter, 17 L. D. 426; Magruder vs. Oregon Co., 28 L. D. 177; Johnson vs. California Lustral Co., 127 Cal. 286, 59 Pac. 595; Cleary vs. Skiffich, *supra* (12); see U. S. vs. Reed, 28 Fed. 482.

A discovery of country rock in which the "kidneys" of copper ore may be expected to be found is not a sufficient discovery within the meaning of the statute. Rough Rider Claims, *supra* (8). A valid location can not be made upon porphyry or limestone merely on the theory that the locator was willing to expend his time and money in prospecting for a vein or lode. Ambergris Co. vs. Day, *supra* (11). A location based upon a discovery within the limits of another claim is void. Belk vs. Meagher, 104 U. S., 279; Del Monte Co. vs. Last Chance Co., 171 U. S. 55; see 66 Fed. 212; Thallman vs. Thomas, 111 Fed. 277; Webb vs. American Co., 157 Fed. 203; Thornton vs. Phelan, 65 Cal. A. 480, 224 Pac. 259; Banfield vs. Crispen, 111 Or. 238, 226 Pac. 235; Berquist vs. W. Virginia Co., 18 Wyo. 234, 106 Pac. 673. Gwillim vs. Donnellan, 115 U. S. 45; Clipper Co. vs. Eli Co., 194 U. S. 220; aff'g. 29 Colo. 377, 68 Pac. 289; Brown vs. Gurney, 201 U. S. 184, rev'g. 249 Fed. 81; Swanson vs. Sears, 224 U. S. 180, aff'g. 17 Ida. 339, 105 Pac. 1065; Cole vs. Ralph, *supra* (4). Waskey vs. Hammer, *supra* (1); Montana Co. vs. Clark, 42 Fed. 628; Erwin vs. Perego, *supra* (7); Golden Link Co., 29 L. D. 386; Wilhelm vs. Silvester, 101 Cal. 363, 35 Pac. 997; Miller vs. Hamley, 31 Colo. 495, 74 Pac. 980; see Lavagnino vs. Uhlig, 198 U. S. 443; aff'g. 26 Utah 1, 71 Pac. 1046; see *infra*, note 51. A prior discovery upon an adjoining location can not support a consolidation with other land. Weed vs. Snook, *supra* (7).

The discovery must lie within the limits of the location, and if the title to the discovery fails so must the location which rests upon it. Gwillim vs. Donnellan, *supra*; Waskey vs. Hammer, *supra*; Behrends vs. Goldsteen, 1 Alaska 525; Miller vs. Hamley, *supra*; Miller vs. Girard, 3 Colo. A. 278, 33 Pac. 68. See *infra*, notes 18 and 19.

[18] East Tintic Co., *supra* (2); see 43 L. D. 79, rev'g. 41 L. D. 255; Jefferson-Montana Co., 41 L. D. 323. See U. S. vs. Bunker Hill Co., 48 L. D. 598; State vs. Braffet, 49 L. D. 212. The discovery of seams containing mineral-bearing rock and earth similar in character to seams or veins of mineral matter that has induced other miners to locate claims in the same district, and which by development were found to be a part of a well defined lode or vein containing ore of great value, constitutes a discovery. Jefferson-Montana Co., *supra*; U. S. vs. Hurliman, 51 L. D. 261. See Shoshone Co. vs. Rutter, *supra* (8). Differently stated, the discovery of small seams of iron oxide, quartz, and small quantities of carbonate of lead of sufficient character such as miners in the particular district would follow in the expectation of finding ore, and such as would justify miners in working the claim for that purpose, constitutes a sufficient discovery where the rock in such seams was different from the country rock and was designated by practical miners as rock in place bearing minerals. Id.

See, also, Stevens vs. Gill, Fed. Cas. 13398.

A discovery is sufficient where surface formations of the particular location and others in the vicinity consist of limestone, conglomerate, or limestone and conglomerate, and containing within the limits of the location intrusions of porphyry with iron stained or iron impregnated contacts, and iron "blow outs," as well as stringers, feeders, ledges and blow-outs of quartz, stained more or less with iron oxide or impregnated with iron sulphide, and varying in thickness from two to three

cient discovery of mineral-bearing earth to authorize the location of a placer mining claim.[19]

§ 596. Justification.

The requirements of the federal mining law have been met where minerals have been discovered within the limits of the location and the evidence is sufficient to justify a person of ordinary prudence in making an expenditure of both labor and money, with reasonable prospect of success in developing a valuable mine.[20] The courts never

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inches to a number of feet, and where, according to the belief of mining men, the porphyritic intrusions and contacts have a direct connection with or relation to underlying and deep seated copper deposits, and where such surface exposures are sufficient to warrant the expenditure of time and money with reasonable prospect of the development of a paying mine, and where the location is within one of the richest copper mining districts of the United States, and where such locations have been previously allowed by the land department. Rough Rider Claims, 42 L. D. 584, vacating, 41 L. D. 242 and 255. See Germania Co. vs. James, 107 Fed. 597; Howe vs. Parker, 190 Fed. 738; East Tintic Co., *supra*.

In U. S. vs. Bullington, 51 L. D. 605, it is held that lands, although containing deposits of mineral, will be considered as nonmineral in character, where the cost of extracting is shown to be so large that a prudent man would not be warranted in expending his time and money thereon in the reasonable expectation of success in developing a paying mine. Citing and applying Cataract Co., 43 L. D. 248.

In Iron Co. vs. Mike & Starr Co., *supra* [12] it is stated: "the amount of ore, the facility for leaching and working it, as well as the product per ton, are all to be considered in determining whether the vein is one which justifies exploration and working."

[19] Lange vs. Robinson, *supra* [4]. There must be some gold found within the limits of the land located as a placer gold claim, but it can not be said in advance as a matter of law how much must be found in order to warrant the court or jury in finding that there was in fact a discovery such as the law requires. The question must be decided, not only with reference to the gold actually found within the limits of the claim located, but also in view of its situation with reference to other lands known to contain valuable deposits of placer gold, and whether its rock and soil formation are such as is usually found where these deposits exist in paying quantities; and, further, in considering the evidence bearing upon the general question, it must not be forgotten that the object of the law in requiring the discovery to precede location is to insure good faith upon the part of the mineral locator, and to prevent frauds upon the government by persons attempting to acquire patents to land not mineral in character; Lange vs. Robinson, *supra*; Shoshone Co. vs. Rutter, *supra* [8]; Cascaden vs. Bartolis, *supra* [5]; Batt vs. Stedman, 36 Cal. A. 608, 173 Pac. 102.

The discovery in beds of water courses of a few colors of gold is not a sufficient discovery upon which to base a valid location as against an agricultural entry. Meyers vs. Pratt, *supra* [17].

It is not sufficient if the locator in panning obtains colors of gold and in some instances fairly good prospects of gold. The discovery should be such as to justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property. Multnomah Co. vs. U. S., *supra* [12].

In Batt vs. Stedman, *supra*, the court said: "Plaintiff testified that when he located the placer claim * * * he made a discovery of gold therein; that he panned and found there was some gold on the claim; that he has mined the claim more or less every year—'placer mining, washing the earth.' He stated that he has kept no record of how much gold he had taken out; that he mined with water, using sluice boxes and ground sluices. He has done the assessment work each year since locating the claim. Under these circumstances it must be held that the land was valuable for placer mining."

[20] Chrisman vs. Miller, *supra* [5]; U. S. vs. Plowman, 216 U. S. 372; Donnelly vs. U. S., 228 U. S. 243; Steele vs. Tanana Co., *supra* [3]; Multnomah Co. vs. U. S., *supra* [12]; U. S. vs. N. P. R. Co., 1 Fed. (2d) 53; Castle vs. Womble, *supra* [2]; Rough Rider Claims, *supra* [8]; Jefferson-Montana Co., *supra* [18]; Freeman vs. Summers, *supra* [8]; see Shoshone Co. vs. Rutter, *supra* [8]; Batt vs. Stedman, *supra* [19]; Ambergris Co. vs. Day, *supra* [11]; Golden vs. Murphy, 31 Nev. 429, 103 Pac. 394, 105 Pac. 99; Muldrick vs. Brown, 37 Or. 189, 61 Pac. 428; *but see supra*, note 2.

From the foregoing it would seem that the law requires as a prerequisite to a valid location that mineral be discovered within the limits of the claim located; that the mineral indications shall be such as to warrant the expenditure of time and money, with a reasonable prospect of success. In order to warrant that proceeding, the locator must have discovered mineral in such situation and such formation that he can follow the vein or the deposit to depth, with a reasonable assurance that paying minerals will be found. In coal and oil cases, at least, belief is substituted for knowledge. U. S. vs. N. P. R. Co., *supra*. See *supra*, note 2. In the Oregon Basin Case (on review), 50 L. D. 244, 258, aff'd. 6 Fed. (2d) 676, 273 U. S. 660, the land department denied an application for placer patent for lands alleged to contain valuable deposits of oil and gas, on the ground of failure to show sufficient discovery. Slight discoveries of gas or oil had been made in shallow wells in shale or sand near the surface, and it was contended that this warranted a prudent man in

have held that in order to entitle one to locate a mining claim upon the public domain he shall show a paying mine at the time of location.[21] But it has been held that a mining location within a government reserve is void in the absence of pay ore therein at the time the location is made.[22]

§ 597. General Rule.

In other words, it is the general rule that it is sufficient if the prospector finds a mineral in a mass so placed that he can follow the vein or other mineral deposit with reasonable hope and assurance that he will ultimately develop a paying mine.[23]

§ 598. Criterion.

It is the finding of the mineral in rock in place as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a lode mining claim.[24] This broad rule, however, has in later cases, been somewhat modified, and now the criterion for a valid location is determined by the fact as to whether, at the vital time, the land is known to contain minerals in quality and quantity reasonably inspiring the average man to believe that expenditure in developing is justified, in that it is reasonably probable that such minerals will be found to return reasonable profits on the investment and more valuable therefor than for other uses; the latter, for

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going further with a reasonable expectation of finding valuable oil deposits at depth. The department concluded in that case that the showing presented "fails to satisfactorily establish that in either of the wells drilled on the claims there was encountered any formation carrying oil or other mineral in sufficient quantity to impress the land with any value on account thereof, while, on the other hand it is conclusively made to appear that the formations from which oil values are expected to be developed within the limits of the claim exist many hundreds of feet below, and are wholly unconnected with the formations penetrated in said wells."

The doctrine of that case was distinctly disapproved in Freeman vs. Summers, *supra* [10]. In that case it appeared from the evidence submitted at the original hearing and rehearing that actual discoveries of mineral (oil shale) were made either upon the surface or in shallow workings and it was held that a mineral discovery may be valid as a basis for a patent although there may be no prospect of an immediate profit from the mineral.

In U. S. vs. Ruddock, 52 L. D. 313, the land department affirmed the doctrine of the Oregon Basin Case.

[21] See Cascaden vs. Bartolis, *supra* [5]; Madison vs. Octave Oil Co., 154 Cal. 768, 99 Pac. 176. In Book vs. Justice Co., *supra* [8], the court said: "Logically carried out it would prohibit a miner from making any valid location until he had fully demonstrated that the vein or lode or lode of quartz or other rock in place bearing gold or silver which he had discovered, would pay all the expenses of removing extracting, crushing and reducing the ore, and leave a profit to the owner. If this view should be sustained, it is manifest it would lead to absurd, injurious and unjust results." See, also, Bonner vs. Meikle, *supra* [8]. It is enough if the vein or deposit has a present or prospective commercial value. Madison vs. Octave Oil Co., *supra*.

[22] U. S. vs. Lavenson, *supra* [8]; *but see* U. S. vs. Safe Inv. Co., *supra* [10]; U. S. vs. Deasy, 24 Fed. (2d) 108.

[23] U. S. vs. Plowman, *supra* [20]; Cameron vs. U. S., 252 U. S. 450, aff'g. 250 Fed. 943; Jupiter Co. vs. Bodie Con. Co., *supra* [7]; Book vs. Justice Co., *supra* [8]; Lange vs. Robinson, *supra* [4]; Charlton vs. Kelly, *supra* [12]; Cascaden vs. Bartolis, *supra* [5]; U. S. vs. Grass Creek Co., *supra* [3]; 481; U. S. vs. Ohio Oil Co., *supra* [3]; U. S. vs. N. P. R. Co., *supra* [20]; Castle vs. Womble, *supra* [2]; Narver vs. Eastman, 34 L. D. 123; East Tintic Co., *supra* [2]; U. S. vs. Hurliman, *supra* [18]; Freeman vs. Summers, *supra* [8]; McShane vs. Kenkle, *supra* [17].

[24] Chrisman vs. Miller, *supra* [3]; Cameron vs. U. S., *supra* [23]; Book vs. Justice Co., *supra* [8]; *but see* Ehrhardt vs. Boaro, *supra* [2]. In Kern Oil Company vs. Clotfelter, 30 L. D. 583, the land department held that the evidence bearing upon the mineral character of the land selected should not be restricted to mineral discoveries or developments upon these lands and to their geological formation, but may extend to the discovery and development of mineral on adjacent lands and to their geological formation. See, also, in this connection, Jefferson-Montana Company, *supra* [18]; U. S. vs. Hurliman, *supra* [18]; Freeman vs. Summers, *supra* [20].

that it is not more valuable for mineral, if to secure the mineral, uses of greater value must be destroyed.[25]

§ 599. Oil Discoveries.

It has been held, as previously suggested, that mere indications of oil, however strong, traces of oil, information that land may be valuable for oil, seepages, or even discoveries of oil in small quantities do not constitute discoveries of oil to warrant or validate an oil placer location.[26] But it suffices if the conditions known at the time of the patent, as to the geology, adjacent discoveries, and other *indicia* upon which men prudent and experienced in such matters are shown to be accustomed to act and make large expenditures, were such as reasonably to engender the belief that the lands contained oil of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end.[27]

§ 600. Priority of Discovery.

Priority of discovery is an essential fact in determining the right of possession to mining ground.[28] In the absence of discovery the locator's rights depend upon actual possession and diligent prosecution in good

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[25] Deffeback vs. Hawke, 115 U. S. 404; Davis. vs. Weibbold, 139 U. S. 520; Chrisman vs. Miller, *supra* (5); U. S. vs. Plowman, *supra* (20); U. S. vs. N. P. R. Co., *supra* (20); Multnomah Co. vs. U. S., *supra* (12); U. S. vs. N. P. R. Co., *supra* (24). In U. S. vs. Bunker Hill Co., *supra* (18), it was said: "The vital question in this case is as to discovery. The requirement with respect to discovery is statutory. * * * In connection with the matter of discovery it must not be understood that an actual disclosure of commercial ore is essential to a sufficient and adequate discovery. The principle laid down in the case of Castle vs. Womble (19 L. D. 455), which has been many times cited, is authoritative. See, also, the case of Jefferson-Montana Co., 41 L. D. 320; Cataract Co., 43 L. D. 248; Chrisman vs. Miller, 197 U. S. 323, and Cole vs. Ralph, 252 U. S. 286, rev'g. 249 Fed. 81." See, also, Raven Co., 50 L. D. 386; Freeman vs. Summers, *supra* (8); and *compare* Oregon Basin Co., *supra* (20).

In Cook vs. Johnson, *supra* (11) the court said "It is obvious that physical conditions surrounding placer deposits are so radically different from those in which the mineral vein or lode exists, and that the form and manner in which the two classes of mineral have been by nature deposited are so unlike," that the same rule does not apply. "The prospector who discovers a vein or lode has something definite to follow. * * * The very nature of placer deposits renders any such estimate by the prospector impossible, until he has at great expense of time and labor actually found the pay streak."

[26] Nevada Sierra Oil Co. vs. Home Oil Co., *supra* (3); Miller vs. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, aff'd. 197 U. S. 313; Southwestern Pacific Oil Co. vs. U. S., 249 Fed. 785; see U. S. vs. S. P. Co., *supra* (2); Southwestern Co. vs. A. & P. Co., *supra* (14); Butte Oil Co., *supra* (14); Dean vs. Omaha-Wyoming Co., 21 Wyo. 133, 128 Pac. 881, 129 Pac. 1023; Whiting vs. Straup, 17 Wyo. 19, 95 Pac. 854; Granlick vs. Johnston, 29 Wyo. 349, 213 Pac. 89.

In Olive Land Co vs. Olmstead, *supra* (12), the court held that the geological formation the presence of an anticline, and of bituminous sand which gave out distinct odor of petroleum was not sufficient to validate an attempted location. In U. S. vs. McCutchen, *supra* (1), it was held that oil had not been discovered, and the quantity of gas encountered did not have any appreciable value. In New England Oil Co. vs. Congdon, 152 Cal. 211, 92 Pac. 180, the court found from the evidence that "some oil sand stained with oil, and a ridge of fossil" had been found, which, the court held, was no discovery. In Bay vs. Oklahoma Co., 13 Okla. 425, 73 Pac. 940, the court said that the production of only one and a half gallons of oil was not a sufficient discovery under the law to sustain a location.

As to discovery in oil shale lands see Freeman vs. Summers, *supra* (8).

[27] U. S. vs. S. P. Co., *supra* (2); Olive Land Co. vs. Olmstead, *supra* (12); U. S. vs. Stockton Midway Oil Co., *supra* (5); Freeman vs. Summers, *supra* (20); Weed vs. Snook, *supra* (7); *but see* Nevada Sierra Co. vs. Home Oil Co., *supra* (3).

[28] Johanson vs. White, 160 Fed. 901; Cook vs. Klonos, 164 Fed. 536; Hanson vs. Craig, 170 Fed. 62; see Belk vs. Meagher, *supra* (10); Creede Co. vs. Uinta Co., *supra* (7); Crossman vs. Pendery, 8 Fed. 693; Gemmell vs. Swain, 28 Mont. 331, 72 Pac. 662.

Priority of discovery gives priority of right against naked location and possession. Horswell vs. Ruiz, 67 Cal. 111, 7 Pac. 197; Garthe vs. Hart, 73 Cal. 541, 15 Pac. 93.

The language of the statute makes it plain that without discovery parties may not go upon the public domain and acquire the right of possession by the mere performance of the acts prescribed for a location. Creede Co. vs. Uinta Co., *supra* (7).

faith of the work of discovery.[29] A mining location not so held is subject to location by another who enters peaceably and not forcibly, fraudulently, surreptituously nor clandestinely.[30] The one making the first discovery has the full right to the claim.[31] The date of discovery fixes the date of location.[32]

§ 601. Development of Discovery.

The federal mining law does not require any particular manner or amount of discovery work such as a shaft or its equivalent.[33] Local statutes or district rules usually provide for the character, extent and the time within which such work shall be performed. When such work is so required it is an essential act of location,[34] provided, a penalty is affixed for nonobservance.[35] The mining claim is protected from adverse location during the time prescribed for such preliminary work.[36]

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[29] Union Oil Co. vs. Smith, *supra* (7); Johanson vs. White, *supra* (28); U. S. vs. McCutchen, 217 Fed. 650; New England Oil Co. vs. Congdon, 152 Cal. 211, 92 Pac. 180; Phillips vs. Brill, *supra* (11); see Hanson vs. Craig, *supra* (28). Where a claim is located, its locator is entitled as against all save the government to pursue his work of discovery uninterruptedly, though discovery is essential to a valid mining claim. U. S. vs. Stockton Midway Oil Co., *supra* (5). See Rooney vs. Barnette, 200 Fed. 700; Con. Mutual Oil Co. vs. U. S., 245 U. S. 525; Jose vs. Utley, *supra* (2); Hullinger vs. Big Sespe Co., 28 Cal. A. 69, 151 Pac. 370. These cases, together with the cases of Miller vs. Chrisman, *supra* (26); McLemore vs. Express Oil Co., *supra* (11); Weed vs. Snook, *supra* (7), seem but to state the general rule that where one party lawfully is in possession of a mining claim no rights adverse to him can be initiated by a trespasser. Sparks vs. Mount, 29 Wyo. 1, 207 Pac. 1099. Discovery fixes the date of location with respect to all parties who have made the discoveries provided by law within the boundaries of overlapping claims. Hall vs. McKinnon, *supra* (3).

[30] Miller vs. Chrisman, *supra* (5); Cole vs. Ralph, *supra* (4); Thallman vs. Thomas, *supra* (17); San Francisco Co. vs. Duffield, 201 Fed. 830, *certiorari* denied, 229 U. S. 609; Con. Mutual Oil Co., *supra* (29); U. S. vs. Rock Oil Co., 257 Fed. 333; see Clark, 48 L. D. 630; Mt. States Co. vs. Taylor, 50 L. D. 348; U. S. vs. McCutcheon, 51 L. D. 258; Jose vs. Utley, *supra* (2); Mt. Rosa Co. vs. Palmer, 26 Colo. 56, 56 Pac. 176; Moffat vs. Blue River Co., 33 Colo. 142, 80 Pac. 139. A clandestine location was upheld in Ehrhardt vs. Boaro, *supra* (2). A peaceable location was upheld in DuPrat vs. James, 65 Cal. 55, 4 Pac. 562, "a location may be made upon a known lode within the limits of a placer claim if entry and discovery is made peaceably and in good faith." Campbell vs. McIntyre, 295 Fed. 46.

The cases do not throw a great deal of light on the question as to what is meant by the terms "forcible," "fraudulent," and "clandestine" when used in connection with an entry, nor when such entry is effected in a forcible manner. Sparks vs. Mount, *supra* (29). See Granlick vs. Johnston, *supra* (26), where the court with reference to continuous occupancy under *pedis possessio* alone, pending discovery, said: "The necessity for such occupancy is but stated in another way when it is said that the object of the rule is to protect an explorer against a forcible, fraudulent or clandestine actual occupancy, the land may be taken by someone acquiring a right, but so long as he maintains a continued actual occupancy, it is difficult to see how any hostile entry could be made that would not be either forcible, fraudulent or clandestine." See *supra*, note 86. Where the locator of a mining claim permitted a third person to enter thereon and sink a shaft within its boundaries within which shaft mineral was discovered and a location was made by the permittee without protest before the first locator made discovery, such junior locator has the priority of right. Crossman vs. Pendery, *supra* (28); see Johanson vs. White, *supra* (29); Duffield vs. San Francisco Co., 205 Fed. 485, rev'g. 198 Fed. 942; *certiorari* denied, 229 U. S. 609; Ferris vs. McNally, 45 Mont. 20, 121 Pac. 890; Sparks vs. Mount, *supra*.

[31] Butte & S. Co. vs. Clark-Montana Co., 249 U. S. 12, aff'g. 248 Fed. 609, aff'g. 233 Fed. 547; Johanson vs. White, *supra* (28); *but see* Hanson vs. Craig, *supra* (28).

[32] Hall vs. McKinnon, *supra* (3). See Work Co. vs. Doctor Jack Pot Co., 194 Fed. 620.

[33] Butte City Co. vs. Baker, 196 U. S. 119; aff'g. 28 Mont. 222, 72 Pac. 617; Gray vs. Truby, 6 Colo. 278; Electro Magnetic Co. vs. Van Auken, 9 Colo. 204, 11 Pac. 80; Treasury Co. vs. Boss, 32 Colo. 27, 74 Pac. 888. Where it is provided by local law for the sinking of a discovery shaft or cut, a discovery and discovery shaft or cut may be anywhere along the course of a vein or lode within the end lines of a location, may be nearer one end than the other, may be nearer one side line than the other, and is not required to be within any given distance from either of the side lines. Taylor vs. Parenteau, 23 Colo., 374, 48 Pac. 505.

[34] Northmore vs. Simmons, 97 Fed. 386; Eaton vs. Norris, 131 Cal. 561, 63 Pac. 856; Becker vs. Pugh, 9 Colo. 389, 13 Pac. 906; Walsh vs. Henry, 38 Colo. 393, 88 Pac. 449; Sissons vs. Sommers, 24 Nev. 379, 55 Pac. 829. Lockhart vs. Wills, 9 N. M. 344, 54 Pac. 336. See Treasury Co. vs. Boss, *supra* (33); Wright vs. Lyons, 45 Or. 167, 77 Pac. 81; Winters vs. Burkland, 123 Or. 137, 260 Pac. 231.

[35] Butte & S. Co. vs. Clark-Montana Co., *supra* (31); Stock vs. Plunkett, 181 Cal. 193, 183 Pac. 657, and cases therein cited; Nash vs. McNamara, 30 Nev. 114, 93 Pac. 412.

[36] Erhardt vs. Boaro, *supra* (2). Butte & S. Co. vs. Clark-Montana Co., *supra* (31).

§ 602. Discovery Shaft or Its Equivalent.

The discovery shaft or its equivalent when required by local law must be upon otherwise unappropriated mineral ground within the boundary lines of the location [37] and the notice of location be posted upon the claim at the place designated therein.[38] For example, if it is provided that the location notice shall be posted "at the point of discovery" a posting thereof at another place within the exterior boundaries of the location will not prevail as against an intervening right as the locator's right to the ground is of the date that he complies with the local requirements.[39]

§ 603. Mineral Disclosure.

The discovery shaft or its equivalent should disclose mineral-bearing rock therein [40] but it has been held that discovery may be made elsewhere within the location and validate it.[41] The excavation must be of the depth or length required by local law or local rule.[42]

§ 604. Loss of Discovery.

All rights in the claim will be lost if the place of discovery be patented to another,[43] unless a reconveyance has been agreed upon between

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[37] Zollars vs. Evans, 5 Fed. 172; Little Pittsburg Co. vs. Amie Co., 17 Fed. 57; Tuolumne Co. vs. Maier, *supra* (7); Treasury Co. vs. Boss, *supra* (33); Round Mt. Co. vs. Round Mt. Co., *supra* (10); Berquist vs. W. Virginia Co., *supra* (15).

In Costigan's Mining law, page 154, § 43, it is said: "The discovery must be distinguished from the discovery shaft required by state statutes as part of the location. The discovery shaft is one of the acts of location which normally follows location."

In Nichols vs. Williams, 38 Mont. 552, 100 Pac. 969, it is said that where the original discovery shaft was sunk to the depth required by local law and a portion thereof within the boundaries of the claim was large enough to enable a miner to work within the boundaries, the fact that a part of the shaft was in ground belonging to adjacent patented land is immaterial. See, also, Upton vs. Larkin, *supra* (1).

[38] Batt vs. Stedman, *supra* (19); Butte Co. vs. Radmilovich, 39 Mont. 157, 101 Pac. 1078; see Upton vs. Santa Rita Co., 14 N. M. 96, 89 Pac. 275.

[39] Butte Co. vs. Radmilovich, *supra* (38); Batt vs. Stedman, *supra* (19). See McGinnis vs. Egbert, 8 Colo. 41, 5 Pac. 652. The same discovery point can not be used for the location of two or more claims located upon the public domain. Reynolds vs. Pascoe, 24 Utah 219, 66 Pac. 1064. See, also, *supra* (11).

[40] Cheesman vs. Shreeve, 40 Fed. 787; Terrible Co. vs. Argentine Co., 89 Fed. 583, aff'd. 122 U. S. 478; Beals vs. Cone, 27 Colo. 473, 62 Pac. 948; McMillen vs. Ferrum, Co., 32 Colo. 78, 74 Pac. 462.

[41] Chambers vs. Harrington, 111 U. S. 350; aff'g. 3 Utah 94, 1 Pac. 362; Gibson vs. Hjul, 32 Nev. 360, 108 Pac. 759; Tonopah Co. vs. Mt. Oddie Co., *supra* (7). In Gibson vs. Hjul, *supra* it is said that though ore was not discovered in a so-called "discovery shaft" on a mining claim, it is enough that the locator subsequently found valuable ore in other workings upon the claim, and where ore was unquestionably discovered was more than the equivalent of that required for a discovery shaft; *but see* Cheeseman vs. Shreeve, *supra* (40). In Treasury Co. vs. Boss, *supra* (33), it is said that where the locator has performed all the several acts of location except the discovery of mineral, and then makes a subsequent valid discovery, if no change in boundaries occur, there is no reason why he should put at the point of valid discovery, a new notice, for sufficient notice already is of record. See O'Donnell vs. Glenn, 8 Mont. 248, 19 Pac. 302. The ore discovered within the discovery shaft need not possess commercial value. Muldrick vs. Brown, *supra* (20).

However, it has been held that the miner is not bound to make the first shaft or opening which he may sink his discovery shaft. Terrible Co. vs. Argentine Co., *supra* (40), or to sink his discovery shaft at the point of discovery. Butte Co. vs. Radmilovich, *supra* (38).

[42] Sissons vs. Sommers, *supra* (34). See Electro Mag. Co. vs. Auken, *supra* (30).

[43] Gwillim vs. Donnellan, *supra* (17), distinguished in Richards vs. Wolfling, 98 Cal. 195, 32 Pac. 971. Girard vs. Carson, 22 Colo. 345, 44 Pac. 508; Silver City Co. vs. Lowry, 19 Utah 334, 57 Pac. 11; dis. 179 U. S. 196; see Lone Dane Co., 10 L. D. 53; Paul Jones Lode, 28 L. D. 120; Robbins, 42 L. D. 481. Where the discovery is carved out of the location by a readjustment of the location as originally laid, the location becomes void. Waskey vs. Hammer, *supra* (1). When as the result of a judgment in an adverse suit that part of the applicant's location containing the original discovery is lost, it is essential that there be shown a discovery made upon that portion of the claim remaining intact prior to the date of the application for patent. Star Co., 47 L. D. 38; Brown vs. Wellington, 24 Colo. A. 256, 133 Pac. 427.

the parties,[44] or a new discovery is made elsewhere within the location.[45] A location which is intersected by a patented mill site,[46] but not by a lode claim,[47] is restricted to that portion of the location within which the discovery exists, unless a valid discovery of the same vein can be shown upon the other part. In some states the loss of the discovery shaft, or cut, works a forfeiture of a location.[48] The loss of the titular discovery, however, is not, necessarily, the loss of the property,[49] but if in casting off excess ground within the boundaries of a location, the discovery upon which the claim is included is within the discarded excess a new discovery within the reserved part must be made in order to validate the location.[50]

§ 605. Discovery Within Lode Claims.

The discovery must be of rock in place[51] bearing mineral,[52] not necessarily in fissure,[53] nor with well defined walls,[54] but the location must include the top or apex of a vein or lode.[55] The vein or lode must occupy defined space and be capable of identification;[56] it may

[44] Duxie Lode, 27 L. D. 88.

[45] Perigo vs. Erwin, 85 Fed. 90; Silver City Co. vs. Lowry, 19 Utah 334, 57 Pac. 11, dis. 179 U. S. 196; Tonopah Co. vs. Tonopah Co., 125 Fed. 408; dis. 129 Fed. 1007; Bingham Amalg. Co. vs. Ute Co., 181 Fed. 748; dis. 190 Fed. 1022; see Indiana Co. vs. Gold Hills Co., 35 Nev. 158, 126 Pac. 965; aff'd. 93 Fed. 608; *but see* Butte Co. vs. Radmilovich, *supra* [38]; *compare* O'Donnell vs. Glenn, *supra* [41].

[46] See 2 Lindl. Mines, (3d ed.) p. 786 § 338. In Hales and Symons, 51 L. D. 123, it is stated that a single application for patent or entry under the United States mining laws may not include incontiguous mining claims or locations, and the location of a mill-site on ground between mining claims will not establish the necessary contiguity. See U. S. vs. Bunker Hill Co., 48 L. D. 598.

[47] Bingham vs. Ute Co., *supra* [45]; Butte Co. vs. Radmilovich, *supra* [38].

[48] Bingham Co. vs. Ute Co., *supra* [45].

[49] Id. Miller vs. Girard, *supra* [17].

[50] Waskey vs. Hammer, *supra* [1]; Behrends vs. Goldsteen, *supra* [17]; Miller vs. Girard, *supra* [17]; see Larkin vs. Upton, *supra* [37]; Upton vs. Santa Rita Co., *supra* [38].

[51] Butte & S. Co. vs. Clark-Montana Co., *supra* [31]; Book vs. Justice Co., *supra* [8]; Meydenbauer vs. Stevens, 78 Fed. 787; see U. S. vs. Ohio Oil Co., *supra* [3]; Fox vs. Myers, *supra* [10]; Hayes vs. Lavagnino, *supra* [10]; Butte Co. vs. Radmilovich, *supra* [38]. The discovery must be upon unappropriated territory. Brown vs. Gurney, 201 U. S. 184; El Paso Co. vs. McKnight, 233 U. S. 250, rev'g. 16 N. M. 721, 120 Pac. 694; Little Pittsburg Co vs. Amie Co., *supra* [37]; Porter vs. Tonopah Co., 133 Fed. 756; aff'd. 146 Fed. 385; Winter Lode, 22 L. D. 362; Tuolumne Co. vs. Maier, *supra* [7]; Flynn Co. vs. Murphy, 18 Ida. 266, 109 Pac. 851. Part or all of the location monuments may be placed upon property adversely held, if openly and peaceably done, whether the invaded territory is patented or unpatented. Del Monte Co vs. Last Chance Co., *supra* [17]; Jim Butler Co. vs. West End Co., *supra* [6]; but the discovery must not be within the encroached land. Gwillim vs. Donnellan, *supra* [17]; Jupiter Co. vs. Bodie Con. Co., *supra* [7]; Bunker Hill Co. vs. Shoshone Co., 33 L. D. 142; Sullivan vs. Sharp, 33 Colo. 346, 80 Pac. 1054; O'Donnell vs. Glenn, *supra* [41]; *but see* Larkin vs. Upton, *supra* [37]; Nichols vs. Williams, *supra* [37] holding that a part of a discovery shaft was in ground belonging to another was immaterial. See, also, Healy vs. Rupp, *supra* [11]; Phillips vs. Brill, *supra* [11] (oil well). See *supra*, note 37.

[52] Butte & S. Co. vs. Clark-Montana Co., *supra* [31]; Book vs. Justice Co., *supra* [8]; Meydenbauer vs. Stevens, *supra* [51]; U. S. vs. Ohio Oil Co., *supra* [3]; Fox vs. Myers, *supra* [10]; Hayes vs. Lavagnino, *supra* [10]. Butte Co. vs. Radmilovich, *supra* [38].

[53] Mt. Diablo Co. vs. Callison, Fed. Case. 9886. As to horizontal vein, irregular in form, not in fissure and incapable of being traced by its outcrop, see Breece Co., 3 L. D. 11.

[54] Burke vs. McDonald, 2 Ida. 679, 33 Pac. 49; see O'Donnell vs. Glenn, *supra*.

[55] Larkin vs. Upton, *supra* [37]; Bunker Hill Co. vs. Shoshone Co., *supra* [51]; see Iron Co. vs. Murphy, 3 Fed. 368; Van Zandt vs. Argentine Co., *supra* [39]; U. S. Borax Co., 51 L. D. 464. In Bunker Hill Co. vs. Shoshone Co., *supra* [51], it is said: "If it be true that the Shoshone and Summit locations are based upon discoveries on the dip or downward course of a vein or lode whose top or apex lies inside of the vertical lines of the Stemwinder claim, owned and possessed by the Bunker Hill Co., as alleged in the protest, there can be no serious question in view of the provisions of the statute referred to and of the principal as enounced in the authorities cited, that said locations were made without authority of law, are wholly illegal and void, and confer no rights upon the Shoshone Company, claimant thereunder"; *but see*. Van Zandt vs. Argentine Co., 8 Fed. 725.

[56] Foote vs. National Co., 2 Mont.; Fox vs. Myers, *supra* [10].

be wide or narrow,[57] be a seam or stringer,[58] slightly interrupted, partially closed,[59] pinced out in places or expand or swell out and as suddenly contract, forming "kidneys."[60] The vein or lode may be rich or poor.[61] Uniformity is not required,[62] although it may be unevenly distributed;[63] it may be in pockets, gashes, or shoots;[64] it must not consist of pieces or bunches of quartz, not in place,[65] nor of float rock[66] nor of boulders detached from the earth's crust.[67]

§ 606. Discovery Within Placer Claims.

But one discovery of mineral is required within a placer location whether the claim be of twenty acres located by one or more persons, or of one hundred and sixty acres located by eight or more persons,[68]

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[57] North Noonday Co. vs. Orient Co., *supra* [7]; Meydenbauer vs. Stevens, *supra* [51].

[58] McShane vs. Kenkle, *supra* [13]; see North Noonday Co. vs. Orient Co., *supra* [7]; Jupiter Co. vs. Bodie Con. Co., *supra* [7]; Book vs. Justice Co., *supra* [8]; Shoshone Co. vs. Rutter, *supra* [8].

[59] Jupiter Co. vs. Bodie Con. Co., *supra* [7].

[60] Meydenbauer vs. Stevens, *supra* [51].

[61] Book vs. Justice Co., *supra* [8]; Meydenbauer vs. Stevens, *supra* [51]; North Noonday Co. vs. Orient Co., *supra* [7]; Jupiter Co. vs. Bodie Co., *supra* [7]; Southern Cross Co. vs. Europa Co., 15 Nev. 383.

[62] Meydenbauer vs. Stevens, *supra* [51].

[63] Jupiter Co. vs. Bodie Con. Co., *supra* [7]; Meydenbauer vs. Stevens, *supra* [51]; Murray vs. White, 42 Mont. 423, 113 Pac. 754.

[64] Illinois Co. vs. Raff, 7 N. M. 336, 34 Pac. 514.

[65] Jupiter Co. vs. Bodie Con. Co., *supra* [7]; Waterloo Co. vs. Doe, *supra* [2]. The discovery of an isolated b't of mineral, not connected with or leading to prospective values is not a sufficient discovery but a mining locator is not expected to find at the surface or in a shallow working a body of mineral which can be immediately mined and reduced at a profit. It is sufficient, if he finds mineral in a mass so located that he can follow the vein or the mineral-bearing body, with reasonable hope and assurance that he will ultimately develop a paying mine. Freeman vs. Summers, *supra* [20]. See Waterloo Co. vs. Doe, *supra*. Mason vs. Washington Butte Co., *supra* [2].

[66] Book vs. Justice Co., *supra* [8]. For an instance of "float" supporting a lode mining location, see Erhardt vs. Boaro, *supra* [2].

[67] Meydenbauer vs. Stevens, *supra* [51]; Ambergris Co. vs. Day, *supra* [11]. It is the finding of the mineral rock in place as distinguished from float rock that constitutes a discovery and warrants the location of a lode claim. Book vs. Justice Co., *supra* [8]; Shoshone Co. vs. Rutter, *supra* [8]; Lange vs. Robinson, *supra* [4]; Jefferson-Montana Co., *supra* [18]; McShane vs. Kenkle, *supra* [13]; Murray vs. White, *supra* [64]; see Migeon vs. Montana Co., *supra* [2]; Henderson vs. Fulton, 35 L. D. 658; Rough Rider Claims, *supra* [8]; Noyes vs. Clifford, *supra* [2].

It is held that the following elements are essential to constitute a valid discovery of a lode claim, viz: "1. A vein or lode of quartz or other rock in place. 2. Quartz or other rock in place must carry gold or some other valuable mineral deposit. 3. A vein or lode of quartz or other rock in place carrying gold or other mineral deposit sufficient in quantity to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine." Jefferson-Montana Co., *supra*. U. S. vs. Hurliman, *supra* [18].

[68] Miller vs. Chrisman, *supra* [26]; U. S. vs. Brookshire Oil Co., 242 Fed. 721; Con. Mutual Oil Co., *supra* [29]; Union Oil Co., 25 L. D. 359, overruling 23 L. D. 222; see McFayden, 51 L. D. 441; Reeder vs. Mills, 62 Cal. A. 581, 217 Pac. 562; McDonald vs. Montana Wood Co., 14 Mont. 88, 35 Pac. 668; see Yard, 38 L. D. 59; Bakersfield Co., 39 L. D. 460, distinguishing Chrisman vs. Miller, *supra* [5]. "Where eight associates make a location of one hundred and sixty acres of mineral lands and before making discovery convey a designated forty-acre part thereof to a grantee with the expressed intent that the grantee shall have the rights therein which the associates enjoyed and there is no other agreement the conveyance operates to sever the forty acres from the balance, making it an independent claim, and discovery thereon made by the grantee does not enure to the benefit of the associates." Merced Oil Co. vs. Patterson, 153 Cal. 624, 96 Pac. 90; *but see* Id., 162 Cal. 358, 122 Pac. 950, distinguishing Merced Oil Co. vs. Patterson, *supra*, upon question of effect of transfer before discovery of portion of ground located. See Hall vs. McKinnon, *supra* [3]. To justify the location of a placer mining claim there must be such a discovery of mineral as gives reasonable evidence of the fact that it is valuable for such mining. Creede Co. vs. Uinta Co., *supra* [7]; Chrisman vs. Miller, *supra* [5]; Cole vs. Ralph, *supra* [4]; Steele vs. Tanana Co., *supra* [3]; see Cook vs. Johnson, *supra* [11].

Any area amounting to a legal subdivision within a placer claim which does not contain or is not valuable for its mineral deposits is not mineral land within the contemplation of the federal mining law and will be excluded from mineral entry. In other words, a single discovery of mineral upon public land is sufficient to authorize the location of a placer claim thereon and may, in the absence of any claim or evidence to the contrary, be treated as sufficiently establishing the mineral character of the entire claim to justify patenting, but such discovery does not conclusively establish the mineral character of all the land included within the claim

but such discovery is not conclusive of the mineral character of the entire tract nor that the entire tract can be acquired as appurtenant to the mineral deposits within a portion thereof.[69]

§ 607. Discovery of Lode Within Placer Claim.

The two classes of mineral deposits known as veins or lodes and placer claims are so different in character and formation, and so completely separate and distinct from each other, that even when found to exist in the same superficial area they may be located and held by different persons and patented accordingly.[70]

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so as to preclude further inquiry in respect thereto. C. P. R. Co. vs. Mullin, 52 L. D. 573.

In making a discovery on an oil location it is not necessary to drill a well until the oil-bearing sands are reached; but it is sufficient if oil is discovered at any depth, if it is such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money with a reasonable prospect of finding oil in commercial quantities. U. S. vs. Ohio Oil Co., *supra* (3). See Lange vs. Robinson, *supra* (4); Charlton vs. Kelly, *supra* (12); U. S. vs. Grass Creek Co., *supra* (53); Weed vs. Snook, *supra* (11); McLemore vs. Express Oil Co., *supra* (29). See, also, Diamond Coal Co. vs. U. S., *supra* (2); Cameron vs. U. S., *supra* (23); U. S. vs. N. P. R. Co., *supra* (20); *but see* Oregon Basin Co., *supra* (20); and compare Raven Co., *supra* (20); and Freeman vs. Summers, *supra* (20); (oil shale case). For instructive cases in relation to gold placer claims see Lange vs. Robinson, *supra*; Cascaden vs. Bartolis, *supra* (5); and see, generally, McShane vs. Kenkle, *supra* (13).

[69] American Co., 39 L. D. 299; see Ferrell, 29 L. D. 12; Yard, *supra* (68). In determining the character of land embraced within a placer location, ten-acre tracts, normally in square form are the units of investigation and determination; and if any such area is found to be nonmineral, it should be eliminated from the claim. The evidentiary weight to be attached to the actual discovery or disclosure of placer mineral upon one portion of a one hundred and sixty acre placer claim is dependent upon the character of the deposit and formation, the surrounding geologic conditions, and all the facts and circumstances of the particular case. Crystal Marble Co vs. Dantice, 41 L. D. 643. See Clipper Co. vs. Eli Co., 34 L. D. 411; *but see* Hall vs.McKinnon, *supra* (3); McDonald vs. Montana Wood Co., *supra* (68). The land department does not hold that actual disclosure of mineral must be made on each ten-acre tract; but in a contest the mineral claimant can only succeed as to the area shown to be mineral in character, and for this purpose the land may be divided into ten-acre tracts. Crystal Co. vs. Dantice, *supra*.

[70] Henderson vs. Fulton, *supra* (67); see Reynolds vs. Iron Co., 116 U. S. 687; Iron Co. vs. Reynolds, 124 U. S. 374; Duffield vs. San Francisco Co., *supra* (30); Aurora Lode vs. Bulger Hill Placer, 23 L. D. 95; Hughes vs. Ochsner, 27 L. D. 398; Daphne Lode, 32 L. D. 513; Jaw Bone Lode vs. Damon Placer, 34 L. D. 72; Harry Lode Claim, 41 L. D. 405; and see Mason vs. Washington-Butte Co., *supra* (2). A placer location is not a location of lodes or veins underneath the surface, but is simply a claim of a tract or parcel of ground for the sake of loose deposits of mineral upon or near the surface. Clipper Co. vs. Eli Co., *supra* (17). Float, outcroppings, lodes, and abandoned locations, separately or combined, are not sufficient to constitute a "known lode" within the exclusion of the placer mining law. Barnard vs. Nolan, 215 Fed. 996. Mere outcroppings or other indications of a vein within the limits of a placer, or evidence of the existence of a vein which might be sufficient to support a lode location as against a subsequent placer location in an adverse proceeding, are not sufficient to establish the existence of a known vein or lode within the boundaries of a placer prior in point of time, and which has been patented. McConaghy vs. Doyle, 32 Colo. 92, 75 Pac. 419. See, also, Iron Co. vs. Mike & Starr Co., *supra* (12), and cases therein cited. Sullivan vs. Iron Co., 143, U. S. 431; McKay vs. Mesch, 174 Fed. 867; South Butte Co. vs. Thomas, 260 Fed. 814, rev'g, 201 Fed. 105; Campbell vs. McIntyre, *supra* (30). Clark-Montana Co. vs. Ferguson, 218 Fed. 964; Olaine vs. McGraw, 164 Cal. 424, 129 Pac. 460.

In Richards vs. Dower, 81 Cal. 44, 22 Pac. 307, aff'd. 151 U. S. 658, (a town-site case) the court held that the possession of shafts, tunnels, inclines, dumps and stopes on a vein of no value and which had been abandoned, would not have the effect of preventing the land in which they were situated from passing by the town-site patent as nothing but a mine or a mining claim is reserved. In Dahl vs. Raunheim, 132 U. S. 263, it is held that a vein of quartz exposed two hundred or three hundred feet without the boundaries of a placer claim and trending in the direction of said claim is not presumed to be within it. See, also, U. S. vs. Kostelak, 207 Fed. 447. Discovery Placer vs. Murry, 25 L. D. 464; Cripple Creek Co. vs. Mt. Rosa Co., 26 L. D. 625; Butte & B. Co. vs. Sloan, 16 Mont. 97, 40 Pac. 217; Washoe Co. vs. Junila, 43 Mont. 178, 115 Pac. 917.

A stranger can not enter upon a prior placer location for the purpose of prospecting for or locating unknown lodes or veins. Clipper Co. vs. Eli Co., *supra* (17). Traphagen vs. Kirk, 30 Mont. 574, 77 Pac. 58; Campbell vs. McIntyre, *supra*.

A lode claim peaceably located within the boundaries of a void placer claim which was at the time actually unoccupied, was held valid in Duffield vs. San Francisco Co., 205 Fed. 548. A vein or lode known to exist within the boundaries

§ 608. Discovery Within Statutory Tunnel.

A discovery of mineral is not essential to create a statutory tunnel right, nor to maintain possession thereof [71] because such a tunnel is only a means of discovery [72] of veins or lodes in the line of the tunnel not appearing upon the surface.[73] The right to a vein or lode discovered in a tunnel dates by relation back to the time of the location of the tunnel site.[74]

§ 609. Discovery Within Agricultural Lands.

A discovery of mineral after submission of final proof in support of an agricultural entry confers no right upon the discoverer.[75]

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of a placer mining claim at the date of the application for patent, and not included in the application, may be located by an adverse claimant after the issuance of the patent; "and a vein is known to exist within the meaning of the statute (1) when it is known to the placer claimant; (2) when its existence is generally known; (3) when any examination of the ground sufficient to enable the placer claimant to make oath that it is subject to location as such would necessarily disclose the existence of the vein." Mutchmor vs. McCarty, *supra* [10]. In McConaghy vs. Doyle, *supra*, it is said: "It is now settled that, as between placer and subsequent conflicting lode locations, a known vein within the limits of a placer when that question is raised collaterally, is one known to exist at the time of application for patent for such placer, and to contain minerals in such quantity and quality as to justify expenditure for the purpose of extracting them." Citing numerous cases. "It is also settled that the burden of proof in such circumstances is upon the lode claimant to establish by clear and convincing testimony that the vein or veins which he claims are exempted from the placer application by operation of law and are of the character which will render them known veins, as above defined. Montana Central Co. vs. Migeon, 68 Fed. 811; 1 Snyder on Mines, § 666; Cripple Creek Gold Min. Co. vs. Mt Rosa Mining, Miling Land Co., 26 Land Dec. Dept. Int. 622."

See, generally, U. S. vs. Iron Co., 128 U. S. 673; Mt. Rosa Co. vs. Palmer, 26 Colo. 56, 56 Pac. 176; Noyes vs. Clifford, *supra* [2]; and see Mason vs. Washington-Butte Co., *supra*.

In discussing the question Mr. Costigan says: "Since a placer patent confers no title to known lodes within its limits, one who subsequently locates such lodes can not be deemed a trespasser within the rule that a trespasser upon a lawful possession can acquire no rights. But what if he can not get on the fifty-foot strip without a trespass? * * * If the placer patentee posts a notice to all prospectors to keep off his placer, it is difficult to see how a valid location of the vein can be made without a trespass." Costigan Min. Law, p. 267, § 77. See Clipper Co. vs. Eli Co., 29 Colo. 377, 68 Pac. 289, aff'd. 291 U. S. 220; Casey vs. Thieviege, *supra* [2].

See Lode Within Placer Claim.

[71] Campbell vs. Ellet, 167 U. S. 119, aff'g. 18 Colo. 510, 33 Pac. 521; Creede Co. vs. Uinta Co., *supra* [1]; Uinta Co. vs. Ajax Co., 141 Fed. 567. § 2323 Rev. St., seems to give the right to the possession of certain veins or lodes to the owner of a statutory tunnel before his discovery or location of any lode or vein whatsoever, depending only upon his subsequent discovery of such veins or lodes within his tunnel. Enterprise Co. vs. Rico-Aspen Co., *supra* [10].

[72] Adams, 42 L. D. 457.

[73] Enterprise Co. vs. Rico-Aspen Co., *supra* [10].

[74] Id. On the discovery of a vein or lode within a tunnel the rights of the tunnel claimant are exactly in extent what they would be if the discovery had been made from the surface. Hope Co. vs. Brown, 7 Mont. 555, 19 Pac. 218.

[75] Deffeback vs. Hawke, *supra* [25]; Colorado Coal Co. vs. U. S., 123 U. S. 307; Shaw vs. Kellogg, 170 U. S. 312; Lane vs. Watts, 234 U. S. 539; Wyoming vs. U. S. 255 U. S. 489; Lane vs. Watts, 41 App. D. C. 149; Southern Dev. Co. vs. Enderson, 200 Fed. 272; Harnish vs. Wallace, 13 L. D. 108; Dickensen vs. Capen, on review, 14 L. D. 426; Old Dominion Co. vs. Haverly, 11 Ariz. 252, 90 Pac. 338; Hunt vs. Steese, 75 Cal. 625, 17 Pac. 922; Standard Co. vs. Habishaw, 132 Cal. 119, 64 Pac. 115; Hamman vs. Milne, 179 Cal. 635, 178 Pac. 524; Bay vs. Oklahoma Co., *supra* [20]. The presumption arising upon the location of a mining claim, that the land covered thereby is mineral in character, though returned as agricultural land, exists only where such location is legally made and based upon a proper discovery. Rhodes vs. Treas, 21 L. D. 502. As to lack of knowledge by entryman as to the mineral character of the land, see Christie vs. Great Northern Co., 284 Fed. 704. Gary vs. Todd, 18 L. D. 58.

The discovery in beds of water courses of a few colors of gold is not a sufficient discovery on which to base a mining claim as against an agricultural entry. Meyers vs. Pratt, *supra* [17]; see Aspen Co. vs. Williams, 23 L. D. 17; see, also, Lange vs. Robinson, *supra* [4]; Charlton vs. Kelly, *supra* [12]. Kern Oil Co. vs. Clarke, 30 L. D. 559; State vs. Wyoming, 45 L. D. 590.

See, generally, Diamond Coal Co. vs. U. S., *supra* [2]; Milner vs. U. S., 228 Fed. 431; U. S. vs. Beaman, 242 Fed. 876; U. S. vs. Porter Fuel Co., 247 Fed. 769; U. S. vs. Carbon Co., 9 Fed. (2d) 517.

§ 610. Discovery Within State Lands.

Under a grant of school lands the state's title vests, if at all, at the date of the completion of the survey [76] and, if the land, although in reality is mineral, was not then known to be mineral, the subsequent discovery of its mineral character would not divest the title which had already passed.[77]

§ 611. Discovery Within Railroad Lands.

Although the grant to a railroad company is one in *praesenti* and the land may have been returned as nonmineral by the surveyor general prior to the grant, the fact as to whether or not the same is mineral, and is or is not excepted from the grant because of its mineral character, may be determined by the land department at any time prior to the issuance of patent to the railroad company; and the discovery of the mineral character of the land at any time prior to the issuance of the patent therefor, under a grant excepting mineral lands will exempt the land from the operation of the grant.[78]

§ 612. Discovery Within Town Sites.

Land covered by a town site patent may not be located under the mining law because discovered after the town site entry, to be valuable for mineral.[79]

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[76] Cooper vs. Roberts, 18 How. 173, distinguished in U. S. vs. Sweet, 245 U. S. 563, rev'g. 228 Fed. 421, and following Deffeback vs. Hawke, *supra* (25); Ruddy vs. Rossi, 248 U. S. 110; West vs. Standard Oil Co., 278 U. S. 200, rev'g. 57 App. D. C. 329, 23 Fed. (2d) 750; Frandson, 50 L. D. 516, see Dorff, 50 L. D. 219. The title does not pass to the state until the survey is approved. Heydenfeldt vs. Daney Co., 93 U. S. 634; F. A. Hyde & Co., 37 L. D. 164; Finney vs. Berger, 50 Cal. 248; Medley vs. Robertson, 55 Cal. 396; Kendall vs. Bunnell, 56 Cal. A. 122, 205 Pac. 78; Clemmons vs. Gillette, 33 Mont. 321, 83 Pac. 879. State of Utah Co. vs. Braffet, *supra* (18); see Work vs. Braffet, 19 Fed. (2d) 666, with reference to "known" mineral lands within school land grant; also Miller vs. U. S., *supra* (75); and U. S. vs. Carbon Co., *supra* (75).

In West vs. Standard Oil Co., *supra*, the question was whether or not certain lands were known to be mineral when the survey of them was accepted. The court said: "The proceedings were based on a charge that on the date of the approval of the survey, the land was known to be mineral in character. If the land was then known to be mineral, the title confessedly did not pass by the act. For congress excluded mineral land from the grant (citing cases). If it was not then known to be mineral, the legal title passed to the state on that date. For the land was within one of the sections in place designated in the granting act." (Citing cases.)

[77] U. S. vs. Beaman, *supra* (75); Frees vs. Colorado, 22 L. D. 510; Greene vs. Robison, 109 Tex. 372, 210 S. W. 499. If mineral in paying quantities is discovered after the selection and before its approval the selection is vacated and can not be approved by the land department. Buena Vista Co. vs. Honolulu Co., 166 Cal. 71, 134 Pac. 1154. Discovery of mineral subsequent to the issuance of a nonmineral patent inures to the benefit of the patentee and his grantees. Deffeback vs. Hawke, *supra* (25); Davis vs. Wiebbold, *supra* (25). Ferry vs. Street, 4 Utah 521, 7 Pac. 712.

Where swamp lands granted to a state contained no reservation of mineral lands, and grant was made prior to the establishment of congress of the policy of reserving the minerals generally in the grants of lands known to be mineral in character, such grant is not affected by the subsequent discovery of minerals within the lands so granted. Fall vs. State, 287 Fed. 999. See, also, West vs. Work, 11 Fed. (2d) 828, holding that where lands in Oklahoma were declared to be agricultural, and subject to settlement, only under town site or homestead laws, by the Oklahoma enabling act, no mining permit will issue to claimant under the provisions of the act of February 25, 1920, upon a showing of discoveries of oil on certain said lands.

[78] Barden vs. N. P. R. Co., 154 U. S. 288; N. P. R. Co. vs. Marshall, 17 L. D. 545; C. P. R. Co. vs. Valentine, 11 L. D. 238; see Burke vs. S. P. R. Co., 234 U. S. 669; distinguished in U. S. vs. Exploration Co., 225 Fed. 859. (For history of the litigation in the Burke Case see 225 Fed. 370); Eastern Co. vs. Willow Co., 201 Fed. 209; Spong, 5 L. D. 193; Van Ness vs. Rooney, 160 Cal. 131, 116 Pac. 392. See U. S. vs. N. P. R. Co., 1 Fed. (2d) 53; Berry vs. C. P. R. R. Co., 15 L. D. 463; U. S. vs. C. P. R. Co., 49 L. D. 588.

[79] Laney, 9 L. D. 83. A town site entry and patent are "inoperative as to all lands known at the time to be valuable for their minerals, or discovered to be such before their occupation or improvement for residence or business under the town site title." Deffeback vs. Hawke, *supra* (25). See Moran vs. Horsky, 178 U. S. 209; aff'g. 21 Mont. 345, 53 Pac. 1064; Davis vs. Wiebbold, *supra* (25); Dower vs. Richards, 151

§ 613. Attack Upon Patent.

A patent for a townsite can not be attacked by one on whose rights, if any, attached after issue of the patent on the ground that the land was theretofore known to be mineral land, but it can be assailed only in a direct proceeding by the United States.[80]

§ 614. Location Without Discovery.

A location without discovery can not be said to be totally invalid and of no effect, as the title by such location and possession is good as against every person contending against it, except the government of the United States.[81]

§ 615. Discovery and Assessment Work Not Synonymous.

Assessment work does not take the place of discovery for the requirement relating to such work is in the nature of a condition subsequent to a perfected and valid claim and has nothing to do with locating or holding the claim before discovery.[82]

U. S. 633, aff'g. 81 Cal. 52, 22 Pac. 306; Larned vs. Jenkins, 113 Fed. 637; Kansas City Co. vs. Clay, 3 Ariz. 332, 29 Pac. 11. See Kinney vs. Coastal Oil Co., 1 Fed. (2d) 795, holding that a town site can not be laid by a homestead entryman over a tract of land covered by an oil lease Plymouth Lode, 12 L. D. 512. See Town Sites on Mineral Lands, 52 L. D. 126.

Where a patent for a townsite and a patent for a mining claim conflict, that one will be sustained which first vests the title. Reilly vs. Blackmore (Tombstone Cases), 2 Ariz. 275, 15 Pac. 26, app'd. dis. 145 U. S. 629; Clark vs. Jones, 30 Ariz. 535, 545, 249 Pac. 551, 555; see Clark vs. Holcomb, 31 Ariz. 378, 253 Pac. 897.

[80] Carter vs. Thompson, 65 Fed. 329.

[81] Miller vs. Chrisman, *supra* [29]; Union Oil Co. vs. Smith, *supra* [29]; Johanson vs. White, *supra* [29]; Rooney vs. Barnette, *supra* [29]; U. S. vs. Stockton Midway Oil Co., *supra* [5]; U. S. vs. American Oil Co., 242 Fed. 727; U. S. vs. Rock Oil Co., *supra* [30]; Borgwardt vs. McKittrick Oil Co., 164 Cal. 650, 130 Pac. 417; Jose vs. Utley, *supra* [2]; see Sparks vs. Mount, *supra* [59]; Hullinger vs. Big Sespe Co., *supra* [29]. But the validity and life of the location begins only with the date of discovery. Cole vs. Ralph, *supra* [4]; Clark, 52 L. D. 432; Redden vs. Harlan, 2 Alaska 402; but in the presence of an intervening right it must remain of no effect. Union Oil Co. vs. Smith, *supra* [5]; Cole vs. Ralph, *supra*. The *status* of a locator of a mining claim in the absence of discovery is in the nature of a tenant at sufferance. U. S. vs. McCutchen, *supra* [1]; Hagen vs. Dutton, 21 Ariz. 476, 181 Pac. 580. A relocator is not the discoverer of the mineral in the location. He is the appropriator thereof. Zerres vs. Vanina, *supra* [30].

In McMillen vs. Ferrum Co., 32 Colo. 38, 74 Pac. 461, it is said: "Plaintiff's grantor, as locator of a mining lode, went on the ground of two abandoned claims, and proceeded to relocate as an abandoned claim the territory theretofore covered by them. He sank a discovery shaft, and in due time filed for record his location certificate, in which the discovery was designated as in the shaft, where there was in fact no discovery. *Held* that, though such locator knew of the existence of a vein within the limits of his claim, but did not adopt such discovery as his own and base his location upon it, his grantees could not maintain an action in support of a claim thereto." See, also, Anvil Co. vs. Scandia Syndicate, 4 Alaska 479.

[82] Union Oil Co. vs. Smith, *supra* [5]; see St. Louis Co. vs. Kemp, 104 U. S. 636; Clark, *supra* [81]. There is a broad and distinctive difference as applied in the mining law between the word "discovery" and the words "expenditures," "improvements," or "development" and the three latter are not synonymous with the first. Jackson vs. Roby, 109 U. S. 440; Chambers vs. Harrington, *supra* [41].

Discovery work does not mean the doing of assessment work. It does not mean the pursuit of capital to prosecute the work; nor does it mean any attempted holding by cabin, lumber pile or unused derrick. It means the diligent, continuous prosecution of the work with the expenditure of whatever money may be necessary to the end in view. McLemore vs. Express Oil Co., *supra* [111]. In Charlton vs. Kelly, *supra* [12], the court said: "Counsel for the plaintiffs in error have assumed for the word 'development' a broader meaning than was intended in the charge. The court did not mean that, in order to comply with the law, there must be such a discovery as to justify the expenditure of time and money upon a claim to the extent of opening up the whole thereof and acquiring an exhaustive knowledge concerning its resources. The word as it was used by the court, and as in connection with the whole charge it must have been understood by the jury, was equivalent to the word 'exploration,' and was used in the sense in which it was employed in Chrisman vs. Miller, 197 U. S. 313, 323, in which the court thus quoted with approval the language of Mr. Justice Field in a prior case. (Erhardt vs Boaro, *supra* [2].) 'The mere location or presence of gold or silver is not sufficient to establish the existence

§ 616. Essential Acts of Location.

The marking of boundaries and the posting and record may precede discovery, or discovery may be made prior to such acts, but no location, strictly speaking, is valid until all of those acts are complete.[83] For instance, under local statutes providing for the posting of the notice of location a notice of location posted without discovery, is an absolute nullity;[84] and a notice of location, posted even with discovery and not followed by the marking of the boundaries of the claim, initiates no rights thereto.[85] This rule of law, however, is subject to this qualification: in advance of discovery a locator in actual possession and diligently searching for minerals has a right of possession against all intruders and with it the right to protect his possession against all intrusions.[86] It is not necessary as a matter of law that the locator should be the first discoverer of mineral upon the land in order to make a valid location; however, he must not only have knowledge of the former discovery, but he must adopt such actual discovery and claim the same in order to give validity to his location.[87]

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of a lode. The mineral must exist in such quantities as to justify the expenditure of money for the development of the mine and the extraction of the mineral.'" Cole vs. Ralph, *supra* (4). U. S. vs. Stockton Midway Co., *supra* (81). Hodgson vs Midwest Oil Co., 17 Fed. (2d) 71.

[83] Creede Co. vs. Uinta Co., *supra* (7); Doe vs. Waterloo Co., 70 Fed. 460; aff'g. 55 Fed. 11; Waskey vs. Hammer, *supra* (1); U. S. vs. McCutchen, *supra* (1); Gregory vs. Pershbaker, 73 Cal. 120, 14 Pac. 401; Tuolumne Co. vs. Maier, *supra* (7); see Hall vs. McKinnon, *supra* (3); Sparks vs. Mount, *supra* (29).

[84] The basis of location of a mining claim is discovery and a mere posting of a notice without discovery is of no force or effect so far as rendering invalid another location covering the whole or a portion of the same ground based upon a valid discovery. Round Mt. Co. vs. Round Mt. Co., *supra* (10). See, generally, Union Oil Co. vs. Smith, *supra* (29); U. S. vs. Midway Oil Co., 232 Fed. 624; U. S. vs. McCutchen, *supra* (1); U. S. vs. Ohio Oil Co., *supra* (2); Hagan vs. Dutton, *supra* (81); Emerson vs. Akin, *supra* (11); Butte Co. vs. Radmilovich, *supra* (38).

[85] Maleck vs. Tinsley, 73 Ark. 810, 85 S. W. 81. Mere discovery of mineral vests no rights in the discoverer. The discovery must be included within the boundaries of a duly located mining claim; otherwise the discovery is open to appropriation by others. Adams vs. Crawford, 116 Cal. 495, 48 Pac. 488. Mere marking upon the surface of a location does not necessarily make the location valid and subsisting, and the ground may be entirely free for adverse location. Del Monte Co. vs. Last Chance Co., *supra* (1). See Gobert vs. Butterfield, 23 Cal. 1, 136 Pac. 516.

[86] U. S. vs. McCutchen, *supra* (1); Con. Mutual Oil Co. vs. U. S., *supra* (29); Hullinger vs. Big Sespe Co., *supra* (29); see, also, Union Oil Co. vs. Smith, *supra* (7); Cole vs. Ralph, *supra* (4); in Union Oil Co. vs. Smith, *supra*, it is said: "In the California courts the rights of a locator before discovery, while in possession of his claim and prosecuting exploration work, is recognized as a substantial interest, extending not only as far as the *pedis possessio*, but to the limits of the claim as located; so that if a duly qualified person peaceably and in good faith enters upon vacant lands of the United States prior to discovery, but for the purpose of discovering oil or other valuable mineral deposits, there being no valid mineral location upon it, such person has the right to maintain possession as against violent, fraudulent, and surreptitious intrusions so long as he continues to occupy the land to the exclusion of others and diligently and in good faith prosecutes the work of endeavoring to discover minerals thereon." See, also, Clark, *supra* (81); Jose vs. Utley, *supra* (2); *but see* Hanson vs. Craig, *supra* (28).

Rooney vs. Barnette, *supra* (29). The above cases, together with the cases of Miller vs. Chrisman, *supra* (26); McLemore vs. Express Oil Co., *supra* (29), seem but to state the general rule that where one party lawfully is in possession of a mining claim, no rights adverse to him can be initiated by a trespasser. Sparks vs. Mount, *supra* (29).

[87] Jupiter Co. vs. Bodie Con. Co., *supra* (7); Book vs. Justice Co., *supra* (8); Nevada Sierra Oil Co. vs. Home Oil Co., *supra* (3); see Aurora Lode vs. Bulger Hill Placer, *supra* (70); see *supra*, note 81. O'Donnell vs. Glenn, *supra* (41); Hayes vs. Lavagnino, *supra* (10). A discovery of a vein or lode by the sinking of a discovery shaft is a substantial compliance with the provisions of the mining law, and knowledge on the part of the locators of the existence of mineral entitles them to make a location, although the original discovery was made by some one other than the locators. Hayes vs. Lavagnino, *supra*; see Erhardt vs. Boaro, *supra* (2). Jupiter Co. vs. Bodie Con. Co., *supra*; McMillen vs. Ferrum Co., *supra* (10).

Where a discoverer has himself perfected a valid location on account of his discovery no one else can have the benefit of his discovery for the purpose of location adverse to him, except as a relocator after the prior right has been lost or abandoned. Belk vs. Meagher, *supra* (17); Gwillim vs. Donnellan, *supra* (17); Aurora Lode vs. Bulger Hill Placer, *supra*. See Betsch vs. Umphrey, 252 Fed. 573.

§ 617. Subsequent Discovery.

In the absence of an intervening right, discovery subsequent to monumenting and recording will inure to the benefit of the locator or his grantee as of the date of the discovery.[88]

§ 618. Questions of Fact.

Whether there has been a discovery of mineral within a location so as to perfect it is a question of fact for the court or jury, depending on the circumstances of the particular case.[89] In any case it may be an open question whether a location includes land valuable for minerals, or whether it is based upon a barren seam or fissure.[90] The fact that

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[88] Creede Co. vs. Uinta Co., *supra* [7]; Union Oil Co. vs. Smith, *supra* [7]; Cole vs. Ralph, *supra* [4]; North Noonday Co. vs. Orient Co., *supra* [7]; Jupiter Co. vs. Bodie Con. Co., *supra* [7]; Erwin vs. Perigo, *supra* [7]; Weed vs. Snook, *supra* [31]; Sharkey vs. Candiani, *supra* [10]; see Healey vs. Rupp, *supra* [11]. In Brewster vs. Shoemaker, *supra* [10], the principle involved is that where the location of a mining claim is void because of the absence of a valid discovery, a subsequent discovery of mineral, after the filing of the location notice or certificate, and after all acts of location have been performed, will validate it, provided such subsequent discovery is made before the rights of any third party have attached. That it would be a useless and idle ceremony for the locators to again locate their claim and refile location notice or certificate, or file a new one. See Creede Co. vs. Uinta Co., *supra*; Whiting vs. Straup, *supra* [26].

[89] Iron Co. vs. Mike & Starr Co., *supra* [12]; Book vs. Justice Co., *supra* [8]; Bonner vs. Meikle, *supra* [21]; Lange vs. Robinson, *supra* [4]; Hanson vs. Craig, *supra* [28]; Ebner Co. vs. Alaska Co., 210 Fed. 603; U. S. vs. Ohio Oil Co., *supra* [3]; Waterloo Co., 17 L. D. 114; Castle vs. Womble, *supra* [2]; Yard, *supra* [68]; Rough Rider Claims, *supra* [8]; Tuolumne Co. vs. Maier, *supra* [31]; Hedrick vs. Lee, *supra* [10]; Gemmell vs. Swain, *supra* [28]; Ferris vs. McNally, 45 Mont. 22, 121 Pac. 889; see Iron Co. vs. Mike & Starr Co., *supra* [12]; Van Zandt vs. Argentine Co., *supra* [30]; Noyes vs. Clifford, *supra* [2]; Whiting vs. Straup, *supra* [26]; see Reiner vs. Schroeder, 146 Cal. 411, 80 Pac. 517. Proof of the discovery within the limits of the location is necessary to protect the claim against relocation. Little Pauline vs. Leadville Lode, 7 L. D. 508. In Cascaden vs. Bartolis, *supra* [5], the court said: "We therefore conclude that inasmuch as there was evidence of gold having been found within the limits of the plaintiff's claim, the court erred in refusing to permit plaintiff to show the situation, character, value and the mineralogical condition of adjacent claims, and in refusing plaintiff's offer to prove by experienced miners that plaintiff was justified in expending time and money in prospecting and developing the ground as valuable for mineral. See, also, Diamond Coal Co. vs. U. S., *supra* [2]; U. S. vs. S. P. Co., *supra* [2]; Cook vs. Johnson, *supra* [11], citing Book vs. Justice Co., *supra* [8] and approved in U. S. vs. McCutchen, *supra* [1]. The question of discovery may be raised between mining claimants. Waterloo Co. vs. Doe, *supra* [2]; Duffield vs. San Francisco Co., *supra* [30]; Bevis vs. Markland, 130 Fed. 226, but not by co-owners. Allen vs. Blanche Co., 46 Colo. 199, 02 Pac. 1072. McCarthy vs. Speed, 11 S. Dak. 362, 80 N. W. 135, nor by a grantor of the property. Blake vs. Thorne, 2 Ariz. 347, 16 Pac. 270. It may be raised by one claiming the land to be more valuable for agricultural than for mining purposes, or *vice versa*. Steele vs. Tanana Co., *supra* [3]; U. S. vs. Kostelak, *supra* [70]; Crystal Co. vs. Dantice, *supra* [60]; Fall Creek Co., vs. Walton, 24 Ida. 760, 136 Pac. 438; Bay vs. Oklahoma Co., *supra* [26].

When there is a controversy between two mineral claimants, the rule respecting the sufficiency of discovery is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry under the land laws. Chrisman vs. Miller, *supra* [3]; Lange vs. Robinson, *supra* [4]; Steele vs. Tanana Co., *supra*. The reason for the above distinction is that when land is sought to be taken from the category of agricultural lands, the evidence of its mineral character should be reasonably clear, while in a controversy between rival claimants to mineral land, the question simply is which is entitled to priority; but even then the existence of mineral should be shown without, however, the weighing of scales to determine the value of the mineral found. Bonner vs. Meikle, *supra* [8].

When the contest is between a mineral claimant and one claiming under the general land laws, or a railroad company claiming under its land grant. Steele vs. Tanana Co., *supra*, the test is not the mere existence of a mineral deposit or the prospect of its existence, but, whether, as a present fact, it will pay to mine by the ordinary methods of mining. Davis vs. Weibbold, *supra* [25]; U. S. vs. Reed, *supra* [17]; Cutting vs. Reininhausen, 7 L. D. 265; Harnish vs. Wallace, *supra* [75]; Royal K. Placer, 13 L. D. 86; Ferrell vs. Hoge, 27 L. D. 129; Brophy vs. O'Hara, 34 L. D. 596; Hunt vs. Steese, *supra* [75]. While the question of discovery is not one ordinarily present before the land department, yet under certain circumstances this question may be fully investigated and determined by the department. Healey vs. Rupp, *supra* [11].

Patents have been held to be proof of discovery relating back to the date of the location of the claim and can not be collaterally attacked. Calhoun Co. vs. Ajax Co., 182 U. S. 490; *but see* Star Co. vs. Federal Co., *supra* [11].

[90] Montana Co. vs. Migeon, *supra* [13]; Rough Rider Claims, *supra* [8]; see Madison vs. Octave Oil Co., *supra* [8]. While a mere possibility that ground claimed is valuable for mineral, or that there are mere indications of the existence of mineral

the land has been adjudicated to be mineral in character does not dispense with the necessity of making a discovery as a basis of location and mineral patent, and the question of whether a discovery had in fact been made is not barred by a prior adjudication that the land was mineral in character.[91]

When the controversy over the right of possession to mineral land is between two mineral claimants the rule as to the sufficiency of a discovery is more liberal than when the controversy is between a mineral claimant and an agricultural claimant.[92] The general rule is that recitals of discovery in the location notice are mere *ex parte*, self serving declarations on the part of the locator and not evidence of discovery.[93]

The sufficiency of the marking of the claim[94] or of the discovery work[95] or of the annual work,[96] or whether the end lines are substan-

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in the ground is not enough to justify a prudent person in expending money and work in exploration of it; yet, where the evidence shows the actual existence of mineral in the claim and such evidence is of sufficient weight to submit to the jury upon the issue of discovery, the locator has a right to strengthen his proof upon any of the elements which enter into what is comprehended by discovery. In doing so, he may supplement the showing that mineral actually did exist by introducing evidence of the fact that as a ground of justification for the expenditure of time and money, the adjacent ground in the immediate vicinity is rich in the same mineral or that adjacent claims were developed into paying mines after development upon similar showings of mineral, or that the geological conditions are so similar to that from the character of the mineral discovered, it is reasonable to expect to find mineral in valuable quantities in the exploitation of the ground staked. Cascaden vs. Bartolis, *supra* (5). See Diamond Coal Co. vs. U. S., *supra* (2); U. S. vs. S. P. Co., *supra* (2); Shoshone Co. vs. Rutter, *supra* (8); Lange vs. Robinson, *supra* (4); see Ambergris Co. vs. Day, *supra* (11).

A locator may supplement evidence of discovery by showing that the outeroppings were mineralized. Columbia Co. vs. Duchess Co., *supra* (10). See Diamond Coal Co. vs. U. S., *supra; but see* Colorado Coal Co. vs. U. S., *supra* (15); Frees vs. Colorado, *supra* (17); or probably carried mineral value. Fox vs. Myers, *supra* (10), or the discovery may be shown by expert testimony. Davidson vs. Bordeaux, *supra* (10), or by the testimony of a surveyor. Southern Cross Co. vs. Europa Co., *supra* (61); see Davidson vs. Bordeaux, *supra*. Negative testimony may disprove the claim of discovery. Ambergris Co. vs. Day, *supra*. As to underground discoveries see Little Gunnell Co. vs. Kimber, Fed. Cas. No. 8402; Reiner vs. Schroeder, *supra* (39); Brewster vs. Shoemaker, *supra* (10); McMillen vs. Ferrum Co., *supra* (10).

[91] Bunte, 41 L. D. 520.

[92] Chrisman vs. Miller, *supra* (5); Hawley vs. Romney, *supra* (10); Steele vs. Tanana Co., *supra* (3); Lange vs. Robinson, *supra* (3); Charlton vs. Kelly, 2 Alaska 541; Charlton vs. Kelly, *supra* (12); Cook vs. Johnson, *supra* (11); Nevada Sierra Oil Co. vs. Home Oil Co., *supra* (3). The question of discovery sufficient to support a lode location is one of fact, and a finding by the trial court that no discovery had been made on the claim will not be disturbed on appeal where the evidence was conflicting, and the rule is not affected by the fact that both parties were claiming the ground in dispute as being mineral. Ebner Co. vs. Alaska-Juneau Co., *supra* (59); see, also, Waterloo Co. vs. Doe, *supra* (2).

[93] Cole vs. Ralph, *supra* (4); Independent Co. vs. Levelle (on rehearing), 50 L. D. 8; see Creede Co. vs. Uinta Co., *supra* (7); Magruder vs. O. & C. Co., 28 L. D. 174; Mutchmor vs. McCarty, *supra* (10); Strepy vs. Stark, *supra* (7); Fox vs. Myers, *supra* (10); Round Mt. Co. vs. Round Mt. Co., *supra* (10). The proof must show a discovery and it will not be presumed that a discovery was made from proof of a record of the location and the marking on the ground. Smith vs. Newell, 86 Fed. 60. See Del Monte Co. vs. Last Chance Co., *supra* (17); Cole vs. Ralph, *supra* (4); *but see* Harris vs. Equator Co., 8 Fed. 863; Cheesman vs. Shreeve, 40 Fed. 791; Cheesman vs. Hart, 42 Fed. 98; Vogel vs. Warsing, 146 Fed. 949; Thomas vs. South Butte Co., 211 Fed. 105; Ralph vs. Cole, 249 Fed. 81. The dissenting opinion of Judge Gilbert in the case last cited distinguishes Vogel vs. Warsing, *supra*. This dissenting opinion is practically adopted on appeal in the case of Cole vs. Ralph, *supra*.

[94] Eilers vs. Boatman, 111 U. S. 356; Hammer vs. Garfield, 130 U. S. 291; Bennett vs. Harkrader, 158 U. S. 441; Book vs. Justice Co., *supra* (8); Meydenbauer vs. Stevens, *supra* (51); Charlton vs. Kelly, *supra* (12); Hall vs. McKinnon, *supra* (3); Campbell vs. McIntyre, *supra* (3); Yreka Co. vs. Knight, 133 Cal. 544, 65 Pac. 1091. See, also, Du Prat vs. James, 65 Cal. 555, 4 Pac. 562; McCleary vs. Broaddus, 14 Cal. A. 60, 111 Pac. 125. The existence of natural or fixed monuments and the sufficiency of the description of mining locations are questions of fact to be determined as other questions of fact. Slothower vs. Hunter, 15 Wyo. 200, 88 Pac. 36; see Bonanza Co. vs. Golden Head Co., 29 Utah 159, 80 Pac. 736.

[95] Nichols vs. Williams, *supra* (37). See Multnomah Co. vs. U. S., *supra* (17).

[96] Big Three Co. vs. Hamilton, 157 Cal. 130, 107 Pac. 301; Gear vs. Ford, 4 Cal. A. 556, 88 Pac. 600.

tially parallel or not, are questions of fact.[97] In these cases the patent is conclusive evidence.[98]

Whether a particular vein or lode is one that a discoverer could obtain title thereto under the mining law is a question of fact to be determined as such.[99] In a case involving the extralateral right the question within which claim the apex of the vein or lode in dispute is situate may be determined by the court[100] or a jury.[101] Whether a vein or lode exists within the boundaries of a placer claim at the time of making application for a patent is a question of fact which the locator has a right to have tried as such.[102]

What constitutes the use of land as a mill site for "mining and milling purposes" so as to entitle a party to a patent is a mixed question of law and fact.[103]

The question whether land is mining land, or valuable for mining, is one of fact, which is the peculiar province of the land department to determine before the patent issues. The issuance of such patent is conclusive in the absence of fraud, mistake, or imposition.[104]

§ 619. Sale Before Discovery.

A sale unaccompanied by a writing, by a joint locator to the other locators or to other persons after marking the claim and before discovery,[105] or a transfer of part of a location after discovery and before fully marking the claim carries no loss in the claim to the purchaser.[106]

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[97] Cheesman vs. Hart, 42 Fed. 98.

[98] Doe vs. Waterloo Co., 54 Fed. 935.

[99] Iron Co. vs. Mike & Starr Co., *supra* [12]; Charlton vs. Kelly, *supra* [12]; Columbia Co. vs. Duchess Co., *supra* [10]; Blue Bird Co. vs. Largey, 49 Fed. 290; Illinois Co. vs. Raff, *supra* [64]; Bullion Beck Co. vs. Eureka Co., 5 Utah 3, 11 Pac. 519. What constitutes an apex is a question of law. Blue Bird Co. vs. Largey, *supra*; Illinois Co. vs. Raff, *supra*. See Jim Butler Co. vs. West End Co., *supra* [1]. Where the invalidity of a mining location is alleged and the ownership of the apex is a controlling fact in determining its validity the land department has jurisdiction to inquire whether the apex of the discovery vein is within the claim attacked. U. S. Borax Co., 151 L. D. 464.

[100] See Waterloo Co. vs. Doe, 82 Fed. 45, wherein the court held that a jury trial had been waived. See, also, El Dora Oil Co. vs. U. S. 229 Fed. 946. In Hickey vs. Anaconda Co., 33 Mont. 46, 81 Pac. 806, it was held that in a suit to determine extralateral rights a jury trial is not a matter of right.

[101] Bluebird Co. vs. Largey, *supra* [99]; Campbell vs. Golden Cycle Co., 141 Fed. 610; Golden Cycle Co. vs. Christmas Co., 204 Fed. 940; Illinois Co. vs. Raff, 7 N. M. 336, 34 Pac. 544.

[102] Iron Co. vs. Campbell, 135 U. S. 293; N. P. R. Co. vs. Cannon, 54 Fed. 259.

[103] S. P. Mines vs. Valcalda, 79 Fed. 886; Cleary vs. Skiffich, *supra* [12]; Hartman vs. Smith, 7 Mont. 19, 14 Pac. 648.

[104] Standard Co. vs. Habishaw, *supra* [75]. See Southern Dev. Co. vs. Enderson, *supra* [75]; U. S. vs. Schultz, 31 Fed. (2d) 764.

[105] Miller vs. Chrisman, *supra* [5]; Union Oil Co., vs. Smith, *supra* [7]; Rooney vs. Barnette, *supra* [29]; U. S. vs. Stockton Midway Oil Co., *supra* [5]; U. S. vs. Thirty-two Oil Co., 242 Fed. 730; U. S. vs. Rock Oil Co., *supra* [30]; U. S. vs. Standard Oil Co., 265 Fed. 751; *but see* Chanslor Canfield Co. vs. U. S., 266 Fed. 145; Merced Oil Co. vs. Patterson, *supra* [68]; Hullinger vs. Big Sespe Oil Co., *supra* [29]; Whiting vs. Straup, *supra* [20]; *but see* Yard, *supra* [68]; Bakersfield Co., 39 L. D. 460; Bay vs. Oklahoma Co., *supra* [26].

In Merced Oil Co. vs. Patterson, *supra*, the court held that a mining claim could be made the subject of conveyance by the locators as well before as after discovery. That where part of an "association placer claim" was conveyed to a third person who agreed to and did complete the location, that the discovery made upon the segregated portion of the claim inured to the benefit of the part not conveyed, and that the eight associates obtained rights thereto as against a subsequent locator. Merced Oil Co. vs. Patterson, 162 Cal. 358, 122 Pac. 950, and, see, also, Hodgson vs. Midwest Oil Co., 17 Fed. (2d) 75, and cases therein cited.

See Act of March 2, 1911, 36 Stats. 1015, as to the transfer of oil and gas lands prior to discovery.

[106] Doe vs. Waterloo Co., *supra* [98] (a verbal transfer); Rooney vs. Barnette, *supra* [29]; Miller vs. Chrisman, *supra* [26].

See § 582.

§ 620. Sale After Discovery.

A sale of that portion of an unpatented location which contains the discovery does not invalidate the remaining portion of the claim.[107]

§ 621. Estoppel of Locator.

A person locating a mining claim as provided by law is, after a sale and transfer of such claim to a third person, estopped from denying that he was the owner of and entitled to the possession of such claim when transferred to such third person, and also is estopped from denying that he had located the claim in accordance with law.[108]

§ 622. Estoppel of Owner by Silence.

The rule of estoppel of owner by silence is not the making of improvements, or expending money on another's property, which entitles the person so expending to hold the property, or even the improvements; but it is the fraud of the owner, who silently or otherwise, encourages the expenditure. But this fraud only exists, at the very most, where the owner knows that the other person is making the expenditures, and also knows that he makes them under the *bona fide* reasonable belief that he is the owner of the property.[109]

§ 623. Patent.

The issuance of a patent for a mining claim evidences discovery, proper location, marking, posting of notice, recording thereof, requisite expenditure, notice of application, and that all other steps to acquire patent, required by law, were regularly taken.[110] A patent can not be issued based upon a discovery made after application therefor.[111] Where that portion of the claim entered, upon which are situate the discovery and improvements is excluded from the entry, it is incumbent on the claimant to show a discovery and the required expenditure upon the claimed ground.[112]

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[107] Little Pittsburg Co. vs. Amie Co., *supra* (37); Tonopah Co. vs. Tonopah Co., 125 Fed. 415, *supra* (45); *but see* Gwillin vs. Donnellan, *supra* (17); see Zeckendorf vs. Hutchinson, 1 N. M. 476.

[108] Belcher Co. vs. Defarrari, 61 Cal. 162; see, also, Blake vs. Thorne, *supra* (94); Drake vs. Gilpin, 16 Colo. 231, 27 Pac. 708; McCarthy vs. Speed, 11 S. Dak. 362, 77 N. W. 590; and see Philes vs. Hickies, 2 Ariz. 407, 18 Pac. 595; Shreve vs. Copper Bell Co., 11 Mont. 309, 28 Pac. 315.

[109] McGarrity vs. Byington, 12 Cal. 431. In Pacific Co. vs. Pioneer Co., 205 Fed. 577, it is said that expenditures made by a trespasser on a mining claim with knowledge of owner but against his warnings, did not estop latter to assert his title.

See Highland Boy vs. Strickley, 116 Fed. 852, holding that mere acquiescence of the owner of mining property in a continuing trespass of a wrongdoer, does not deprive him of his right to maintain ejectment for the possession of his property at any time within the limit prescribed for such actions by statute.

See, also, South Penn. Oil Co. vs. California Oil Co., 140 Fed. 507.

Where plaintiff occupied a mining claim under a lease from the owner, agreeing in part consideration to procure a patent therefor in the owner's name, he was estopped to deny the latter's right to the ground covered by the lease on the ground that the only discovery of mineral thereon was at a place substantially the discovery point of another and subsisting location. Bunker Hill Co. vs. Pascoe, *supra* (37).

[110] N. P. R. Co. vs. Cannon, *supra* (102); Last Chance Co. vs. Tyler Co., 61 Fed. 563; see 157 U. S. 733.

[111] See U. S. vs. Bunker Hill Co., *supra* (18).

[112] Antediluvian Mill Site, 8 L. D. 602; Independent Lode, 9 L. D. 571; Lone Dane Lode, *supra* (43); Winter Lode, 22 L. D. 362; Robbins, 42 L. D. 481; Star Co., 47 L. D. 38; Girard vs. Carson, 22 Colo., 345, 44 Pac. 508; see Silver City Co. vs. Lowry, 19 Utah 334, 57 Pac. 11.

CHAPTER XXX.

DRAINAGE.

§ 624. Federal Provision.

The federal mining law provides that "As a condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent."[1]

§ 625. State Legislation.

The rules and easements so intended to be authorized were evidently such as should be enacted in accordance with the fundamental law of the state or territory. In other words, congress can not ignore state constitutions and authorize local legislatures, regardless of state constitutions, to pass laws providing for the working of mines, etc.[2] But in the absence of a state constitutional power to do so a state legislature has no power to authorize the taking of private property to be used by another for mining purposes, although the latter pay the former therefor.[3]

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[1] Rev. St. § 2338; 6 Fed. St. Ann. [2d. ed.], p. 590, § 2338. In the case of a quartz or drift mine drainage is an appropriate term, when applied to the means by which the water which is in them—always superfluous, and a hindrance to the work—is met and disposed of. Jacob vs. Day, 111 Cal. 571, 44 Pac. 243.

[2] People vs. District Court, 11 Colo. 147, 17 Pac. 301; see, also, 1 Lindl. Mines (3d ed.), p. 567, § 252, citing Clark vs. Nash, 198 U. S. 361; Strickley vs. Highland Boy Co., 200 U. S. 527; Jacob vs. Day, 111 Cal. 571, 44 Pac. 243; see, generally, Calhoun Co. vs. Ajax Co., 182 U. S. 499, aff'g. 27 Colo. 1, 59 Pac. 607; Woodruff vs. North Bloomfield Co., 18 Fed. 753; Baillie vs. Larson, 138 Fed. 177.

For a collection of state statutes providing for and regulating drainage of mines see Lindl. Mines (3d. ed.), p. 565, § 252.

[3] Gillan vs. Hutchinson, 16 Cal. 153.

See Eminent Domain.

CHAPTER XXXI.

EASEMENTS.

§ 626. Federal Grant of Easements.

The United States undoubtedly can grant easements, and other limited rights, in any portion of the public lands, and subsequent purchasers must take them burdened with such easements or other rights, but when it once has disposed of its entire estate in the lands of one party, it can, afterwards, no more burden it with other rights than any other proprietor of lands.[1]

[1] Amador Median Co. vs. South Spring Hill Co. 36 Fed. 668, see 145 U. S. 300. See, also, Woodruff vs. North Bloomfield Co., 18 Fed. 772; U. S. vs. Utah Co., 208 Fed. 821; Dower vs. Richards, 73 Cal. 477, 15 Pac. 107; Welch vs. Garret, 5 Ida. 639, 51 Pac. 405; Murray vs. City of Butte, 31 Mont. 177, 77 Pac. 527; Reeves vs. Oregon Co., 127 Or. 686, 273 Pac. 384.

In Broder vs. Water Co., 101 U. S. 274, it was said: "It is the established doctrine of this court that rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government has by its conduct recognized and encouraged and was bound to protect before the passage of the Act of 1866. We are of the opinion that the section of the act we have quoted (2339 Rev. Stats.) was rather a voluntary recognition of a pre-existing right of possession, including a valid claim to its continued use than the establishment of a new one," and holding that Broder, who had bought from the Central Pacific Company, took (with that company) subject to the easement of the water company over the lands sold. See, also, Wyoming vs. Colorado, 259 U. S. 461; Cramer vs. U. S., 261 U. S. 229, citing the Broder Case approvingly. Cruse vs. McCauley, 96 Fed. 372.

In the early case of Wilkinson vs. N. P. Ry. Co., 5 Mont. 538, 6 Pac. 349, where the railroad company had been granted the right for its road in 1864, and plaintiffs had acquired a patent to certain mining land, after many years occupation, the inception of their title, however, being subsequent by several years to that of the railroad company in an action for damages for trespassing on the mining claim of the plaintiffs by tearing up the mining ground and breaking up of ditches thereon in order to lay its track, the company was held to be within its rights and plaintiffs denied damages. See, also, Stepan vs. N. P. Ry. Co., 81 Mont. 361, 263 Pac. 425, an almost similar case, also involving a question of trespass by the defendant upon the patented mining claim of plaintiff by destroying its shaft, said claim being located subsequent to the railroad grant of right of way in 1875 and damage refused for same reason. In Doran vs. C. P. R. Co., 24 Cal. 245, the same principle is applied with reference to unpatented mining ground trespassed upon by the company for the same purpose. A patentee of mining land, over which an adjoining owner had for several years, by local custom and from necessity, maintained a ditch to carry detritus from an hydraulic mine to a river, took subject to the easement. Jacob vs. Day, 111 Cal. 571, 44 Pac. 243. The case of Rockwell vs. Graham, 9 Colo. 36, 10 Pac. 284, involved a right of way for a flume, and the court said that it is not "a right ground for an adverse claim being fully protected by the provisions of the federal laws. Rev. St. 2339, 2340." In Osgood vs. El Dorado Co., 56 Cal. 581, the court, in construing the act of congress of July 26, 1866, c. 262, 14 Stat. 251, relative to the prior appropriation of water upon the public land, and the amendatory act of July 9, 1870, c. 235, 16 Stat. 217, said: "The defendants' grantors, therefore, had the right to appropriate the water in controversy, and if they acquired a vested right therein prior to the issuance of the plaintiff's patent, the plaintiff's rights, by express statutory enactment, are subject to the rights of the defendant. This, of course, depends on the question whether the grantors of the defendant made a valid appropriation of the water, and this, in turn, on the question whether they gave proper notice of their intention to appropriate it, and, if so, whether they prosecuted the work in that behalf with reasonable diligence. If they gave sufficient notice, and prosecuted the work with reasonable diligence, there can be no doubt that, on the completion of the work, their rights related back at least to the commencement of the work." See, also, San Bernardino Bank vs. Jones, 207 Cal. 613, 271 Pac. 1103.

In Flint Co. vs. Gordon, 41 Mich. 420, 2 N. W. 648, a controversy as to the right of way for a railroad and the rights of a homestead entryman, the court said: "In this case there is what seems at first blush to be a conflict of grants. The defendant made his entry first, but the complainant completed its road over the land before the defendant obtained his patent. To acquire the benefit tendered by the Act of 1866, nothing more was necessary than for the road to be constructed. No patent is required in such cases, but the offer and acceptance, taken together, are equivalent to a grant. The complainant, therefore, by accepting the offer of the government, obtained a grant of the right of way, which was at least perfectly good as against the government, and must be held to be perfectly good as against this defendant

§ 627. State Statutes.

Unless a state statute imposing an easement upon mining claims is in accord with the state constitution, it can not be enforced by the courts.[2]

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unless his patent antedates it by relation, or unless the equities springing from his possession and improvement would preclude any right being acquired adversely."

These general principles are well settled. Miocene Ditch Co. vs. Jacobsen, 146 Fed. 683.

In Snyder vs. Colorado Co., 181 Fed. 70, the court said: "When the Mascot placer was patented to Wells, he took it subject to the easement therein which had been acquired under the congressional enactment by the construction and use of the original Galena ditch while the placer was still a part of the public lands, but that easement extended only to the maintenance and use of the ditch substantially as then constructed, for the purpose of diverting and carrying the volume of water theretofore appropriate, and did not give any right to enlarge the ditch, or to change its location, or to use it in diverting and carrying a largely increased volume of water. McGuire vs. Brown, 106 Cal. 660, 39 Pac. 1060; Westal vs. Young, 147 Cal. 715, 82 Pac. 381 (and other cases). Thus it was essential that the right so to alter the ditch and to enlarge its use be acquired through a grant from Wells or through a resort to appropriate condemnation proceedings. But as no such right was acquired, the change made in the ditch and its enlarged use were as unlawful and as much a trespass as would have been the construction and use of an entirely new ditch in the like circumstances. And not only was the increased water appropriation initiated by means of this trespass, but the maintenance and enjoyment of that appropriation are dependent upon a continuance of that trespass." See Schwab vs. Beam, 86 Fed. 41; Empire Co. vs. Cascade Co., 205 Fed. 123; Felsenthal vs. Warring, 40 Cal. A. 119, 180 Pac. 67. See St. Louis Co. vs. Montana Co., 113 Fed. 902, aff'd. 194 U. S. 235.

For a collection of state statutes prescribing the method of obtaining easements and rights of way for mining purposes, see 1 Lindl. on Mines (3d ed.), p. 566, §252.

[2] People vs. District Court, 11 Colo. 147, 17 Pac. 303; *but see* Baillie vs. Larson, 138 Fed. 177, aff'd. 152 Fed. 93. In Amador Queen Co. vs. Dewitt, 73 Cal. 482, 15 Pac. 74, dis. 145 U. S. 627, it is said that the plaintiff, a private corporation, owns two mining claims, and between them was located a mining claim owned by defendant, through which he had constructed a tunnel for his private use. This tunnel plaintiff sought to condemn, for the purpose of enabling it to work its mines. *Held* that plaintiff being a private corporation, the action could not be maintained under Code Civil Proc. Cal., § 1238, subd. 5; *but see* Monetaire Co. vs. Columbus Co., 50 Utah 413, 174 Pac. 173, where it was held the owner of a mining claim may condemn right to joint use of a tunnel for the purpose of transporting ore where tunnel is not being used by owner to full capacity. See, generally, Calhoun Co. vs. Ajax Co., *supra* [1]; Woodruff vs. North Bloomfield Co., *supra* [2]; Jacob vs. Day, *supra* [2].

See Eminent Domain.

CHAPTER XXXII.

EMINENT DOMAIN.

§ 628. Eminent Domain Vested in State

The federal government's general sovereignty of eminent domain within a state or territory is not delegated to the mining claimant, but the power of eminent domain is vested in the State, which may delegate it to corporations or individuals.[1]

§ 629. Constitutional Provision.

The power to exercise the right of eminent domain by a mining claimant exists solely by virtue of a local constitutional provision declaring mining to be a public use.[2] Where none such exists a local legislature has no power to authorize the taking of private property for mining purposes.[3]

§ 630. Public Use and Public Welfare.

There is a tendency to break away from the old rigid rules on the subject of "public use" and to enlarge[4] the definition of the term

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[1] See Kohl vs. U. S., 91 U. S. 367; aff'g. Fed. Cas. 15441; 54 A. L. R. 22, note; Jones vs. U. S., 48 Wis. 367; 4 N. W. 519; Kansas City Co. vs. Sevier Co., 171 Ark. 90, 286 S. W. 1035, 287 S. W. 405; Gilman vs. Lime Point, 18 Cal. 229; Moran vs. Ross, 79 Cal. 160, 21 Pac. 547; Desert Co. vs. State, 167 Cal. 147, 138 Pac. 981; Smith vs. Cameron, 106 Or. 1, 210 Pac. 716; dis. 145 U. S. 627; Id., 123 Or. 501, 262 Pac. 946; *but see* U. S. vs. O'Neill, 198 Fed 677.

Land of the United States within a state, which is not used or needed for a governmental purpose, is subject to the jurisdiction, powers, and laws of the state in the same manner and to the same extent as similar lands of others. Broder vs. Water Co., 101 U. S. 274; Kansas vs. Colorado, 206 U. S. 46; McGilvra vs. Ross, 215 U. S. 70; Woodruff vs. North Bloomfield Co., 18 Fed. 753; People vs. Shearer, 30 Cal. 658. See, also, U. S. vs. Chicago, 7 How. 185; Jones vs. Florida Co., 41 Fed. 70; State vs. Batchelder, 5 Minn. 223; Simonson vs. Thompson, 25 Minn. 453; Burt vs. Merchants' Co., 106 Mass. 360; *but see* Utah Co. vs. U. S., 242 U. S. 404.

[2] See Clark vs. Nash, 198 U. S. 361; aff'g. 27 Utah 158, 75 Pac. 371; Marsh vs. Inland Co., 30 Ida. 1, 165 Pac. 1128; see Smith vs. Cameron, *supra* [1].

[3] Con. Channel Co. vs. C. P. R. Co., 51 Cal. 269; People vs. Pittsburgh Co., 53 Cal. 694; Lorenz vs. Jacob, 63 Cal. 73; Amador Queen Co. vs. De Witt, 73 Cal. 482, 15 Pac. 74; dis. 145 U. S. 627. Sutter County vs. Nichols, 152 Cal. 688, 93 Pac. 872, 14 Ann. Cas. 900; Gravelly Ford Co. vs. Pope & Talbot Co., 36 Cal. A. 556, 178 Pac. 150, 54 A. L. R. 15, note; see Riverside County vs. Alberhill, 34 Cal. A. 538, 168 Pac. 152; People vs. District Court, 11 Colo. 147, 17 Pac. 298; see Strickley vs. Highland Boy Co., 200 U. S. 527, aff'g. 28 Utah 215, 78 Pac. 296; Northern Co. vs. Alaska Co., 20 Fed. (2d) 5.

For cases denying eminent domain—mining—see 54 A. L. R. 63, note.

See Utah Co. vs. Montana-Bingham Co., 69 Utah 423, 255 Pac. 672. In California a private property may not be taken or damaged for private use. It may be taken only for public use after just compensation made or paid. Const. art. 1, § 14. In Con. Channel Co. vs. C. P. R. Co., *supra*, the question of the constitutionality of subdivision 5 of § 1238 of the Code of Civil Procedure authorizing the exercise of eminent domain among other things of "tunnels, ditches, flumes, pipes and dumping places for working mines; also outlets, natural or otherwise for the flow, deposit or conduct of tailings or refuse matter from the mines," and the court held that this case (wherein it was sought to condemn a site for a bed rock flume, etc.) does not come within the meaning of that clause of the constitution which permits the taking of private property for a public use after just compensation made." See, also, Northern Co. vs. Alaska Co., *supra*. In Amador Co. vs. DeWitt, *supra* [3], the court said: "The plaintiff can not have a right of way through defendant's mine condemned for its use in working its own mine. The mine of defendant is his private property, and it is clear that the plaintiff asks for the condemnation in order that it may appropriate a way through that property for its private use. This can not be done." In other words, it has been uniformly held in California that the power of eminent domain can not be used by a private person to promote private enterprises, no matter how necessary or advantageous it may be to their successor or how beneficial to the public. Gravelly Ford Co. vs. Pope & Talbot Co., *supra; but see* Headrick vs. Larson, 152 Fed. 93.

[4] Monetaire vs. Columbus Co., 53 Utah 413, 174 Pac. 172; Westport Co. vs. Thomas, 175 Ind. 319, 94 N. E. 406; Cottrell vs. Chicago Co., 192 Ind. 694, 138 N. E. 594; Headrick vs Larson, *supra* [3]; see Smith vs. Cameron, *supra* [1].

so as to make it synonymous with "public welfare," and the test of "public welfare" instead of the old doctrine of "public use" is being gradually extended in most jurisdictions. Some courts have gone to the extent of holding that "public use" is synonymous with "public benefit," "public utility," or "public advantage." Striking illustrations of this view are furnished in Nash vs. Clark,[5] Highland Boy Co. vs. Strickley,[6] Oury vs. Goodwin,[7] Ellinghouse vs. Taylor,[8] and Dayton Co. vs. Seawell.[9] These authorities go upon the theory that when one of the natural resources of a state is of such magnitude that its development will very materially contribute to the general welfare, then whatever is necessary because of climatic or soil conditions and the like to make it possible to accomplish such development may be a public use. The result capable of being attained determines the nature of the use. For example, Utah is rich in minerals, and so it has been held that the owner of a quartz mine can condemn the right to maintain an aerial tramway over placer ground owned by another, notwithstanding the tramway is to be used for no purpose whatsoever except to carry ores from the mine to the smelter and to convey to the mine whatever is needed for its operation. A similar doctrine prevails in Nevada.[10]

§ 631. When Mining a Public Use.

Where mining is expressly declared by the constitution of a state to be a public use, as in Arizona,[11] Colorado,[12] Idaho,[13] Montana,[14] Nevada,[15] Oregon,[16] Tennessee,[17] Utah,[18] West Virginia,[19] Wyoming,[20] a local statute authorizing the taking of land by a mining corporation, or by a miner, for mining purposes, as, for instance, a subterranean right of way through another's mining claim,[21] or for a tailings pond,[22] or the right to joint use of a tunnel to transport ores, where the tunnel is not used to full capacity by the owner,[23] or flooding the land by a reservoir and for the purposes of irrigation,[24] is a taking for a public use.

§ 632. Invasion of Neighboring Property.

A person is bound by law to so conduct his business as that it shall not be derogatory to the private rights of other property owners. In

[5] *Supra* (2).
[6] *Supra* (3).
[7] 3 Ariz. 255, 26 Pac. 376.
[8] 19 Mont. 462, 48 Pac. 757. See Eastern Oregon Co. vs. Willow River Co., 204 Fed. 516.
[9] 11 Nev. 394.
[10] See Strickley vs. Highland Boy Co., *supra* (3); Dayton Co. vs. Seawell, *supra* (9); Smith vs. Cameron, *supra* (1).
[11] Inspiration Co. vs. New Keystone Co., 16 Ariz. 257, 144 Pac. 277.
[12] Trippe vs. Overaker, 7 Colo. 72, 1 Pac. 695; Downing vs. Moore, 12 Colo. 316, 20 Pac. 766; see People vs. District Court, *supra* (3); Tanner vs. Treasury Co., 35 Colo. 593, 83 Pac. 464.
[13] Marsh Co. vs. Inland Empire Co., *supra* (2). See, also, Bunker Hill Co. vs. Polak, 7 Fed. (2d) 583; Blackwell vs. Empire Co., 28 Ida. 556, 155 Pac. 189.
[14] Helena Co. vs. Spratt, 35 Mont. 108, 88 Pac. 773; Kipp vs. Davis, 41 Mont. 509, 110 Pac. 237.
[15] Byrnes vs. Douglass, 83 Fed. 45; aff'g. 59 Fed. 29; Dayton Co. vs. Seawell, *supra* (9); Overman Co. vs. Corcoran, 15 Nev. 147; Goldfield Co. vs. Old Co., 38 Nev. 426, 150 Pac. 313.
[16] Apex Co. vs. Garbide, 32 Or. 582, 52 Pac. 367.
[17] Alfred Phosphate Co. vs. Duck River Co., 120 Tenn. 260, 113 S. W. 410.
[18] Strickley vs. Highland Boy Co., *supra* (3).
[19] Valley City Co. vs. Brown, 7 W. Va. 191.
[20] Laws, 1920, §§ 4380, 4893.
[21] Byrnes vs. Douglass, *supra* (15); Monetaire vs. Columbus Co., *supra* (4).
[22] Goldfield Co. vs. Old Co., *supra* (15).
[23] Strickley vs. Highland Boy Co., *supra* (3); Monetaire vs. Columbus Co., *supra* (4); Headrick vs. Larson, *supra* (3).
[24] Helena Co. vs. Spratt, *supra* (11).

mining pursuits a mine owner is entitled to use his mining claim in a lawful manner; but no manner can be considered lawful which precludes another from the enjoyment of his rights. No person, natural or artificial, has a right, directly or indirectly, to cover his neighbor's land with mining debris, sand, and gravel, or other material, so as to render it valueless.[25] If he do so it is a "taking"[26] from which an implied contract to make just compensation arises,[27] without any express constitutional provision affecting the right of eminent domain, and which may be compensated for by damages in an action in trespass or nuisance in conjunction with possible injunctional proceedings;[28] the title to the land remaining in the land owner.[29] It makes no practical difference how careful a miner may be in working his mine, if he actually injures his neighbor's property, he is responsible, notwithstanding the efforts he makes or means he uses to prevent such injury.[30] The doctrine of necessity which frequently has been invoked, in justification of injuries of this character, has no application.[31]

§ 633. Condemnation for More Necessary Public Use.

Property devoted to, or held for a public use is subject to the power of eminent domain if the right to so take it is given by constitutional provision or legislative enactment, in express terms or by clear implication, but it can not be taken to be used in the same manner and for the

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[25] Hobbs vs. Amador Co., 66 Cal. 161, 4 Pac. 1147; Dripps vs. Allison's Co., 45 Cal. A. 98, 187 Pac. 448; see Bunker Hill Co. vs. Polak, *supra* (13); Carson vs. Hayes, 39 Or. 97, 65 Pac. 814.

"Where the land of the lower locator is actually invaded by 'tailings,' 'slickens,' or other material from the claim of the upper locator, it makes no difference how carefully the latter may have worked his mine. His liability does not depend upon negligence in the construction or use of his property. If his work in fact injures the property of another, he is none the less liable, be he ever so cautious or careful to avoid injurious consequences. (Hill vs. Smith, 27 Cal. 476; Levaroni vs. Miller, 34 Cal. 231; Fitzpatrick vs. Montgomery, 20 Mont. 188, 50 Pac. 416; Salstrom vs. Orleans Bar Co., 153 Cal. 551, 96 Pac. 292.) What we have said respecting defendant's liability for the tailings carried down upon plaintiff's claim applies with equal force to the rocks and boulders that were caused to roll down the steep sides of the gulch by reason of the trail constructed by defendants, thereby endangering the life of any person who might attempt to work the claim, and seriously impair it, if not utterly destroy its value for mining purposes. As was said in Pumpelly vs. Green Bay Co., *supra* (20), 'Where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the constitution.'" See, also, Dripps vs. Allison's Co., *supra* (25); Galbreath vs. Hopkins, *supra* (28); Kall vs. Caruthers, 59 Cal. A. 555, 211 Pac. 43; see, also, Sussex Co. vs. Midwest Co., 294 Fed. 597, aff'g. 276 Fed. 947; *but see* Sutliff vs. Sweetwater Co., 182 Cal. 34, 186 Pac. 766, wherein the court said: "Invariably a recovery has been allowed or refused according as the defendant is found to be negligent or not." See this case for a discussion of authorities both for and against the rules stated in the text.

See, also, Green vs. Gen. Petroleum Corp., 205 Cal. 328, 270 Pac. 952, superseding 262 Pac. 377, wherein it is said that where an oil well was drilled with proper precautions to prevent explosion of gas and without negligence in any other respect, a neighboring property owner was not entitled to recover for having mud and oil thrown on his premises by explosion in nature of accident.

See Flooding of Mines.

[26] Pumpelly vs. Green Bay Co., 80 U. S. 166; see, also, U. S. vs. Lynah, 188 U. S. 470; U. S. vs. Cress, 243 U. S. 320; Jackson vs. U. S., 31 Ct. Cl. 318; Williams vs. U. S., 104 Fed. 53; Hewitt Lea Co. vs. King Co., 113 Wash. 436, 194 Pac. 377; *certiorari*, denied, 257 U. S. 622.

[27] See *supra*, note 26, and Hill vs. Smith, 27 Cal. 476; Levaroni vs. Miller, *supra* (25).

[28] Galbreath vs. Hopkins, 159 Cal. 297, 113 Pac. 174.

[29] Kall vs. Carruthers, *supra* (25); *but see* U. S. vs. Lynah, *supra* (26).

[30] Merriam vs. U. S., 29 Ct. Cl. 250; see, also, *supra*, note 25.

[31] Carson vs. Hayes, *supra* (25).

See Flooding of Mines.

same purpose to which it is already being applied, or for which it is in good faith, being held, if by so doing that purpose will be defeated.[32]

§ 634. Right of Way.

The condemnation of a right of way over mineral land confers no interest in the land nor the minerals thereunder but only a right of way across it. Should the condemner abstract such minerals the mine owner could recover their value in an action for damages for their conversion or he could maintain an action in claim and delivery for their possession to the same extent as against any other trespasser.[33]

§ 635. Burden of Proof.

In a proceeding to condemn property the burden of proof rests upon the condemner to show that the asserted use is a public use and that its existence is necessary in the particular case.[34]

§ 636. Compensation.

The measure of damages to which a property owner is entitled in condemnation is the market or actual value of the property plus the damage to the land not taken, if any. In estimating this value "the test is not value for a special purpose, but fair value in view of all purposes to which the property is naturally adapted."[35] Such uses, however, do not include remote or speculative possibilities,[36] or the value if the property should be devoted to some other particular use.[37]

§ 637. Alaskan Provisions.

Under the provisions of the Alaskan statutes a corporation may be authorized by its charter to appropriate water and water rights and

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[32] Marsh Co. vs. Inland Empire Co., *supra* (2). In this case the court said: "It was not the intention of the framers of the constitution, nor of the legislature, that the power of eminent domain be so invoked that one mine will be developed and thereby another be destroyed, nor that one mine owner be enriched and another be impoverished. The act of eminent domain is extended to the industry, not to the individual." See, also Kansas City Co. vs. Sevier Co., *supra* (1); Ketchum Co. vs. Pleasant Valley Co., 50 Utah 395, 168 Pac. 86; Utah Co. vs. Montana-Bingham Co., *supra* (3).

[33] Midland Co. vs. Coon, 21 Fed. (2d) 96; S. P. R. Co. vs. San Francisco Savings Union, 146 Cal. 290, 79 Pac. 961; N. P. R. Co. vs. Forbis, 15 Mont. 452, 39 Pac. 571; see Hays vs. Walnut Creek Co., 75 W. Va. 263, 83 S. E. 900. It would seem that when the condemner has acquired the right to the minerals under the right of way, the barrier so created between the owner's mining property on either side thereof, the latter has the right to make passages under the right of way to work the minerals so situate. Midland Co. vs. Miles, L. R. 30 Ch. Div. 634; S. P. R. Co. vs. San Francisco Savings Union, *supra*.

As to condemnation for forestry purpose of a right of way of power transmission lines held by a power company see U. S. vs. Southern Power Co., 31 Fed. (2d) 852.

[34] Monetaire vs. Columbus Co., *supra* (4). See Montana Co. vs. Warren, 6 Mont. 275, 12 Pac. 641, approved in Monongahela Co. vs. Monongahela Co., 101 W. Va. 165, 132 S. E. 384.

[35] 10 Cal. Jur., p. 338, § 54; People vs. Marblehead Co., 82 Cal. A. 289, 255 Pac. 553; see Idaho Co. vs. Brackett, 36 Ida. 748, 213 Pac. 696, 257 Pac. 35.

[36] Yolo Water Co. vs. Hudson, 182 Cal. 53, 186 Pac. 772.

[37] Sacramento Co. vs. Heilbron, 156 Cal. 409, 104 Pac. 979; Oakland vs. Pacific Coast Co., 171 Cal. 400, 153 Pac. 705; Oakland vs. Parker, 70 Cal. A. 295, 233 Pac. 68; Los Angeles vs. Hyatt, 79 Cal. A. 272, 249 Pac. 221. See Joslin Co. vs. Providence, 262 U. S. 675, citing Oakland vs. Pacific Coast Co., *supra*; Idaho Co. vs. Brackett, *supra* (35). A railroad company appropriated a strip of land for a right of way over a mining claim. The mining company was entitled to recover whatever damages it might suffer by reason of the appropriation of the right of way and the railroad company could not escape liability nor mitigate the damages by permitting or offering to permit the mining company to use a part of the appropriated land for dumping purposes. Bingham Co. vs. North Utah Co., 40 Utah 125, 162 Pac. 68.

their appurtenances, etc., and to acquire land for a public pipe line to supply water for mining.[38] The right of eminent domain also may be exercised in behalf of mines within that territory.[39]

§ 638. Electric Power.

The generation of electric power for distribution and sale to the public is a public use.[40]

§ 639. Distinction Between Public and Private Use.

The distinction between public and private use of hydroelectric power plants and rights of way acquired for use in connection therewith has often been recognized in cases involving the appropriation, distribution, and use of water.[41]

§ 640. No Ouster.

When a public service corporation, having the power of eminent domain, constructs its plant upon the land of another, without condemnation or agreement, but without objection from the owner, the public service corporation will not be ousted either by ejectment or injunction, the owner's remedy being limited to damages measured by the reasonable value of the land.[42]

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[38] 34 Stats. 1070; Miocene Co. vs. Lyng, 138 Fed. 544; see Miocene Co. vs. Jacobsen, 146 Fed. 680; *but see* Northern Co. vs. Alaska Co., *supra* [(3)].

[39] Carter's Code, § 204.

[40] Mt. Vernon Co. vs. Alabama Co., 240 U. S. 30; Walker vs. Shasta Co., 160 Fed. 856. See Cal. C. C. P., § 1238, subds. 12, 13. See Seneca Con. Co. vs. Great Western Power Co., ___ Cal. ___, 287 Pac. 93.

[41] Hildreth vs. Montecito Co., 139 Cal. 28, 72 Pac. 395; Thayer vs. California Co., 164 Cal. 117, 128 Pac. 21; Story vs. Richardson, 186 Cal. 167, 198 Pac. 1057, construing "Public Utilities Act," Stats. 1915, pp. 115, 117, 118.

[42] Roberts vs. N. P. R. Co., 158 U. S. 39; N. P. R. Co. vs. Smith, 171 U. S. 260; Donohue vs. El Paso Co., 214 U. S. 499; Kamper vs. Chicago, 215 Fed. 706. See Young vs. Vallejo Co., 202 Cal. 327, 262 Pac. 327. See, also, New York vs. Pine, 185 U. S. 93; West vs. Octoraro Co., 159 Fed. 528; McCann vs. Chasm Co., 211 N. Y. 301, 105 N. E. 416, holding that even where the public service corporation has not the power to condemn the property in question equity will not restrain it from maintaining or operating its plant, but merely will require it to pay damages, measured by the reasonable value of the land.

CHAPTER XXXIII.

FIXTURES.

§ 641. Defined.

A "fixture" is an article which may or may not actually be affixed to the freehold as, for instance, engines, boilers, hoisting works, mills, pumps, electric hoist firmly bolted to the substructure upon which it rests, the superstructure and engine-house sufficiently affixed to the soil for mining purposes, a gallows frame together with the gallows and transformers forming integral parts of one mechanism. So, derricks, belt-houses, wells, oil well casing, tanks, pump-house, camp-house and bunk-house, affixed to the land become a part of the realty.[1]

[1] Jeffrey Co. vs. Mound Co., 215 Fed. 222, 240 Fed. 412; Otis Co. vs. Palmetto Co., 237 Fed. 769; Big Sespe Oil Co. vs. Cochran, 276 Fed. 225; Arizona Co. vs. Bolman, 15 Ariz. 504, 140 Pac. 490; Merritt vs. Judd, 14 Cal. 59; Conde vs. Sweeney, 16 Cal. A. 157, 116 Pac. 32; see Randolph Co. vs. Stevenson, 65 Cal. A. 7, 222 Pac. 849; Horn vs. Clark, 54 Colo. 522, 131 Pac. 405; Roseville Co. vs. Alton Co., 15 Colo. 29, 24 Pac. 920; Puzzle Co. vs. Morse, 21 Colo. A. 74, 131 Pac. 791; Treadway vs. Sharon, 7 Nev. 37; Arnold vs. Goldfield Co., 32 Nev. 447, 109 Pac. 718; Washburn vs. Inter-Mountain Co., 56 Or. 578, 109 Pac. 382; Robinson vs. Harrison, 227 Pa. St. 613, 85 Atl. 879.

In California, sluice boxes, flumes, hose, pipes, railway tracks, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are deemed to be affixed to the mine. Cal. C. C., § 661; Malone vs. Big Flat Co., 76 Cal. 578, 18 Pac. 772. But this Code provision was not intended to apply to petroleum oil operations, though the development and production of such oil for some purposes is classed as mining. Cortelyou vs. Baker, 182 Cal. 168, 187 Pac. 417. See, Gartland vs. Hickman, 56 W. Va. 85, 49 S. E. 14. The casing of an oil well and other necessary appliances and machinery for pumping a well on the leased premises are trade fixtures and removable by owner during the term of the lease. Robinson vs. Harrison, *supra*. In Sunburst Co. vs. Callender, 84 Mont. 178, 274 Pac. 834, it is held that casings, derricks, engines, machinery and appliances for testing and developing and operating for oil and gas are trade fixtures, which can be removed during the lease at any time or within a reasonable time thereafter. But casing can not be removed from a producing well. See Conrad vs. Saginaw Co, 54 Mich. 249, 20 N. W. 39; Mickle vs. Douglas, 75 Iowa 78, 39 N. W. 198; *but see* Gartland vs. Hickman, *supra*. Improvements placed upon a mining location by the original locator or his grantee if they fall within the class designated as fixtures, become a part of the realty and the subsequent adverse appropriation of the land carries with it, necessarily, whatever may be affixed to it, and while prior to the determination of his estate by the perfection of an adverse relocation the prior locator or his grantee may sever and remove all machinery, buildings, and other improvements which, by the manner of their attachment to the soil, have become a part of the freehold, his right of entry for that purpose ceases when the rights flowing from the original location is terminated. Watterson vs. Cruse, 179 Cal. 379, 176 Pac. 870. In determining whether personal property attached to land becomes a part of the realty there are three general tests which may be applied, first, annexation to the realty, either actual or constructive; second, adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and, third, intention to make the article a permanent accession to the freehold. Breyfogle vs. Tighe, 58 Cal. A. 305, 208 Pac. 1008, citing 11 R. C. L. 1059. See, also, county of Placer vs. Lake Tahoe Co., 58 Cal. A. 782, 209 Pac. 900. A chattel may remain such as to the vendor although attached to the realty when it is the subject of a conditional sale, but as a fixture against everyone except the seller, and a judgment creditor of the buyer and a purchaser at an execution sale may not claim the property as personal property by virtue of the contract of sale. Arnold vs. Goldfield Co., *supra*; see, Seward Co., 242 Fed. 225; *certiorari* denied, 245 U. S. 651; Craig Co., 269 Fed. 755; Blanchard vs. Eureka Co., 58 Or. 37, 113 Pac. 55. The rights of a conditional vendor of machinery and material, placed by the vendee on mining property leased by it, were paramount and superior to the landlord's rights under his contingent lien for rent, though the contract of conditional sale was not recorded, where such machinery and material were not so intimately embodied in the other property of the lessee as to cause more or less disintegration of the tenant's property from the removal thereof. Jeffrey Co. vs. Mound Co., *supra*, citing Holt vs. Henley, 232 U. S. 637; Detroit Co. vs. Sistersville Co., 233 U. S. 712; First Natl. Bank vs. Bank, 262 Fed. 755. For the distinction between the word "improvement" and the word "fixtures" see Siegloch vs. Iroquois Co., 106 Wash. 632, 181 Pac. 51; see, Conde vs. Sweeney, *supra*; and see, American Fork Co., 291 Fed. 746.

§ 642. Intention of Parties.

The intention of the parties is a circumstance of importance under the law of fixtures.[2]

§ 643. Relocator's Rights.

All fixtures upon an abandoned or forfeited mining claim become the property of the relocator.[3]

§ 644. Lessee's Right of Removal.

Under a lease giving the right to remove any and all buildings and machinery from the leased premises within a reasonable time after the termination of the lease any property placed upon the premises by the lessee remains personal property and does not become a fixture, although actually affixed to the soil.[4]

§ 645. General Rule in Oil and Gas Cases.

In Patton vs. Woodrow,[5] it is said: "The general rule requires the lessee for oil and gas purposes to remove all fixtures and machinery placed on the premises during the term of the lease, or at least within a reasonable time thereafter. If this is not done, the fixtures and machinery become the property of the lessor, and he may enjoin their removal; if severed from the freehold and then removed without his consent, he may replevin them, or recover their value in an action for damages. This is true where the lessee expressly reserved his right to remove them."

§ 646. Status of Fixtures on Withdrawn Lands.

Improvements placed upon the surface of withdrawn lands for the purpose of prospecting for mineral are appurtenant to the mining rights and not to the land and the surface claimant secures no right therein upon the abandonment of the mining claim. Hence, if such

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[2] Jenkins vs. Boyd, 6 Fed. (2d) 845; McCullom vs. Christy Co., 6 Fed. (2d) 845; Breyfogle vs. Tighe, *supra* (1); County vs. Lake Tahoe Co., *supra* (1). See Jahnke vs. Jahnke, 81 Cal. A. 387, 253 Pac. 752; Hammond Co. vs. Gordon, 84 Cal. A. 701, 258 Pac 612; 11 R. C. L. 1062. While things affixed to the soil ordinarily belong to the owner of the soil, there may be a right of removal arising from the agreement of the parties or their relation. Thus he who has affixed improvements to land under a license from the owner generally is held to have a right to remove them within a reasonable time after the termination of the license. Bronson on Fixt., § 106. An agreement for such right of removal is implied from the circumstances. but there is no real analogy between the status of the locator of a mining claim and that of a mere licensee. Watterson vs. Cruse, *supra* (1).

In Miller vs. Struven, 63 Cal. A. 132, 218 Pac. 287, the court said: "It is a quite well-settled rule of law that the parties themselves may, in their dealings with chattels annexed to or used in connection with real estate, fix upon them whatever character, as realty or personalty they desire and that the courts will give to the property the character which the parties themselves have fixed upon it. Fratt vs. Whittier, 58 Cal. 126, 132." Alberson vs. Elk Creek Co., 39 Or. 552, 65 Pac. 978; *but see* Prescott vs. Wells Fargo Co., 3 Nev. 82. See, also, Arnold vs. Goldfield Co., *supra* (1).

[3] Yankee Lode, 30 L. D. 239; Merritt vs. Judd, *supra* (1); Roseville Co. vs. Iowa Co., *supra* (1). When a valid relocation is made, the interest of the former locator comes to an end. By such a relocation the relocator acquires the exclusive right of possession and enjoyment of the land, and this necessarily involves everything that was a part of the land. In other words, the original locator has no right to remove the fixtures after the adverse location has been duly made. Watterson vs. Cruse, *supra* (1).

[4] Cowgill vs. Little Persimmon Co., ___ Mo. A. ___, 183 S. W. 346; see McClendon vs. Busch-Everett Co., 138 La. 722, 70 So. 781.

[5] 198 Ky. 85, 248 S. W. 226; see, also, Monarch Co. vs. Hunt, 193 Ky. 315, 235 S. W. 772; Shellar vs. Shivers, 171 Pa. St. 569, 33 Atl. 95.

improvements are annexed as fixtures they become a part of the interest in the realty in the aid of which they were affixed, that is, they become a part of that interest in the realty which the United States has reserved to itself and which the surface claimant could not obtain. In such a case the government alone has the right to claim a forfeiture.[6]

[6] Son vs. Adamson, 188 Cal. 99, 204 Pac. 392; Midland Oil Co. vs. Rudneck, 188 Cal. 265, 204 Pac. 1074.

CHAPTER XXXIV.

FLOODING OF MINES.

§ 647. Rule Defining Rights and Liabilities.

The rule defining the rights and liabilities of adjoining mine owners has been stated in this form: For damages resulting from natural causes or from lawful acts done in a proper manner, the law gives no redress; but where one of the two adjoining mine owners conducts water into his neighbor's mine which would not otherwise go there, or cause it to go there at different times and in larger quantities than it would go there naturally, he commits a wrong which the law will redress.[1]

§ 648. Conflicting Opinions.

There is much conflict in the decisions of the courts, both American and English, and, as between themselves, as to the basis of liability that may result to coterminous or adjacent mine owners by super-induced additions of water or other substances upon their properties by operations of the adjoining mine owner. In England the leading case upon this subject is Fletcher vs. Rylands,[2] and the leading case

[1]Lord vs. Carbon Co., 42 N. J. Eq. 157, 6 Atl. 812; Clinchfield Corp. vs. Compton, 148 Va. 437, 139 S. E. 308; 53 A. L. R. 1376 and note to 1471. The measure of damages recoverable for the flooding of a mining claim preventing work being done thereon by plaintiffs who were lessees engaged in working the same, is not the amount expended by them for machinery and other equipment for prosecuting the work, but the value of the use of the claim during the time the work was prevented. Dalton vs. Moore, 141 Fed. 311, *certiorari* denied, 200 U. S. 619. The natural percolation of water from one mine to another is not a matter as to which the owner of the lower mine has any right of complaint as against the owner of the other mine. The owner of the upper mine has a right to work it just as he likes, and his neighbor below can not complain unless he finds that the water has been turned into his mine by a channel or artificial arrangement. Phillips vs. Homfray, L. R. 6 Ch. App. 770. See, also, Duff vs. U. S. Gypsum Co., 189 Fed. 234.

"The right to use land for agricultural or mining purposes in the usual and proper manner, although it may result in some additional flow of surface water upon the land of an adjoining owner, is undoubted, but the right to collect such water and conduct it upon another's land through an artificial channel can not be sustained. While proper farming or mining may affect the flow of surface water, yet, when it departs, it must be in a natural course, and not collected together and cast upon lower land by artificial means. Kauffman vs. Griesemer, 26 Pa. 407; Locust Mountain Coal & Iron Co. vs. Gorrell, 9 Phila. 247; Strauss vs. Allentown, 215 Pa. 96, 63 A. 1073, 7 Ann. Cases, 686; Reilly vs. Stephenson, 222 Pa. 252, 70 A. 1097. 'A mine owner may not conduct a drain emptying into the neighboring mine.' Barringer and Adams on Mines and Mining (1st ed. 630). It is the natural drainage only that the owner of the lower field is under the servitude of receiving. Scots Mines Co. vs. Leadville Mines Co., 34 Law Times Reports 34. The case of Smith vs. Kendrick contains an interesting discussion of the rights and liabilities of the owners of adjoining mines with reference to surface waters. See, also, Gould on Waters (3d ed., p. 570). The fact here is well founded that defendant's mining was improperly conducted in that the ditch in the tunnel was constructed on a descending grade towards plaintiff's land; and, when it should have been on an ascending grade so as to drain the water back into defendant's sump or pool, that the surplus might be pumped to the surface, as formerly, and not discharged into plaintiff's mine. This improper grade of the ditch, and the fact that, as originally constructed, its outlet came to plaintiff's property by an opening driven through solid rock or coal (although later changed), establish defendant's intent to rid itself of surplus water at plaintiff's expense." Lehigh & Wilkes-Barre Co. vs. Pittston Co., 289 Pa. St. 492, 137 Atl. 672.

[2]L. R. 1 Ex. 265, L. R. 3 Eng. & Ir. App. 330; app'd. 23 L. R., 3 H. L. 330; see Fletcher vs. Smith, L. R. 2 App. Cas. 781; L. R. 7 Ex. 305; Broughton vs. Midland Co., Irr. Rep. 7 C. L. 169; Madras Co. vs. Zemmindar, L. R. 1 Ind. App. 624; Dunn vs. Birmingham, L. R. 8 Q. B. 42. In Nicholas vs. Marshland, L. R. 10 Ex. 255 S. C.

in the United States, perhaps, is Pennsylvania Coal Co. vs. Sanderson,[3] in which the doctrine of the first named case is repudiated.

In California its Supreme Court in Colton vs. Onderdonk,[4] and its appellate court in Kall vs. Carruthers,[5] McIntosh vs. Brimmer,[6] and Stoops vs. Pistachio,[7] arrive at a conclusion apparently consistent with the doctrine of Fletcher vs. Rylands, whilst in Sutliffe vs. Sweetwater

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on appeal 2 Ex. Div. 1 is differentiated and its doctrine limited. In Fletcher vs. Rylands, *supra*, the defendant had constructed a reservoir, the waters of which broke through the bottom into some ancient underground workings whose existence was unknown, and thence escaped into and flooded an adjacent colliery. The court held that the defendant was liable for damages thus caused, the court saying: "We think that the rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie*, answerable for all the damage which is the natural consequence of its escape." See Fletcher vs. Smith, *supra*, in which the correctness of this doctrine is discussed. In Kall vs. Carruthers, 59 Cal. A. 555, 211 Pac. 43, the court said: "The precise obligation imposed by law upon one who collects waters in an artificial reservoir is a subject of grave dispute. In Fletcher vs. Ryland, *supra*, it was declared that no amount of diligence is a legal excuse if such water escapes and damages another. The effect of this doctrine is everywhere conceded to make every person who brings a foreign substance upon his property an insurer against all damage that may result by reason of its presence on his property. The soundness of this doctrine has been much discussed by law writers and courts in England and in this country, and there is no case on the subject in either country so much cited and considered. This doctrine is frequently applied to other subjects, for example, the handling of explosives, setting fires * * * alkali works and numerous other subjects."

[3] 113 Pa. St. 126, 6 Atl. 453. In the case of Bunker Hill Co. vs. Polak, 7 Fed. (2d) 585, *certiorari* denied 269 U. S. 581, where, in referring to the case of Pennsylvania Co. vs. Sanderson, the court said: "The doctrine of this case seems to have been rejected by every court to which it has been presented and it is believed to be contrary to an unbroken line of decisions in the United States and England." See, on general subject of liability as analagous cases other than mines, Actiesselskabet vs. Central Ry., 216 Fed. 72; Caughlin vs. Campbell Co., 39 Colo. 148, 89 Pac. 53; Bishop vs. Brown, 14 Colo. A. 535, 61 Pac. 50; Murphy vs. Gillim, 73 Mo. A. 487; Marshall vs. Melwood, 38 N. J. Law 339 (where the principle is considered at great length and rejected); Brown vs. Collins, 53 N. H. 442 (which contains a very extended consideration of the principle; O'Hara vs. Nelson, 71 N. J. Eq. 161, 63 Atl. 836; Losee vs. Buchanan, 51 N. Y. 476; Vanderwiele vs. Taylor, 65 N. Y. 347; Langabaugh vs. Anderson, 68 Ohio St., 131, 67 N. E. 286; *but see* Bradford vs. Manufacturing Co., 60 Ohio St. 560, 54 N. E. 528; Householder vs. Quemahoning Co., 272 Pa. St. 78, 116 Atl. 40; Gulf Co. vs. Oakes, 94 Tex. 155, 58 S. W. 155; Klepsch vs. Donald, 4 Wash. 436, 30 Pac. 991. On the other hand, the rule has been followed in Massachusetts: Ainsworth vs. Lakin, 180 Mass. 397, 62 N. E. 746. Minnesota: City Water Co. vs. Fergus Falls, 113 Minn. 34, 128 N. W. 817; Cahill vs. Eastman, 18 Minn. 324; Montana: Longtin vs. Persell, 30 Mont. 306, 76 Pac. 699. Oregon: Essen vs. Wattier, 25 Or. 7, 34 Pac. 756; Mallett vs. Taylor, 78 Or. 208, 152 Pac. 873. Vermont: Gilson vs. Delaware Co., 65 Vt. 213.

Although the doctrine of the Fletcher-Rylands case is seemingly followed in Ohio in Bradford vs. Manufacturing Co., *supra*, it was repudiated in the later case of Langabaugh vs. Anderson, *supra*.

In Illinois, in the case of Jones vs. Robertson, 116 Ill. 543, 6 N. E. 890, the court said: "If the upper proprietor is unable to profitably work his mine without building a dam across the way leading into it from above may he do so? Or must he abandon his own mine altogether rather than incur the risk of the dam ultimately giving way and precipitating the water thus accumulated in undue quantities upon himself and the owner below, before the latter has been able to take out his own coal? Under the circumstances stated, we do not understand the law requires the owner of the upper mine to so abandon his property in order to avoid such a contingency as that suggested. On the contrary we are of the opinion he has the right to build the dam; and if, in doing so, he exercises ordinary care and skill, he will not be held liable for the consequences, should it subsequently give way without his fault. While it is customary for the owners of mines to keep them as free from water as practicable, yet they are not bound by law to do so. The only obligation resting upon them in such respect is that of self-interest. The upper owner may abandon his own mines whenever he pleases, notwithstanding his doing so may largely increase the flow of water into the mine below and thereby greatly enhance the labor and expense of the owner in operating it. So the owner of a mine for the purpose of protecting himself from the encroachments of water, which is regarded as the common enemy of mines and mining interests, may erect a dam or any other structure on his premises, if necessary for such purpose, subject to the limitation that such dam or other structure does not have the effect to collect water from adjacent territory, and eventually cast it upon a lower mine, which but for such dam or other structure, would not have reached it."

[4] 69 Cal. 155, 10 Pac. 395. Munro vs. Pacific Coast Co., 84 Cal. 515, 24 Pac. 303.

[5] 59 Cal. A. 555, 211 Pac. 43.

[6] 68 Cal. A. 770, 230 Pac. 203.

[7] Stoops vs. Pistachio, 70 Cal. A. 772, 234 Pac. 423.

Co.[8] the Supreme Court holds that such doctrine is not the law in California. A statement which finds support in the prior case of Kleebauer vs. Western Fuse Co.[9]

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[8] 182 Cal. 34, 186 Pac. 766. In this case the court cites Hoffman vs. Tuolumne Co., 10 Cal. 413, to the effect that "The general rule is, that every man may do as he chooses with his own property, provided he does not injure another's. But there is another rule as well established, which is, that a man must so use his own property as not to injure his neighbor's. This last rule, however, does not make a man responsible for every injury which may arise to another from the use which the first may make of his property. It would be an intolerable hardship to hold a man responsible for unavoidable accidents which may occur to his property by fires or casualties, or acts beyond his control, though others are likewise injured." The court then cites Tenney vs. Miners' Ditch Co., 7 Cal. 335; Wolf vs. St. Louis Co., 10 Cal. 541; Todd vs. Coehell, 17 Cal. 97; Everett vs. Hydraulic Co., 23 Cal. 225; Campbell vs. Bear River Co., 35 Cal. 679; Weiderkind vs. Tuolumne Co., 65 Cal. 431, 4 Pac. 415; Moore vs. San Vincente Co., 175 Cal. 212, 165 Pac. 687; Bacon vs. Kearney Syndicate, 1 Cal. A. 275, 82 Pac. 84, and says: "It is true that in all of these cases, negligence on the part of the defendant was relied upon by the plaintiff and that the question of absolute liability on the part of the defendant was not presented to the court or discussed. Nevertheless, it is repeatedly laid down that the governing rule of law is that the defendant is not liable unless he has been negligent, and the actual decisions of the cases are consistent with this rule only. Under such circumstances the rule so declared and followed must be taken to be the law, and the fact that the propriety of the rule has not been questioned or discussed is not a sufficient justification for reopening the subject."

The principle laid down in the case of Sutliff vs. Sweetwater Co., *infra*, has again been announced in Green vs. General Petroleum Co., --- Cal. A. ---, 262 Pac. 377, superseded in 205 Cal. 328, 270 Pac. 952.

This was a case where in the drilling of an oil well, with proper precautions by the defendant, the well suddenly and violently erupted, showering plaintiff's home and garden and the surrounding neighborhood with oil and mud. In reversing the judgment of the lower court awarding damages to plaintiff, the court said:

"It is not our province to enter into a philosophical discussion of the doctrine or doctrines of Fletcher vs. Rylands. Discussion of the doctrine's origin, development, and the difficulties of defining the limits of its application belong more properly to the research of law reviews. See University of Pa. Law Review, 59 American Law Register, pp. 298 and 423, Prof. Francis H. Bohlen. It will suffice for this opinion to state that the case in so far as it may be said to sanction liability without fault, has never been approved in this state. On the contrary our Supreme Court has refused to follow that doctrine in Sutliff vs. Sweetwater Co., 182 Cal. 324, 186 Pac. 766, and in Kleebauer vs. Western Fuse Co., 138 Cal. 497, 71 Pac. 617. * * * In Sutliff vs. Sweetwater Co., *supra*, the Fletcher vs. Rylands case is stated to be no authority for liability for escaping water in the absence of negligence. The opinion points out that liability in cases of escaping water in this state has been based either upon negligence or upon the proposition that the water or reservoir, in the very manner of its maintenance, was an invasion of the plaintiff's property. The Commissioner's opinion in Kleebauer vs. Western Fuse Co., 6 Cal. Unrep, 933, 69 Pac. 246, held the storage of gunpowder to be a nuisance *per se*, and held the defendant liable for damages as an insurer under the authority of Fletcher vs. Rylands. The Supreme Court's opinion in bank, however, held the defendant not liable because the keeping of gunpowder in the place and under the circumstances was held not to constitute a nuisance. If the defendant, Western Fuse Company, was liable for all perils upon the theory as literally expressed in Fletcher vs. Rylands in the excerpt from that case quoted in Sutliff vs. Sweetwater Co., *supra*, then the defendant would have been liable regardless of whether the stored powder was a nuisance or not. The English precedent has not met with favor in the United States; has often been directly repudiated where it has been cited and apparently followed, it has usually been upon the assumption that it did not uphold the theory of liability without fault. The drilling of the oil well here was a lawful use of defendant's property. It was not a nuisance in the neighborhood. It was not a direct invasion of plaintiff's property rights. Considering the unforeseeable and unprecedented violence of the blow-out it was in the nature of an accident. Under such circumstances, there is no liability without negligence."

This case was carried into the Supreme Court of the state, 205 Cal. 328, 270 Pac. 952, and the court said: "The appeal presents for our determination the question whether, under the existing circumstances of injury without negligence, appellant (company) is liable for the damages suffered by respondents, and, if so, what is the measure of damages. * * * Citation of authority is, of course, unnecessary to support the doctrine that, where one person does something he has no legal right to do, to the prejudice of another, or doing something he may rightfully do, does it negligently, or neglects doing something he should do, or does something he should do, and another is injured thereby, the one doing the act, or omitting to do it, is liable for the injury suffered by the other. See Perkins vs. Blauth, 163 Cal. 782, 786, 127 Pac. 50. * * * The rule to be applied in this case is, if the cost of repairing the injury by removing the debris deposited by the appellant, and otherwise restoring the premises to their original condition, amounts to less than the value of the property prior to the injury, such cost is the proper measure of damages; and if the cost of restoration will exceed such value, then the value of the property is the proper measure. Salstrom vs. Orleans Bar Co., 153 Cal. 551, 558, 96 Pac. 292."

To the same effect see Behle vs. Shell Oil Pipe Line Corp., --- Mo. A. ---, 17 S. W. (2d) 656, which was an action for damages caused by escaping oil from the defendant's pipe line.

§ 649. Basis of Liability Regardless of Negligence.

Many of the authorities hold, however, that no matter how carefully the miner may conduct his operations, he has no lawful right to flood a lower owner's land or wash away his neighbor's land or deposit tailings and debris thereon, to its injury, and that if by the deposit of mining debris in the stream he causes such a result, he is liable for the resulting damage. The fact that he uses all the care for the protection of his neighbor's property consistent with the successful conduct of his mining operations is immaterial.[10] That is to say, the injury is the proximate cause of the mine owner's normal operations.[11]

In Sussex Co. vs. Midwest Refining Co., 294 Fed. 597, a producer of oil in field, without negligence and notwithstanding use of every known device for prevention of escape of oil, caused damages to persons on a stream having priority of right to the water, there being both deterioration in the water and damage to grasses belonging to land owner, was held liable in damages. See, also, Johnson vs. Sultan Co., 145 Wash. 106, 258 Pac. 1033.

[9] 138 Cal. 497, 71 Pac. 617. See, also, 19 C. J., Negligence, p. 607, § 43 to the same effect.

[10] Good examples of cases where the direct and necessary result of a mine owner's acts is to invade another's property, and which thus assist in showing the basis of liability regardless of negligence, are found in Hill vs. Smith, 27 Cal. 476, 32 Cal. 166; Levaroni vs. Miller, 34 Cal. 231; Robinson vs. Black Diamond Co., 50 Cal. 460; 57 Cal. 412; Salstrom vs. Orleans Bar Co., 153 Cal. 551, 96 Pac. 292; Dripps vs. Allison's Co., 45 Cal. A. 95, 187 Pac. 448; Bunker Hill Co. vs. Polak, *supra* [3]; Carson vs. Hayes, 39 Or. 97, 65 Pac. 814; Robinson vs. Moark-Nemo Co., 178 Mo. A. 531, 196 S. W. 1131; Fitzpatrick vs. Montgomery, 20 Mont. 181, So. Pac. 416. See Devonian Oil Co. vs. Smith, 124 Okla. 71, 254 Pac. 14; Bowling Coal Co. vs. Ruffner, 117 Tenn. 180, 100 S. W. 116; 39 A. L. R. 891; 48 A. L. R. 129, note.

Where the water from the higher level of a mine flowed naturally down to the level of a lower mine, the owner is not held liable, but if the water is caused to flow upon the lower mine by his act, the owner of the upper level is liable to damages. Spadra Creek Co. vs. Eureka Co., 104 Ark. 359, 148 S. W. 644.

Where a mining company is discharging refuse from its mill into a ditch, causing the same to fill up and overflow, depositing the refuse on plaintiff's upland, the mining company is responsible in damages for injury caused thereby irrespective of the question of negligence.

Good vs. West Co., 154 Mo. A. 591, 136 S. W. 241.

Flowing of lower lands with oil and salt water from oil wells was held to be an actionable injury. Niagara Oil Co. vs. Ogle, 177 Ind. 292, 98 N. E. 60.

[11] In Green vs. Gen. Petroleum Co., *supra* [8], it is held that where an injury arises out of or is caused directly or proximately by contemplated act or thing, without the interposition of any external or independent agency, which was not or could not be foreseen, there is an absolute liability for consequential damage, regardless of any element of negligence. See *supra*, note 8.

CHAPTER XXXV.

FORFEITURE.

§ 650. General Rule.

A forfeiture takes place by operation of law without regard to the intention of the locator and is made effectual by one who enters upon the location *after* the expiration of the time within which the annual assessment work may be done, and completes an adverse location before the resumption of work[1] or a relocation by the delinquent owner.[2] In other words, the general rule is that the mere failure to comply with the statutory requirement as to annual expenditure does not terminate the mine claimant's right to the claim. The effect of such failure is to throw the land open to location by others, but in the absence of any subsequent valid adverse location, the original claimant, or his grantee, has the right at any time to relocate the claim or to resume work thereon.[3]

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[1] Black vs. Elkhorn Co., 163 U. S. 450; Lakin vs. Sierra Buttes Co., 25 Fed. 343; Fee vs. Durham, 121 Fed. 468; McCulloch vs. Murphy, 125 Fed. 153; Willitt vs. Baker, 133 Fed. 937; Zerres vs. Vanina, 134 Fed. 617, aff'd. 150 Fed. 564; McKay vs. Neussler, 148 Fed. 88; Bingham Amalg. Co. vs. Ute Co., 181 Fed. 750; dis. 190 Fed. 1022; Mesmer vs. Geith, 22 Fed. (2d) 690; Shank vs. Holmes, 15 Ariz. 229; 137 Pac. 871; Du Prat vs. James, 65 Cal. 555, 4 Pac. 562; Pharis vs. Muldoon, 75 Cal. 284, 17 Pac. 70; Street vs. Delta Co., 42 Mont. 386, 112 Pac. 701; Geyman vs. Boulware, 47 Nev. 409, 224 Pac. 409; Lewis vs. Carr, 49 Nev. 366, 246 Pac. 695; Knutson vs. Fredlund, 56 Wash. 634, 106 Pac. 200; Golden Giant Co. vs. Hill, 27 N. M. 124, 198 Pac. 276, 14 A. L. R. 1450; Bishop vs. Baisley, 28 Or. 119, 41 Pac. 941; Kirkpatrick vs. Curtiss, 138 Wash. 333, 244 Pac. 571; see Tripp vs. Silver Dyke Co., 70 Mont. 120, 224 Pac. 272; Peyer vs. Champion Co., 30 N. M. 147, 228 Pac. 606.

The forfeiture of a mining claim is different from an abandonment, and it can occur only at the termination of the prescribed period, and is created by statute. Inez Co. vs. Kinney, 46 Fed. 835. The distinction between the effect of an abandonment and a forfeiture is pointed out in McKay vs. McDougall, 25 Mont. 258, 64 Pac. 672. See, also, Justice Co. vs. Barclay, 82 Fed. 559; Emerson vs. McWhirter, 133 Cal. 510, 65 Pac. 1036, *sub nom.* Emerson vs. Yosemite Co., 149 Cal. 50, 85 Pac. 1036, aff'd., 208 U. S. 25.

[2] Rohn vs. Iron Chief Co., 186 Cal. 703, 200 Pac. 644, and cases therein cited. This case is not authority as to locations made subsequent to the passage, in 1909, of Cal. C. C., § 1426*s*. Warnock vs. DeWitt, 11 Utah 324, 40 Pac. 205; *but see* Lehman vs. Sutter, 60 Mont. 97, 198 Pac. 1100. See Wailes vs. Davies, 158 Fed. 669, aff'd. 164 Fed. 397; Peachy vs. Frisco Co., 204 Fed. 659. See Perley vs. Goar, 22 Ariz. 146, 195 Pac. 533, where a relocation of a mining claim made by a stepson of the original locator who had failed to do the assessment work was held valid, and where he transferred the same thereafter for a nominal sum to the original locator, no assumption was had therefrom that the relocation was made to avoid the doing of the annual work. Cooperative Co. vs. Law, 65 Or. 250, 132 Pac. 521, where a locator of mining claims after inducing others to organize a company to take over the locations, relocated them after deliberately failing to do the assessment work while acting as the agent for the company, such location inured to the benefit of the company.

[3] McCulloch vs. Murphy, *supra* (1), cited approvingly in Miehlich vs. Tintic Co., 60 Utah 570, 211 Pac. 690. See Utah Co. vs. Tintic Co., --- Utah ---, 274 Pac. 950. Madison vs. Octave Oil Co., 154 Cal. 768, 99 Pac. 176; Rohn vs. Iron Chief Co., *supra* (2); *but see* Cal. C. C., § 1426*s*; Moorhead vs. Erie Co., 43 Colo. 408, 96 Pac. 253; Richen vs. Davis, 76 Or. 311, 148 Pac. 1130; Winters vs. Burkland, 123 Or. 137, 260 Pac. 231; Stratton vs. Raine, 45 Nev. 10, 197 Pac. 694; rehearing denied, 200 Pac. 533. The rule that mere failure to perform annual assessment work does not constitute in itself a forfeiture has been upheld by the courts of the mining states of the west. In Field vs. Tanner, 32 Colo. 278, 75 Pac. 916, the court said: "It will be observed that failure to do the annual assessment work does not, *ipso facto*, work a forfeiture of a lode mining claim, but the same merely becomes liable to forfeiture, which may be complete and final when the rights of third persons accrue. If, however, before such rights do attach, the original locator resumes work, the forfeiture is avoided. McGinnis vs. Egbert, 8 Colo. 41, 5 Pac. 652; Belk vs. Meagher, 104 U. S. 279, 26 L. Ed. 735." To the same effect are Lacey vs. Woodward, 5 N. M. 583, 25 Pac. 785; Emerson vs. McWhirter, *supra* (1); Madison vs. Octave Oil Co., 154 Cal. 768, 99 Pac. 176; Florence-Rae Co. vs. Kimbel, 85 Wash. 162, 147 Pac. 881. See Thatcher vs. Brown, 190 Fed. 708; Ebner Co. vs. Alaska Co., 210 Fed.

§ 651. Intervening Right,.

In the absence of an intervening valid location a lapse of years between the cessation and the resumption of work, will not defeat the title of the locator or his grantee;[4] or, where a valid adverse relocation has been made and subsequently abandoned, the original claimant's right thereto will be revived upon his, or his grantee, resuming possession.[5]

§ 652. Adverse Entry.

A defective adverse relocation is not a bar to the resumption of work;[6] but, if relocators have entered and are in actual possession after forfeiture, although they have not formally relocated, the original claimant, or his grantee, has no right to make a forcible entry for the purpose of resuming work.[7] A peaceable entry for relocation, however, may be made after failure to perform the annual labor, although the claim is occupied by the delinquent owner.[8]

When the location lies within withdrawn or reserved lands,[9] other than national forests,[10] as between the government and the locator or his grantee, the mere failure to do the annual assessment work upon valid locations otherwise held, does not result in a forfeiture,[11] as that requires the intervention of a third party and a valid relocation of

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599, where, under an Alaskan statute, no resumption of labor is permitted a locator who fails to do the necessary work within the period prescribed; see also Chichagoff Co. vs. Alaska Co., 45 Fed. [2d. ed.] 553.

As to the resumption of labor within withdrawn areas see U. S. vs. West, 30 Fed. (2d) 742, aff'd. 280 U. S. 306, wherein the court held that under the mining law, Rev. St. §§ 2324, 2325, 30 U. S. C. A., §§ 28, 29, the locator of a mining claim, resuming assessment work before intervention of relocation, was entitled to a patent, notwithstanding Leasing Act, § 37, 30 U. S. C. A., § 193, withdrawing certain mineral deposits from location, since locator was not by reason thereof subjected to any forfeiture that did not apply to the mining act, and mere fact that such deposits were no longer subject to relocation did not affect the rights of the claimant under existing laws. To the same effect see Work vs. Braffet, 276 U. S. 566; *but see* Krushnic (on rehearing), 52 L. D. 295.

[4] North Noonday Co. vs. Orient Co., 1 Fed. 522; Jupiter Co. vs. Bodie Con. Co., 11 Fed. 666; Lakin vs. Sierra Buttes Co., *supra* [(1)]; Justice Co. vs. Barclay, *supra* [(1)]; Peachy vs. Gaddis, 14 Ariz. 214, 127, 739; Buffalo Zinc Co. vs. Crump, 70 Ark. 540, 69 S. W. 572; Worthen vs. Sidway, 72 Ark. 226, 79 S. W. 781; Temescal Co. vs. Salcido, 137 Cal. 211, 69 Pac. 1010; Crown Point Co. vs. Crismon, 39 Or. 364, 65 Pac. 87; approved in Richen vs. Davis, *supra* [(3)]; Winters vs. Burkland, *supra* [(3)]; *but see* McCarthy vs. Speed, 11 S. Dak. 362, 77 N. W. 590; Id. 12 S. Dak. 80 N. W. 135.

[5] See Klopenstine vs. Hays, 20 Utah 45, 57 Pac. 712; Richen vs. Davis, *supra* [(3)], and see Justice Co. vs. Barclay, *supra* [(1)]; Costigan Min. Law, p. 288, § 86.

[6] Thornton vs. Kaufman, 40 Mont. 282, 106 Pac. 361.

[7] Slavonian Co. vs. Perasich, 7 Fed. 333.

[8] Olive Land Co. vs. Olmstead, 103 Fed. 575; Hanson vs. Craig, 170 Fed. 65; Consolidated Co. vs. U. S., 245 Fed. 523. DuPrat vs. James, *supra* [(1)]; Russell vs. Brosseau, 65 Cal. 608, 4 Pac. 643; Horswell vs. Ruiz, 67 Cal. 111, 7 Pac. 197; Garthe vs. Hart, 73 Cal. 545, 15 Pac. 93; Goldberg vs. Bruschi, 146 Cal. 708, 81 Pac. 23; *but see* Fee vs. Durham, *supra* [(1)]; Northmore vs. Simmons, 97 Fed. 386. Weise vs. Barker, 7 Colo. 178, 2 Pac. 919. In Du Prat vs. James, *supra*, the court cited but refused to follow this case.

The rule stated in the text does not apply to locations that are within withdrawn areas, for even the Secretary of the Interior can not act as a relocator thereof. U. S. vs. West, *supra* [(3)].

[9] See U. S. vs. West, *supra* [(3)]; *but see* Interstate Oil Corp., 50 L. D. 262; Krushnic, *supra* [(3)].

[10] See U. S. vs. Rizzinelli, 186 Fed. 680; U. S. vs. Deasy, 24 Fed. (2d) 108; Yard, 38 L. D. 66.

[11] Beals vs. Cone, 27 Colo. 500, 62 Pac. 958. Forfeiture is the loss of the right to a mining claim by adverse relocation. Du Prat vs. James, *supra* [(1)], and rests upon the fact of the nonobservance of the mining laws. Strang vs. Ryan, 46 Cal. 34, which is taken advantage of by another. Lockhart vs. Johnson, 181 U. S. 516; Madison vs. Octave Oil Co., 154 Cal. 768, 99 Pac. 176, holding that adverse possession by "jumper" excuses performance of assessment work. Street vs. Delta Co., *supra* [(1)]; Anderson vs. Robinson, 63 Or. 228, 126 Pac. 988, 127 Pac. 546.

See Wilbur vs. Krushnic, 280 U. S. 306, aff'g. 30 Fed (2d) 742.

the ground,[12] it is only necessary to perform the annual labor in order to protect rights of the locator against third persons.[13]

§ 653. Resumption of Work.

"To resume work" within the meaning of the mining law, is to actually begin anew with a *bona fide* intention of prosecuting it.[14] The question as to whether there was a resumption of work after failure to do the annual work for a particular year is a question of fact to be determined upon the trial of a case, and can not be determined as a matter of law.[15]

§ 654. When Resumption Ineffective.

There can be no resumption of work upon a mining claim situate within withdrawn or reserved areas unless made prior thereto.[16] By statutory enactment there can be no resumption of work within Alaska.[17]

§ 655. Failure to Record Not Necessarily Fatal.

The failure to record the location notice will not forfeit the title to the claim in the absence of intervening adverse rights under the mining laws, where the local customs or statutes do not so provide.[18] The failure to record an affidavit of annual expenditures, as provided by local statute, will not operate as a forfeiture.[19]

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[12] Snowy Peak Co. vs. Tamarack Co., 17 Ida. 630, 107 Pac. 60; Law vs. Fowler, 45 Ida. 13, 261 Pac. 667; Golden Giant Co. vs. Hill, *supra* (1).
Florence-Rae Co. vs. Kimbel, 85 Wash. 173, 147 Pac. 885. See *supra*, note 11.

[13] Beals vs. Cone, *supra* (11); Wilson vs. Freeman, 29 Mont. 470, 75 Pac. 84; Knutson vs. Fredlund, *supra* (1).

[14] Jordan vs. Duke, 6 Ariz. 70, 53 Pac. 197. McCormick vs. Baldwin, 104 Cal. 227, 37 Pac. 903; see Worthen vs. Sidway, *supra* (4); Honaker vs. Martin, 11 Mont. 91, 27 Pac. 397. Hirschler vs. McKendricks, 16 Mont. 211, 40 Pac. 290; McKay vs. McDougall, *supra* (1). Florence-Rae Co. vs. Kimbel, *supra* (12).

[15] Peachy vs. Frisco Co., *supra* (2); McCormick vs. Baldwin, *supra* (14). See McKnight vs. El Paso Co., 16 N. M. 721, 120 Pac. 695. See, generally, First Nat. Co. vs. Altvater, 149 Fed. 395.

[16] U. S. vs. West, *supra* (3), distinguishing Hodgson vs. Midwest Oil Co., 17 Fed. (2d) 71, in which last named case it was held that failure to do assessment work for 1921 upon an oil placer claim located in 1887 on lands included within a petroleum withdrawal made in 1909, terminated all possessory rights thereto. This last cited case was followed in Krushnic, *supra* (5).

[17] Thatcher vs. Brown, *supra* (3); Ebner vs. Alaska Co., *supra* (3); *but see* Chichagoff Co. vs. Alaska Handy Co., *supra* (3).

[18] Yosemite Co. vs. Emerson, *supra* (1). Last Chance Co. vs. Bunker Hill Co., 131 Fed. 586; Zerres vs. Vanina, *supra* (1); Wailes vs. Davies, *supra* (2); Sturtevant vs. Vogel, 167 Fed. 448; Butte & S. Co. vs. Clark-Montana Co., 248 Fed. 612, aff'd. 249 U. S. 12; S. P. R. Co., 50 L. D. 578; Stock vs. Plunkett, 181 Cal. 193, 183 Pac. 657; Dripps vs. Allison's Co., 45 Cal. A. 95, 187 Pac. 452; Ford vs. Campbell, 29 Nev. 578, 92 Pac. 206; Nash vs. McNamara, 30 Nev. 114, 93 Pac. 412; Gibson vs. Hjul, 32 Nev. 360, 108 Pac. 759; Indiana Co. vs. Gold Hills Co., 35 Nev. 159, 126 Pac. 967; Clark vs. Mitchell, called "Hornsilver Cases," 35 Nev. 464, 474, 134 Pac. 452. In both Yosemite Co. vs. Emerson, *supra*, and Butte & S. Co. vs. Clark-Montana Co., *supra*, this rule is dictum, the decision being based as much on knowledge of the locator as on validity or nonforfeiture of the location. And see Hedrick vs. Lee, 39 Ida. 42, 227 Pac. 27, holding that there can be no forfeiture till there is a valid location to forfeit and distinguishing the Yosemite Case, *supra*. To the same effect see Ringling vs. Mahurin, 59 Mont. 46, 197 Pac. 830.

[19] Book vs. Justice Co., 58 Fed. 118; Betsch vs. Umphrey, 270 Fed. 47, overruling 6 Alaska 938, wherein a statute of Alaska making failure to file an affidavit of the doing of assessment work on a mining claim, an abandonment of the claim subjecting the same to relocation was held void. Affidavits of annual expenditure are *prima facie* evidence of the facts therein stated. Big Three Co. vs. Hamilton, 157 Cal. 130, 107 Pac. 308; Dickens Co. vs. Crescent Co., 26 Ida. 153, 141 Pac. 568. They may be supported by oral testimony. Big Three Co. vs. Hamilton, *supra;* Murray Hill Co. vs. Havenor, 24 Utah 73, 66 Pac. 762, or may be met and overcome by positive evidence that the labor has not been performed. Dickens-West Co. vs. Crescent Co., *supra*.

§ 656. Forfeiture Not Favored.

Ordinarily forfeitures are not favored, and a very strict or severe construction should not be placed on the statute where the prior owners have proceeded in good faith and apparently done all that is required by a fair construction of the laws relating to mining claims.[20]

§ 657. Forfeiture Strictly Construed.

In order that the forfeiture may be worked, the facts constituting it or laying the foundation therefor must exist and the statute must be strictly construed.[21] Where a coowner bringing the proceedings was not a coowner at the time the expenditures for which the contribution was demanded were made, the proceedings must fail.[22]

§ 658. Proof to Establish Forfeiture.

The forfeiture of a mining claim can not be established except upon clear and convincing proof of the failure of the owner of the claim to have the work done or improvements made;[23] and every reasonable

[20] Debney vs. Iles, 3 Alaska, 449, citing Hammer vs. Garfield Co., 130 U. S. 301; Thornton vs. Kaufman, *supra* (6). Murray vs. Osborne, 33 Nev. 280; Ill. Pac. 34, see Copper Co. vs. Butte & Corbin Co., 39 Mont. 487, 104 Pac. 540; Love vs. Mt. Oddie Co., 43 Nev. 76, 184 Pac. 925. See *supra* notes 18 and 19 and *infra* notes 22, 24 and 25.

The rule that forfeitures are not favored does not apply to leases to explore for oil and gas. Krutzfeld vs. Stevenson, 86 Mont. 463, 284 Pac. 553.

[21] Brundy vs. Mayfield, 15 Mont. 201, 38 Pac. 1069; O'Hanlon vs. Ruby Gulch Co., 48 Mont. 75, 135 Pac. 913, s. c. 64 Mont. 318, 209 Pac. 1062. See Van Sice vs. Ibex Co., 173 Fed. 895; *certiorari* denied, 215 U. S. 607; dis. 223 U. S. 712.

[22] Turner vs. Sawyer, 150 U. S. 585; Repeater Lodes, 35 L. D. 54; Squires, 40 L. D. 544; Delmoe vs. Long, 35 Mont. 139; 88 Pac. 778; see Golden and Cord Claims, 31 L. D. 179. "Mining laws, when introduced in evidence, are to be construed by the court, and the question whether by virtue of such laws a forfeiture had accrued, is a question of law. It was, therefore, improper to submit it to the determination of the jury." Fairbanks vs. Woodhouse, 6 Cal. 433; *but see* Taylor vs. Middleton, 67 Cal. 656, 8 Pac. 594; Gear vs. Ford, 4 Cal. A. 556, 88 Pac. 603; Ring vs. U. S. Gypsum Co., 62 Cal. A. 70, 216 Pac. 409.

In Pack vs. Thompson, 223 Fed. 635, aff'g. 219 Fed. 624, it was held that in order that the interest of a delinquent coowner may be forfeited, it is essential that the *entire* work shall be performed by one or more of the coowners claiming the forfeiture. See, also, Delmoe vs. Long, *supra*. In Crary vs. Dye, 208 U. S. 525, aff'g. 12 N. M. 460, 85 Pac. 1038, Dye owned five-sixths of the mine; the other one-sixth was owned by the Apex Gold Mining Company. Dye did not do the assessment work upon the mine for a certain year and the work was done by the mining company. There was an attempt at forfeiture of Dye's interest but the notice of publication was not given by the mining company, but by the manager of the company, who described himself as coowner with Dye. The court held that a forfeiture had not been effected because the manager of the company was not a coowner with Dye, but the company was, and that the mining company had not given notice of forfeiture.

[23] Hammer vs. Garfield Co., *supra* (20); McCulloch vs. Murphy, *supra* (1); Emerson vs. McWhirter, *supra* (3); Book vs. Justice Co., *supra* (19); Zerres vs. Vanina, *supra* (14); Wailes vs. Davies, *supra* (2); Buffalo Zinc Co. vs. Crump, *supra* (4); Providence Co. vs. Burke, 6 Ariz. 332, 57 Pac. 841; Goldberg vs. Bruschi, *supra* (8); Big Three Co. vs. Hamilton, *supra* (19); Ring vs. U. S. Co., *supra* (22); Power vs. Sla, 24 Mont. 243, 61 Pac. 471; Gear vs. Ford, 4 Cal. A. 556, 88 Pac. 600; Upton vs. Santa Rita Co., 14 N. M. 132, 89 Pac. 275; Utah Co. vs. Tintic Co., *supra* (3).

In Big Three Co. vs. Hamilton, *supra*, the court said: "In instruction 9 the court told the jury that 'the law requires clear and convincing evidence to support the forfeiture' of a claim duly located and worked in good faith. It then stated 'if the evidence does not satisfy you by a clear preponderance thereof that the plaintiff failed to perform the necessary work, then it follows that the plaintiff did not forfeit the said claim.' We are unable to see any error in this. While it is often said that a forfeiture can be shown only upon clear and convincing evidence, 'the proof is made as required whenever it is shown by a preponderance of the evidence that the full amount of annual labor or improvements was not made or expended within a given year.' Snyder on Mines, § 726. See further, to the effect that a preponderance of the evidence is all that is required to establish a fact necessary to be shown in a civil action, § 2061 Cal. C. C. P. Ford vs. Chambers, 19 Cal. 143; Murphy vs. Waterhouse, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365.

doubt should be resolved in favor of the validity of a mining location as against the assertion of a forfeiture.[24]

§ 659. Burden of Proof.

The burden of proving either a forfeiture or abandonment rests upon the party who claims a right by reason of such alleged forfeiture.[25]

§ 660. Pleading Forfeiture.

The courts are divided as to whether or not forfeiture should be pleaded.[26] A plea of forfeiture is an admission of a prior valid location.[27] The question of forfeiture can not be raised by one claiming the ground under a void location.[28]

§ 661. Assessment Work by Coowner.

When a location is made by two or more persons they become coowners, and one or more of such coowners may perform the required assessment work and thereby continue the right of themselves as coowners to the exclusive possession of the claim, but if the work is done by one or more the law requires the other coowners to contribute their share of the expense, and upon the failure to do so their interest

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[24] Thornton vs. Kaufman, *supra* (6). A person seeking to avail himself of the failure of a preceding locator to comply with the law in order to secure a relocation of a mining claim must establish such failure by clear and convincing proof, and a court will construe a mining regulation or custom so as to defeat a forfeiture, if it can, and every reasonable doubt will be resolved in favor of the validity of a mining claim as against the assertion of a forfeiture. Musser vs. Fitting, 26 Cal. A. 746, 148 Pac. 537; Florence-Ray Co. vs. Kimbel, *supra* (12); Richen vs. Davis, *supra* (3).

[25] Hammer vs. Garfield Co., *supra* (20); McCullough vs. Murphy, *supra* (1); Whalen Co. vs. Whalen, 127 Fed. 611; Wailes vs. Davies, *supra* (2); Willson vs. Ringwood, 190 Fed. 111; Copper Co. vs. Corbin Co., *supra* (20); Bakke vs. Latimer, 3 Alaska 95; Providence Co. vs. Burke, *supra* (23); Copper Co. vs. Kidder, 20 Ariz. 224, 179 Pac. 641; Buffalo Zinc Co. vs. Crump, *supra* (4); Quigley vs. Gillett, 101 Cal. 469, 35 Pac. 1040; Gear vs. Ford, *supra* (23); Swanson vs. Kettler, 17 Ida. 327, 105 Pac. 1059, aff'd. 224 U. S. 180; Power vs. Sla, *supra* (23); Fredericks vs. Klauser, 52 Or. 40, 96 Pac. 679; see Beals vs. Cone, *supra* (9); Buckeye Co. vs. Powers, 43 Ida. 532, 257 Pac. 833; Lewis vs. Carr, *supra* (1); see, also, Hall vs. McClesky, ___ Tex. ___, 228 S. W. 1004; Meihlich vs. Tintic Co., *supra* (3). The rule of law stated in the last above section does not apply in adverse suits, as each party must prove his own title therein. Merchants Bank vs. McKeown, 60 Or. 325, 119 Pac. 334.

[26] See, Cache Creek Co. vs. Brahenberg, 217 Fed. 240; Contreras vs. Merck, 131 Cal. 211; 63 Pac. 336; Goldberg vs. Bruschi, *supra* (8); Harper vs. Hill, 159 Cal. 250; 113 Pac. 162; Holmes vs. Salamanca Co., 5 Cal. A. 659, 91 Pac. 160; Power vs. Sla, *supra* (23); Copper Co. vs. Butte & Corbin, *supra* (16); Bishop vs. Baisley, *supra* (1); Merchants National Bank vs. McKeon, *supra* (25).

In Cache Creek Co. vs. Brahenberg, *supra*, it was said in a suit to determine an adverse claim to a mining location, it is sufficient in pleading a forfeiture of the rights of the plaintiff to aver "all of plaintiff's right to and in said claim became forfeited and the said claim and all of it became a part of the public domain, subject to location according to law as mineral land" and especially in connection with the further averment that the plaintiff had not performed the annual labor required by law for a period of three years or more.

In Contreras vs. Merck, *supra*, it was determined that the principal fact in issue was the ownership of the mine; that it was not necessary for the plaintiff to allege forfeiture or abandonment by defendant. In the case of Holmes vs. Salamanca Co., *supra*, the court said "if this be the rule, as applying where the issue of ownership is raised by the answer with the presumptive denial upon the part of plaintiff, no reason is apparent why the same should not apply to the issues raised by a complaint and answer. If the original locator, or his successors in interest, be in default in such annual assessment work, they are no longer the owners of the exclusive possessory right; and the defendant should be permitted to show that such exclusive possessory right has terminated, and that after such termination he peaceably entered upon the premises and relocated the same. The mere naked possession of mineral land does not guaranty any rights as against a subsequent locator entering in good faith and making a valid location of the property. Horswell vs. Ruiz, 67 Cal. 112, 7 Pac. 197." See, also, Willit vs. Baker, 133 Fed. 946; McKay vs. Neussler, *supra* (1); Callaghan vs. James, 141 Cal. 294, 74 Pac. 853; Gear vs. Ford, *supra* (21); Tiggeman vs. Mrzlak, 40 Mont. 29, 105 Pac. 77; Madison vs. Octave Oil Co., *supra* (3).

[27] Bakke vs. Latimer, *supra* (24); see, Power vs. Sla, *supra* (23).

[28] Wilson vs. Freeman, *supra* (11). Powers vs. Sla, *supra* (23). Knutson vs. Fredlund, *supra* (1). See Tonopah Co. vs. Mt. Oddie Co., 49 Nev. 420, 248 Pac. 833.

in the claim is subject to forfeiture on proper notice to such coowners, or if they are dead, to their heirs.[29]

§ 662. Assessment Work by Contractor.

Where one enters into possession of a mining claim under a contract with the claimant, by which the person entering undertakes to do the required assessment work, or do other work which would have been sufficient to constitute assessment, he will not be heard to assert the forfeiture of the claim for nonperformance of the assessment work, when such nonperformance was the result of his own default, nor will he be permitted to take advantage at any time of the information obtained by him on account of such relation.[30]

§ 663. Pendency of Patent Proceedings.

Neither the pendency of the proceedings for patent nor of an adverse suit relieves the claimant from the necessity of making the statutory annual expenditures. The duty to make such expenditures continues until the payment of the purchase price to the government, and failure in this respect subjects the claim to relocation on the ground of forfeiture.[31]

§ 664. Forfeiture of Oil and Gas Lease.

If a lessor desires to declare a forfeiture on the ground that the land has not been fully developed, he must give notice of such intention, and a reasonable time must be given for the development.[32]

§ 665. Breach of Implied Condition.

Acme Co. vs. Williams,[33] was a case of the conveyance of a leasehold interest in oil lands where the sole consideration for the lease was a royalty of ten cents per barrel of the oil produced. It was held that

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[29] Elder vs. Horseshoe Co., 9 S. Dak. 642, 70 N. W. 1060; Id. 15 S. Dak. 124, 87 N. W. 586, aff'd. 194 U. S. 248. See Badger Co. vs. Stockton Co., 139 Fed. 838; Van Sice vs. Ibex Co., *supra* (21).

Where a cotenant is holding adverse possession of mining claims during the period when annual work should be done, and refuses his contenant the right to enter, no rights accrue to him under a forfeiture notice directed to said ousted cotenant under the statute. Becker-Franz Co. vs. Shannon, 256 Fed. 524.

See § 498.

[30] Lowry vs. Silver City Co., 179 U. S. 196, dismissing 19 Utah 334, 57 Pac. 11. Golden Giant Co. vs. Hill, *supra* (1). In the case of Stewart vs. Westlake, 148 Fed. 349, it was held that the lessee of a mining claim who was in possession and who had contracted to do work upon the claim that would be sufficient for the assessment work, and who relocated the claim in the name of third parties obtains no right. See Cooperative Co. vs. Law, *supra* (2); McCarthy vs. Speed, *supra* (3). One who does the work on an association claim for which he is paid by one of the part owners has no right to enforce a forfeiture of another coowner, for failure to contribute. Knickerbocker vs. Halla, 177 Fed. 172.

[31] Poore vs. Kaufman, 44 Mont. 248, 119, 786, and cases therein cited; see, also, Gillis vs. Downey, 85 Fed. 483; McNeil vs. Pace, 3 L. D. 267; Ferguson vs. Belvoir Co., 14 L. D. 43; South End Co. vs. Tinney, 22 Nev. 19, 35 Pac. 89; *but see* Marburg Lode, 30 L. D. 211; Lucky Find Placer, 32 L. D. 200; Ring vs. Montana Co., 33 L. D. 132, and see 2 Lindl. Mines (3d ed.), p. 1572, § 632; Costigan Min. Law, pp. 286, 287; Morrison's Mining Rights (15th ed.), p. 627.

[32] Herbert vs. Graham, 72 Cal. A. 317, 237 Pac. 58. See McNeece vs. Wood, 204 Cal. 280, 267 Pac. 877; Bayside Co. vs. Dabney, 90 Cal. A. 122, 265 Pac. 564. The purpose of the notice of forfeiture is to insure to the lessors a strict and faithful performance of the terms of the lease or, in case of default, to retake the property. Therefore the provision for notice is for the benefit of the lessors and is to be strictly interpreted against them. Taylor vs. Hamilton, 194 Cal. 768, 230 Pac. 656. For a case holding that if the lessors elect to declare a forfeiture of the leasehold interest for breach of conditions there must be joint or concurrent action of all the lessors see Jameson vs. Chanslor-Canfield Co., 176 Cal. 1, 167 Pac. 369.

there was an implied covenant or condition for diligent operation of the wells to the best advantage of both parties, which is as effective as if expressed in the lease, and is of the essence of the contract; and for a substantial breach of such implied condition, the lessor may re-enter and claim a forfeiture of the lease.

§ 666. Waiver of Forfeiture.

If there is anything in the notice of forfeiture given or any conduct on the part of the lessor showing a waiver of the default, it will be held that the default is waived and the forfeiture avoided. Less evidence is necessary to establish the waiver of a forfeiture than to establish the forfeiture itself.[34]

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[33] 140 Cal. 681, 74 Pac. 296; Taylor vs. Hamilton, *supra* (32); Sledge vs. Stolz, 41 Cal. A. 221, 182 Pac. 340; Hall vs. Auger, 82 Cal. App. 601, 256 Pac. 232, and cases therein cited. See North Confidence Co. vs. Morrice, 56 Cal. A. 150, 204 Pac. 851, citing Clarno vs. Grayson, 30 Or. 111, 46 Pac. 426.

In Sledge vs. Stolz, *supra*, the court said: "We think the transaction was one where the sole consideration for the purchase price took the form of a royalty resulting from the working of the mine. In such case there is an implied obligation on the part of the grantee to work the mine to the end that the consideration may be paid, failing in which the grantor may have the property restored to himself." See Downing vs. Rademacher, 133 Cal. 220, 65 Pac. 385; Richter vs. Richter, 111 Ind. 456, 12 N. E. 698.

The word "condition" is not necessary to the creation of an estate upon condition, if it plainly appears from the words used that the intent of the parties was to create an estate of that description. Stillwell vs. Knapper, 69 Ind. 558.

[34] Young vs. Mutual Co., Fed. Cas. 18168; Knarston vs. Manhattan Ins. Co., 124 Cal. 74, 56 Pac. 773; Taylor vs. Hamilton, *supra* (29); 12 Cal. Jur. 641, 642.

CHAPTER XXXVI.

HIGHGRADING.

§ 667. Not Larceny Under the Common Law.

It is an ancient rule under the common law, that things which savor of or adhere to realty are not the subject of larceny.[1] In this respect the common law was very defective, and did not afford sufficient protection to many articles of valuable personal property which were constructively annexed to the realty.[2] These defects, have, in some degree, been remedied by a number of statutes in this country[3] and in England.[4]

§ 668. Highgrading Defined.

In the mining states the theft of ore, gold dust, amalgam, nuggets, etc., commonly is called highgrading.[5] It subjects the perpetrator to criminal[6] and civil actions,[7] and makes him a constructive trustee, *ex malificio* or *ex delicto*.[8]

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[1] People vs. Williams, 35 Cal. 671; State vs. Berryman, 8 Nev. 262; State vs. Burt, 61 N. C. 619; Regina vs. Cox, 1 Carr & Kerm. 494; Rough's Case, 2 East Pleas of the Crown, 2 Russ. 83.

[2] State vs. Burt, *supra* (1).

[3] See Cal. St. 1925, p. 688; 3 C. & M. Ann. St. 1925, p. 2187, § 4981 (Colorado); 1 Rev. Laws Nev. 1912, p. 746, § 2483; Id. p. 748, § 2487.

[4] Stat. 7 & 8 Geo. IV, amended by 24 and 25 Vict.

[5] Atolia Co. vs. Industrial Accident Comm., 175 Cal. 691, 167 Pac. 148; Kerr vs. Milatovich, -- Cal. A. --, 282 Pac. 968; s. c. -- Cal. --, 290 Pac. 289.

[6] Pioneer Co. vs. Tyberg, 215 Fed. 501; Nebraska National Bank vs. Johnson, 51 Neb. 56, 71 N. W. 294; Angle vs. Chicago Co., 151 U. S. 1, *but see* U. S. vs. Bitter Root Co., 200 U. S. 451. Under the laws of California highgrading is punishable as a misdemeanor. Stats. 1925, p. 688, and, in Colorado, it is deemed to constitute larceny. 3 C. & M. Ann. St. 1925, p. 2187, § 4981. See, also, Pioneer Co. vs. Tyberg, *supra*.

By recent legislative enactment in California provision is made for the seizure of ores, concentrates or amalgam where there is reasonable grounds to believe that the same were stolen; the same to be held for use as evidence in any action that may be brought. The said substances to be delivered to the owner upon proof of such ownership. A person claiming ownership may petition the court showing his claim thereto and if the court is satisfied that he has title, as claimed, it shall order the same delivered to such person. Stats. 1929, p. 339.

[7] In Williams vs. Dickinson, 28 Fla. 90, 9 So. 847, the court said: "This plea seeks to invoke the doctrine held in the English courts—that where a private individual has been damaged in person or property by the tortious acts of another, which amount to a felony, the matter should be disposed of before the proper criminal tribunal, in order that justice of the country may be first satisfied in respect to the public offense, before the injured individual can seek civil redress for the private wrong inflicted upon him; the redress of the private wrong being postponed until after the public justice is satisfied. Two reasons are assigned in England: first, the party injured is relied upon to take the place of public prosecutor. In some cases he has even been required to employ counsel to prosecute on behalf of the crown, and his interest in the accomplishment of public justice is kept alive by postponing the redress of his private grievance. And second, in cases of felony there was a forfeiture to the crown of the felon's property, and the private individual was not allowed to acquire priority over the crown in satisfaction of his demands upon the property of the felon. But in this country this doctrine of the suspension of the civil remedy in cases of felony has been repudiated by the great weight of the American authorities. Under the system of laws prevailing in the United States the reasons for this rule are entirely absent. Here we have a public officer whose duty it is to prosecute all offenders against the state without reliance upon the injured individual; and there we have no forfeiture of the felon's goods. The civil and criminal prosecution may therefore go on *pari passu*, or the one may precede or succeed the other; or if the criminal prosecution is never commenced at all, the failure to seek public justice is no bar to the private remedy. Neither is an acquittal or conviction upon the criminal charge any bar to the civil action."

See Kerr vs. Milatovich, *supra* (5).

[8] Pom. Eq. Jur., § 1053.

§ 669. Fiduciary Relationship Not Imperative.

Confidential relations are not essential to the jurisdiction of a court of equity to declare and enforce a trust with respect to the stolen property. It may be traced through the thief into a different form of property and restored to the beneficial owner. In contriving means to cheat an owner out of his property, a thief should not be permitted to outstrip the courts in discovering a remedy to restore it when found.[9] In other words, where property is obtained from another by fraud, either through the crime of larceny, or other more complex manner of theft, equity recognizes the ownership to be in him from whom it has been so fraudulently obtained and a court of equity will impress a trust upon the proceeds of such stolen property and the same may be reclaimed by the owner whenever they may be found in the hands of a voluntary assignee, a depositary, or in the possession of any one holding in bad faith;[10] but not if it has passed into the hands of a *bona fide* holder for value, without notice.[11]

§ 670. Quieting Title.

In California an action to quiet title to personal property may be brought by the mine owner, or his assignee, against another person who claims an estate or interest in the stolen property adverse to him, for the purpose of determining such adverse claim.[12]

§ 671. Injunction.

In a highgrading case an injunction is issued not because the acts are criminal, but because they are destructive of property rights.[13]

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[9] Pioneer Co. vs. Tyberg, *supra* [6]; Nebraska National Bank vs. Johnson, *supra* [6]; Aetna Co. vs. Malone, 89 Neb. 260, 131 N. W. 200; Newton vs. Porter, 5 Lans. (N. Y.) 416. In Borchert vs. Borchert, 132 Wis. 593, 113 N. W. 35, it is said: "An action lies to establish a constructive trust and to recover the subject thereof where the property wrongfully obtained in specie, or in its converted form, still remains in the possession of the wrongdoer. Three: In case of a constructive trust an action lies in equity for its establishment and for an accounting even though the property wrongfully obtained is personal and in specie or in some new form into which it can be definitely traced, is within the reach of a plain remedy at law where it is necessary in order to obtain complete justice for equity jurisdiction to deal with the situation. 3 Pom. Eq. Jur. 1053. This court quite recently held that the better rule is that the *cestui que* trust may always sue in equity for an accounting. Harrigan vs. Gilchrist, 121 Wis. 252, 99 N. W. 909. He may certainly do so where there are special circumstances which in the judgment of the court render equity jurisdiction competent to afford a more sufficient remedy than can be obtained at law."

[10] Pioneer Co. vs. Tyberg, *supra* [6]; Borchert vs. Borchert, *supra* [9].

[11] Pom. Eq. Jur., § 1053; U. S. vs. Carter, 172 Fed. 1, aff'd. 217 U. S. 49.

[12] C. C. P., § 738. In Kerr vs. Milatovich, *supra* [5], it is said: "In this section to quiet title to four bars of gold bullion, plaintiff was not required to demonstrate that his assignors owned the bullion at the time it was alleged to be stolen, but was only required to offer that degree of proof which produces conviction in an unprejudiced mind, and whether or not the evidence was convincing was a question for the trial court sitting as a jury."

[13] Goldfield Co. vs. Richardson, 194 Fed. 201. This action was brought under the law of the state of Nevada in which it was provided that every person who, for his own gain, receives or purchases ore, knowing it to have been obtained by embezzlement or larceny, is guilty of a crime punishable by fine or imprisonment for a term of years or by both fine and imprisonment. It was charged in the complaint that "the respondents are engaged in the pretended business of operating assay offices in the town of Goldfield, but, as a matter of fact, they do not operate assay offices, but mere fences, where the employees of the complainant sell and dispose of the ore stolen from employers," and the court held that complainants had no adequate remedy at law, and were entitled to maintain a suit in equity to restrain defendants from continuing to purchase ore so stolen, notwithstanding such purchase constituted a crime; *but see* Daniels vs. Portland Co., 202 Fed. 637 (divided court); *certiorari* denied, 229 U. S. 611. See Pioneer Co. vs. Tyberg, *supra* [6].

CHAPTER XXXVII.

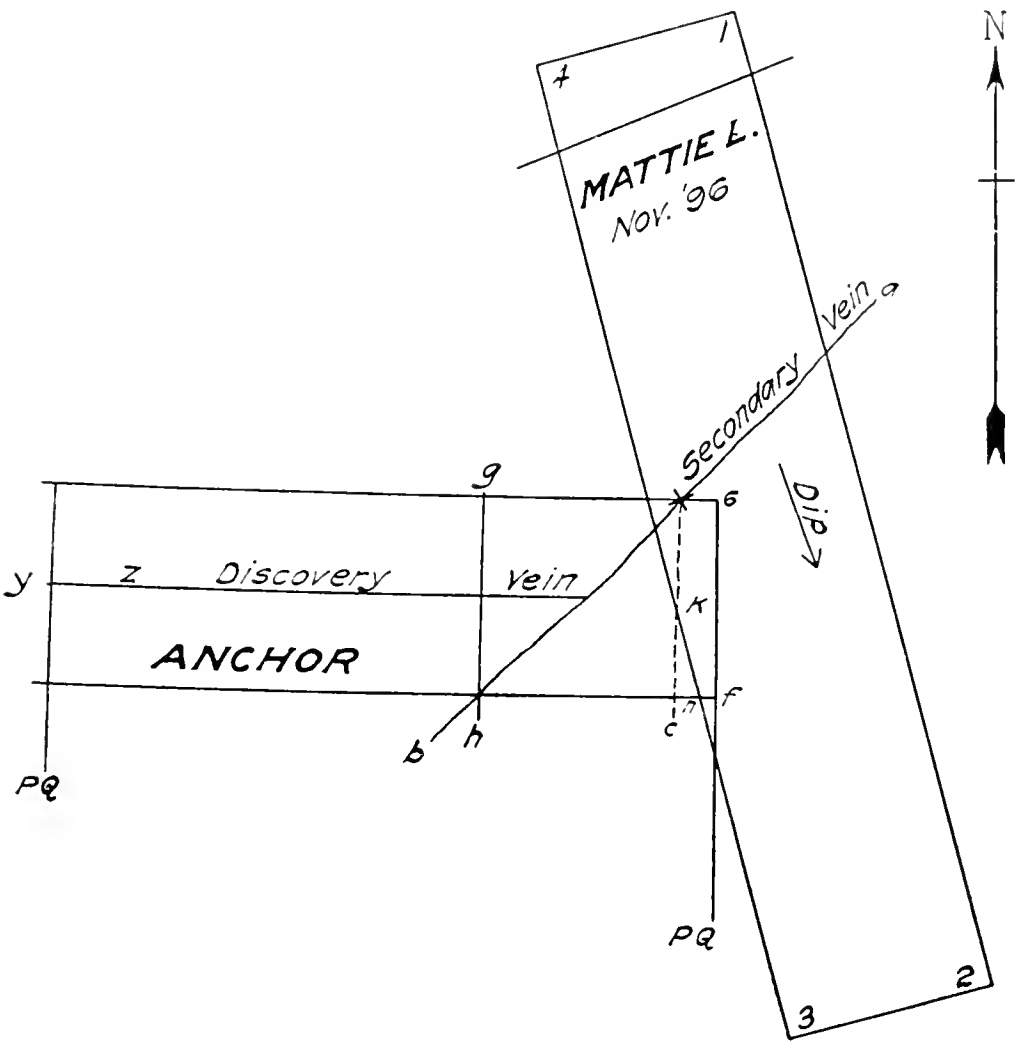
INTRALIMITAL AND EXTRALATERAL RIGHTS.

§ 672. Rights Conferred.

The property rights conferred by a valid lode location are twofold, namely: intralimital and extralimital or extralateral. The first embraces all within its boundaries down to the center of the earth; the second, while depending for its existence upon something within such boundaries, may nevertheless be exercised under conditions, beyond those boundaries. For instance, where the segment of the vein is within the surface lines of the location as they run upon the ground, the property rights of the owner thereto are strictly intralimital, and in no sense referable to the law governing property rights of the second class.[1]

[1] Jefferson Co. vs. Leland-Jefferson Co., 32 Colo. 176, 75 Pac. 1070. In this case it appeared that: The Anchor was patented on October 5, 1894, and the Mattie L. on November 3, 1896. The conflicting surface ground was expressly excluded from the grant to the latter.

The following diagram shows the relative positions of the two claims involved in the above case.



§ 673. Limitations.

What is termed the "extralateral" right[2] is subject to three limitations. One condition is the presence of the top or apex inside the boundaries of the claim. Another restricts it to the dip or downward course, and so excludes the strike or onward course along the top or apex; and the last confines it to such outside parts as lie between the end lines continued outwardly in their own direction and extended vertically downward.[3] But otherwise it is without limitation or exception and broadly includes "all veins, lodes, and ledges throughout their entire depth"[4]—one as much as the other, and all whether they depart through one side line or the other, or through both of such lines.[5]

The Mattie L. as actually located is across, instead of along, the course of the discovery vein, as subsequent developments of the claim show, so what its locators believed to be, and so designated as, its end lines are in law its side lines, so far as concerns extralateral rights. The Anchor location was along the course of the discovery vein, so that its located end lines are the legal end lines for all veins that have their apex within its boundaries. The relative positions of the two locations, and the patented area of each, and the segment of the vein in controversy, are shown with sufficient accuracy by the preceding diagram:

"Referring again to the diagram, counsel say that the owner of the Anchor may follow the discovery vein, y-z, wherever found within the exterior lines of the survey, and upon its dip between the planes PQ, being the planes of the end lines, and may follow the secondary vein a-b, between the vertical planes drawn, parallel to the planes of the end lines, at the points x and h, where the vein a-b departs from the side lines of the location, and within such planes represented by the parallelogram, x, c, h, g, may follow the vein, a-b, to its south side line, either on its strike or dip, at any point west of x, but may not follow it east of x, because the apex of the vein a-b, between x and a, belongs to the owner of the Mattie L. claim, which by its patent has the right to follow such vein on its dip between vertical planes drawn parallel to and coincident with the legal end lines (that is, the located side lines) of the Mattie L. location, and this includes the vein under the surface of the Anchor within the parallelogram, c, x, e. f."

The court said, in part, "The doctrine of extralateral rights, therefore, does not apply; neither does it by analogy fit this case. The intralimital rights of the respective parties govern, and since those rights of the junior Mattie L. claim conflict with, and are interrupted by the senior intralimital rights of the Anchor, the latter prevails."

[2] Grand Central Co. vs. Mammoth Co., 29 Utah 490, 83 Pac. 648; dis. 213 U. S. 72. In Alameda Co. vs. Success Co., 29 Ida. 618, 161 Pac. 862, it is said that the extralateral right conferred by the federal statute is determined by the apex on the surface upon which the prospector makes his location and the dip of the veins, and not upon the levels in the depths of the earth and disclosed by the working of the mine. This case declared the statement made in Stewart Co. vs. Ontario Co., 23 Ida. 724, 132 Pac. 787, aff'd. 237 U. S. 350, about the pursuit of the vein in the direction of its strike at an angle of less than forty-five degrees to the course thereof to be *obiter* and not law.

[3] Jim Butler Co. vs. West End Co., 247 U. S. 454; aff'g. 39 Nev. 375, 158 Pac. 876.

[4] See Twenty-one Co. vs. Original Sixteen Mine, 255 Fed. 658, aff'd. 265 Fed. 549. The terms "principal," "original," "primary," "secondary," "accidental," and "incidental" have all been employed at different times to describe the different veins found within the same surface boundaries, but their meaning is not entirely clear in all cases. They may refer to the relative importance or value of the different veins, or to their relations to each other; they may refer to the time of discovery; or they may well be used to distinguish between the discovery vein and other veins within the same surface boundaries, and beyond question they are most frequently used in this latter sense. Northport Co. vs. Lone Pine Co., 271 Fed. 105.

Where there are two conflicting lode locations, each having a portion of the apex of the same vein, and there is a conflict with respect to the dip rights within the surface lines of the two locations, the senior location must prevail and the junior locator can not claim rights in the lap under the doctrine of extralateral rights.

[5] Flagstaff Co. vs. Tarbet, 98 U. S. 463; Del Monte Co. vs. Last Chance Co., 171 U. S. 55; Jim Butler Co. vs. West End Co., *supra* [(3)]; Calhoun Co. vs. Ajax Co., 27 Colo. 1, 59 Pac. 607; aff'd. 182 U. S. 499; St. Louis Co. vs. Montana Co., 194 U. S. 235, aff'g. 113 Fed. 900. Every vein whose apex is within the vertical limits of the surface lines of a location passes to the locator by virtue of his location. He is not limited to those veins only which extend from one end line to another, or from one side line to another, or from one line of any kind within his surface lines. He is entitled to such veins throughout their entire depth, although they may so depart from a perpendicular in their course downward as to extend outside the vertical side lines of his location. Jim Butler Co. vs. West End Co., *supra*; Rico-Argentine Co. vs. Rico Con. Co., 74 Colo. 444, 223 Pac. 31; Quilp Co. vs. Republic Corp. 96 Wash. 439, 165 Pac. 61.

§ 674. Further Limitations.

The extralateral right does not depend upon priority of location,[6] except where two or more veins unite, interseet or cross each other,[7] or where a broad lode is bisected by the division side lines between two lode claims;[8] in each of these instances priority of location gives priority of title.[9] No extralateral right attaches to a blanket[10] vein nor to a blind vein within a patented placer claim,[11] nor to a lode or vein not "in place,"[12] nor to a lode or vein penetrating land covered by nonmineral patent issued prior to lode location.[13] The extralateral right does not attach to a lode or vein improperly located as a placer claim,[14] nor to a location laid upon the dip,[15] nor to an irregularly

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[6] Colorado Central Co. vs. Turek, 50 Fed. 895; Id. 54 Fed. 266; Id. aff'd. 70 Fed. 294; Jefferson Co. vs. Anchoria Co., *supra* (1).

[7] Calhoun Co. vs. Ajax Co., *supra* (5); Con. Wyoming Co. vs. Champion Co., 63 Fed. 545; Watervale Co vs. Leach, 4 Ariz. 34, 33 Pac. 418; Wilhelm vs. Silvester, 101 Cal. 358, 35 Pac. 997; Anaconda Co. vs. Pilot-Butte Co., 51 Mont. 443, 156 Pac. 443. "When veins or lodes unite on their dip, the older location takes all the ore at the point of intersection and the whole vein thereafter." Champion Co. vs. Con. Wyoming Co., 75 Cal. 78, 16 Pac. 513; Rico-Argentine Co. vs. Rico Con. Co., *supra* (5).

[8] U. S. Co. vs. Lawson, 207 U. S. 1, aff'g. 134 Fed. 769; Star Co. vs. Federal Co., 265 Fed. 881; Tom Reed Co. vs United Eastern Co, 24 Ariz. 269; 209 Pac. 283; *certiorari* denied, 260 U. S. 744.

[9] Id.; Argentine Co. vs. Terrible Co., 122 U. S. 478; aff'g. 89 Fed. 593; Montana Co. vs. St. Louis Co., 183 Fed. 69. The law permits a senior locator to hold all the underground conflict between his extralateral rights and those of a junior locator, even where the older claim may be so irregularly located as to follow the ledge downward upon an oblique angle to its dip, and the junior location is so regularly made as to go down upon its true dip. Bunker Hill Co. vs. Empire State Co., 134 Fed. 273.

[10] Iron Co. vs. Mike & Starr Co., 143 U. S. 394; Stewart Co. vs. Ontario Co., *supra* (2). See § 145.

[11] Rev. St., § 2333; see Clipper Co. vs. Eli Co., 194 U. S. 228; Iron Co. vs. Sullivan, 16 Fed. 832; Webb. vs. American Co., 157 Fed. 203; Thomas vs. South Butte Co., 211 Fed. 128; Mason vs. Washington Butte Co., 214 Fed. 32.

[12] Tabor vs. Dexter, Fed. Cas. 13,723.

[13] Amador Median Co. vs. South Spring Hill Co., 36 Fed. 468. See, Deer Creek Co. vs. Paris, 45 L. D. 274. Reeves vs. Oregon Co., 127 Or. 686, 273 Pac. 389.

Where a lode is discovered within land previously patented as nonmineral no extralateral right attaches thereto and none can be obtained except the patent be vacated for legal cause. In that event the lode would be open to mineral location. See San Francisco Co., 29 L. D. 397; Tryon, 29 L. D. 475.

[14] See Cole vs. Ralph, 252 U. S. 286, rev'g. 249 Fed. 81; San Francisco Co. vs. Duffield, 201 Fed. 830; Henderson vs. Fulton, 35 L. D. 652; Jefferson-Montana Co., 41 L. D. 320; Harry Lode, 41 L. D. 404.

[15] Iron Co. vs. Murphy, 3 Fed. 368; Grand Central Co. vs. Mammoth Co., *supra* (2); see, Van Zandt vs. Argentine Co., 8 Fed. 725; Jones vs. Prospect Co., 21 Nev. 339, 31 Pac. 642; Bunker Hill Co. vs. Shoshone Co., 33 L. D. 142; U. S. Borax Co., 51 L. D. 464, citing Bunker Hill Co. vs. Shoshone Co., 33 L. D. 142, and distinguishing Bick vs. Nickerson, 29 L. D. 662.

shaped location, as when in the form of a horseshoe,[16] or of an isosceles triangle;[17] but the extralateral right attaches to irregularly shaped locations which were made prior to the mining act of 1872.[18]

§ 675. Veins of Equal Dignity.

All veins are of equal dignity, and extralateral rights upon sundry veins, if they are so situated with reference to the parallel end lines that extralateral rights attach at all, are to be measured by the same rule as are the rights upon the discovery or original vein. The length of the apex interrupted by the planes of the end lines will be the extreme limit of the rights upon the original vein. So must the rights in the secondary vein be limited, whether the segment of it intercepted in like manner be longer or shorter than the segment of the original vein.[19]

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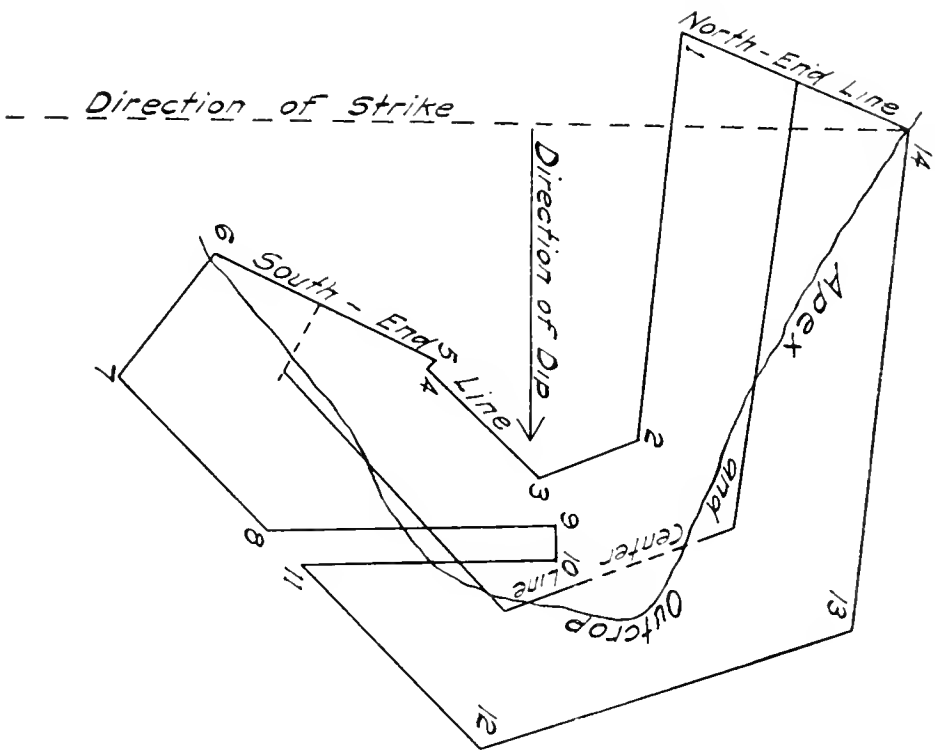
[16] Iron Co. vs. Elgin Co. (Horse Shoe Case), 118 U. S. 196.

The court said: "The exterior lines of the Stone Claim form a curved figure somewhat in the shape of a horseshoe, and its end lines are not and can not be made parallel. What are marked on the plat as end lines are not such. The one between numbers 5 and 6 is a side line. The draughtsman or surveyor seems to have hit upon two parallel lines of his nine-sided figure, and apparently for no other reason than their parallelism, called them end lines. We are, therefore, of opinion that, by reason of the surface form of the Stone Claim, it could not follow the lode existing therein in its downward course beyond the lines of the claim."

The following diagram shows the shape of the Stone Claim, its exterior lines, its center line, and the line of the apex of the vein.



See, also, Hickey vs. Anaconda Co., 33 Mont. 46, 81 Pac. 806.

[17] Montana Co. vs. Clark, 42 Fed. 626.

[18] Argonaut Co. vs. Kennedy Co., 131 Cal. 15, aff'd. 189 U. S. 1. Under the act of 1866 parallelism of the end lines was not required. Iron Co. vs. Elgin Co., *supra* [16]; Walrath vs. Champion Co., 63 Fed. 556; Carson City Co. vs. North Star Co., 73 Fed. 599, aff'd. 83 Fed. 658, *certiorari* denied 171 U. S. 687.

[19] Anaconda Co. vs. Pilot-Butte Co., *supra* [7]; see, Del Monte Co. vs. Last Chance Co., *supra* [5]. Cosmopolitan Co. vs. Foote, 101 Fed. 518.

§ 676. Continuity and Identity of Vein.

A vein or lode can not be pursued outside of the lines of a lode location unless it is the same vein or lode which has its top or apex therein.[20] Such vein or lode need not be a straight line of uniform dip or thickness or richness of mineral matter throughout its course and length.[21] It may be undulating[22] and waiving, with many rolls, curvatures, and variations, and in places be irregular, faulted and broken,[23] or be brecciated in form.[24] It is immaterial how shallow or low the angle of declination may be.[25] The presence of transverse veins or seams or spurs does not necessarily destroy the continuity of the vein or lode nor defeat the right to follow such main vein or lode upon its dip.[26] That the strike of a vein or lode below the surface is in many places almost at right angles to its strike at the surface does not necessarily break the continuity of the vein or lode.[27] Continuity of a vein or lode does not depend on the mineral deposits being in contact throughout or uninterrupted. They usually are found here and there apart from each other and variable in volume and richness.[28]

§ 677. Want of Identity.

The absolute truth as to the identity of ore bodies found on different levels at various depths is difficult to obtain, except where absolute continuity of vein matter is found, until expensive explorations are made, for the continuity of ore may be broken by the injection of country rock into the vein, or a "horse" may be found which is not always easily distinguished from the actual walls of country rock.[29]

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[20] Iron Co. vs. Cheesman, 116 U. S. 529; Barker vs. Condon, 53 Mont. 585, 165 Pac. 912. A lode or vein must be continuous in the sense that it can be traced through the surrounding rocks, and while mere slight interruptions of the vein or lode are not sufficient to destroy its identity, nor would short partial closure of the fissure have the effect to destroy its continuity, it if appear or recur again a little further on. Such continuity is broken and the lode or vein is not the same, either where the mineral and fissure close and come to an end, and are not found again in that direction, or, if found at all, are far off from the tracing of the vein or lode, or much diverted from its original trend or line, or it appears under different geological conditions and surroundings. Cheesman vs. Shreeve, 40 Fed. 793; Tom Reed Co. vs. United Eastern Co., *supra* [8]. "The authorities," said the court in the Tom Reed Case, "further indisputably establish that in determining whether identity exists, the distances separating the deposits claimed to be one vein, as well as the direction and continuity of the vein in the general plane of its dip or course downward, are elements of the highest significance and importance."

[21] Id.

[22] Jim Butler Co. vs. West End Co., *supra* [3].

[23] Twenty-One Co. vs. Original Sixteen Mine, *supra* [4].

[24] Hyman vs. Wheeler, 29 Fed. 354.

[25] Stevens vs. Williams, Fed. Cas. 13,413 and 13,414.

[26] Penn. Co. vs. Grass Valley Co., 117 Fed. 518; Rico-Argentine Co. vs. Rico. Con. Co., *supra* [5].

[27] Carson City Co. vs. North Star Co., *supra* [16]; Penn. Co. vs. Grass Valley Co., *supra* [26].

[28] Utah Con. Co. vs. Utah Co., 285 Fed. 252; Tom Reed Co. vs. United Eastern Co., *supra* [8]. In Daggett vs. Yreka Co., 149 Cal. 357, 86 Pac. 968, the court said: "The burden of proof is upon plaintiff to show by satisfactory evidence, the continuity of the vein between the apex within his lines, and the point at which the defendant is mining, but there are entirely satisfactory modes of proving identity in such cases without an actual tracing."

[29] Justice Co. vs. Barclay, 82 Fed. 556.

If veins are separated permanently, and can not be followed as the same vein, and if it is necessary to pass through great distances of country rock in order to connect them, in which distances there neither are mineralized walls nor seams, such veins must be deemed separate and distinct ones, and can not be identified as one and the same. Tom Reed Co. vs. United Eastern Co., *supra* [8]. The want of identity and continuity of a vein or lode may be established by assays of samples taken from a "fault" therein consisting of country rock. Anaconda Co. vs. Heinze, 27 Mont. 161, 69 Pac. 909.

§ 678. Differentiation.

What constitutes a discovery that will validate a location is a very different thing from what constitutes an apex to which attaches the statutory right to invade the possession of and appropriate the property which is presumed to belong to an adjoining owner. The question of a sufficient discovery of a vein, or of the validity of a notice of location, is substantially different from one relating to the continuity of a vein on its dip from the apex, and which tests the rights of the undisputed owner of the surface to what lies underneath and within his own boundaries. As between conflicting lode claimants, the law is liberally construed in favor of the senior location; but where one claims what *prima facie* belongs to his neighbor, because of an apex in the claimant's location, a more rigid rule of construction against the claimant prevails, and he has the burden to show, not merely that the vein on its dip may include the ore bodies in the adjoining ground, but that in fact it does so include them. Until he establishes such fact beyond reasonable controversy, he has no rights outside of his side lines in another's ground.[30]

In other words, when it is said that a location may be sustained by the discovery of mineral deposits of such value as to, at least, justify the exploration of the lode or vein in the expectation of finding ore sufficiently valuable to work, it is a very different question from telling a jury that the geological fact of the continuity of the vein to a certain point may be determined by what a practical miner might do in looking for some hoped for continuity.[31]

§ 679. Form of Surface Location.

The owner of a lode mining claim has the exclusive right of possession and enjoyment of the surface within the lines of his location without regard to the width or extent of the vein or lode;[32] but its form controls his subsurface rights.[33] So, where a claim is located so that the

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[30] U. S. Borax Co., *supra* (15); Golden vs. Murphy, 31 Nev. 395, 103 Pac. 394; Grand Central Co. vs. Mammoth Co., *supra* (2). In this case the court said: "In determining what constitutes such a discovery as will satisfy the law and form the basis of a valid mining location, we find, as in the case of the definition of the terms 'lode' or 'vein,' that the tendency of the courts is toward naked liberality of construction where a question arises between two miners who have located claims upon the same lode or within the same surface boundaries, and toward strict rules of interpretation when the miner asserts rights in property which either *prima facie* belongs to someone else or is claimed under laws other than those providing for the disposition of mineral lands, in which latter case the relative value of the tract is a matter directly in issue. The reason for this is obvious. In the case where two miners assert rights based upon separate alleged discoveries on the same vein, neither is hampered with presumptions arising from a prior grant of the tract, to overcome which strict proof is required. In applying a liberal rule to one class of cases and a rigid rule to another, the courts justify their action upon the theory that the object of each section of the Revised Statutes, and the whole policy of the entire law should not be overlooked."

[31] Fitzgerald vs. Clark, 17 Mont. 100, 42 Pac. 273.

[32] Gwillim vs. Donnellan, 115 U. S. 47; Calhoun Co. vs. Ajax Co., *supra* (5); Clipper Co. vs. Eli Co., *supra* (11); Bradford vs. Morrison, 212 U. S. 394, aff'g. 10 Ariz. 214, 86 Pac. 6; Doe vs. Waterloo Co., 54 Fed 935, aff'd. 82 Fed. 45. The owner of a mining claim is not authorized to enter upon the surface of a location owned or possessed by another, in claiming the right to follow a vein or lode outside of his side lines, for any purpose whatsoever. Waterloo Co. vs. Doe, 82 Fed. 45, aff'g. 54 Fed. 935; St. Louis Co. vs. Montana Co., 113 Fed. 901; Correction Lode, 15 L. D. 68.

[33] Flagstaff Co. vs. Tarbet, *supra* (5); Iron Co. vs. Elgin Co., *supra* (15); Argentine Co. vs. Terrible Co., *supra* (9); Del Monte Co. vs. Last Chance Co., *supra* (5); Montana Co. vs. Clark, *supra* (17).

vein or lode crosses the location instead of running lengthwise, the locator does not thereby lose his extralateral rights on the dip of the vein or lode beyond his end lines, but what he intended for his side lines are treated as his end lines and he is entitled to the dip between vertical planes through those lines.[34]

§ 680. Subsurface Rights.

The owner of a mining claim has the right of possession of the surface and of everything within his claim, except the veins or lodes therein which may have their apexes within the surface of another claim. The owners of such other veins or lodes have the right to follow them into the claim of another. But this is the extent of their right. They have no general right of exploration within the adjoining claim, whether above or below the surface. The law only gives them the right to follow such veins or lodes and confers upon them no right to approach it from any point other than the vein or lode itself.[35] For instance, the owner of an apex may not legally run a tunnel from his own claim through or into an adjoining location in order to reach the vein or lode apexing within his surface boundaries and penetrating such other claim.[36] But it has been said that such apex claimant is not confined to work entirely within the walls of his vein or lode within territory adversely held. It has been held, however, that he has the right to cut into the country rock on either side of the vein or lode, when necessary for his mining operations, either to keep his workings straight or regular, as customary in such operations when the vein undulates or changes in direction, or when the vein or lode narrows down to a width less than the convenient and ordinary width of the usual mining operations. This departure from the vein or lode may be accompanied by excavations for stations, ore pockets, and chutes connecting with his shaft where, of necessity, there must be allowance for reasonable connections between the shaft and the vein or lode to prevent abandonment of his mining work.[37]

The right of way provided for through the space of intersection in cross veins, is a way of necessity for the purpose of excavating and taking away the mineral contained in the cross vein or lode.[38] This in no way affects possession of the surface of the claim.[39]

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[34] It has been the accepted doctrine of the United States Supreme Court for many years that where the strike of the vein crosses the location at right angles, its dip may be followed extralaterally, whatever the direction in which the length of the location may run. If across the strike, the side lines, as it commonly is expressed, become the end lines. Subsequent locators know as well as the original ones that the determining fact is the direction of the strike, not the first discoverer's guess. Silver King Co. vs. Conkling Co., 256 U. S. 18. See Clark-Montana Co. vs. Butte & S. Co., 233 Fed. 547, aff'd. 248 Fed 609, aff'd 249 U. S. 12; Northport Co. vs. Lone Pine Co., *supra* [4]; Arizona Co. vs. Iron Cap Co., 27 Ariz. 202, 232 Pac. 549, *certiorari* denied, 270 U. S. 642.

[35] St. Louis Co. vs. Montana Co., *supra* [5]; Patten vs.Conglomerates Co., 35 L. D. 617; *but see* Twenty-One Co. vs. Original Sixteen Mine, *supra* [4]; Tom Reed Co. vs. United Eastern Co., *supra* [8].

[36] St. Louis Co. vs. Montana Co., *supra* [5]. See *infra*, note 37.

[37] Twenty-One Co. vs. Original Sixteen Mine, *supra* [4]; *but see* St. Louis Co. vs. Montana Co., *supra* [5]; Star Co. vs. Federal Co., 265 Fed. 881.

[38] Little Josephine Co. vs. Fullerton, 58 Fed. 521; Watervale Co. vs. Leach, *supra* [7]; Lee vs. Stahl, 9 Colo. 210, 11 Pac. 77; see Calhoun Co. vs. Ajax Co., *supra* [5].

[39] Oscamp vs. Crystal River Co., 58 Fed. 293.

§ 681. Trespass.

A person entering within the side lines of the mining claim of another for the purpose of mining the same is *prima facie* a trespasser.[40] The presumptive trespass may be justified by showing the existence of a vein or lode having its apex within the boundaries of a valid lode location; that such vein or lode departs from the side lines of such location on its downward course between the planes of its parallel end lines and penetrates the ground in controversy.[41] The owner of the ground intruded upon may show that such vein or lode is not a separate and independent one, but is simply one of numerous ore channels which together form one broad lode having its apex within the surface lines of each claim, and which descending become united within the side lines of the latter claim,[42] or the latter may show that it is not a part of the same vein or lode having its top or apex within the surface lines covered by the other's location, as identity and continuity of the vein or lode is essential to the extralateral right.[43]

§ 682. Burden of Proof.

The burden of proof rests upon him who asserts extralateral rights.[44]

§ 683. Presumptions.

The presumption is that all ore bodies found within the surface lines of another location belong thereto.[45] The party claiming ore bodies

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[40] Cheeseman vs. Shreeve, 37 Fed. 36; Doe vs. Waterloo Co., *supra* (32); see Flagstaff Co. vs. Tarbet, *supra* (5); Del Monte Co. vs. Last Chance Co., *supra* (5); see, also, Wakeman vs. Norton, 24 Colo. 192, 49 Pac. 283. The approved rule in such cases is this: "Hands off of any and everything within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim, of which you are the owner." Con. Wyoming Co. vs. Champion Co., *supra* (7). See, also, St. Louis Co. vs. Montana Co., *supra* (5); Tom Reed Co. vs. United Eastern Co., *supra* (8); Arizona Co. vs. Iron Cap Co., *supra* (34).

[41] Daggett vs. Yreka Co., *supra* (28); see Central Eureka Co. vs. East Central Eureka Co., 146 Cal. 147, 78 Pac. 834.

[42] Colorado Central Co. vs. Turck, *supra* (6).

[43] Id. See Arizona Co. vs. Iron Cap Co., *supra* (34).

[44] St. Louis Co. vs. Montana Co., *supra* (5); Doe vs. Waterloo Co., *supra* (32); Con. Wyoming Co. vs. Champion Co., *supra* (17); Carson City Co. vs. North Star Co., *supra* (24); Liberty Bell Co. vs. Smuggler Co., 203 Fed. 805; Arizona Co. vs. Iron Cap Co., *supra* (34); Stewart Co. vs. Ontario Co., *supra* (2); Grand Central Co. vs. Mammoth Co., *supra* (2). The term burden of proof is used in different senses. Sometimes it is used to signify the burden of making or meeting a *prima facie* case, and sometimes the burden of producing a preponderance of evidence. The two burdens are distinct things. One may shift back and forth with the ebb and flow of the testimony. The other remains with the party upon whom it is cast by the pleadings; that is to say, with the party who has the affirmative of the issue. Scott vs. Wood, 81 Cal. 400; Jones vs. Prospect Co., *supra* (15); Tonopah Co. vs. Fellenbaum, 32 Nev. 278, 107 Pac. 889.

One who claims rights anterior to the entry of a mining claim for patent and dependent upon the order of the facts making up the right to the land is not concluded by the patent, but may show such order, including the fact of his own prior discovery of mineral. Butte & S. Co. vs. Clark-Montana Co., 249 U. S. 12; aff'g. 248 Fed. 609, aff'g. 233 Fed. 547; Tom Reed Co. vs. United Eastern Co., *supra* (8).

[45] Stewart Co. vs. Bourne, 218 Fed. 327, aff'd. 237 U. S. 350; Grand Central Co. vs. Mammoth Co., *supra* (2). The presumption of ownership in the locator of all within his location lines throughout the entire depth prevails until it is shown that the veins or lodes within the planes of his lines extended downward vertically, having their tops or apices in the surrface of some other valid location, in such a way as to give the owner of the latter location the right to pursue them on their downward course. In St. Louis Co. vs. Montana Co., *supra* (5), the court quoted with approval the expression of Judge Hawley in Con. Wyoming Co. vs. Champion Co., *supra* (7): "hands off of everything within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim." In Doe vs. Waterloo, *supra* (32), it was held that the mere possessor of a mining claim under license from the government would be entitled to this presumption. Of course, it must yield to a showing that such mineral is part of the vein apexing in the claim belonging to another, but this always is a matter of defense. Lawson vs. U. S. Co., *supra* (8); and it has been held that this presumption is not overturned by speculative conjecture or intelligent guess made by mining experts. U. S. Borax Co., *supra* (15); Heinze vs. Butte & M. Co., 30 Mont. 484, 77 Pac. 421.

within the limits of another valid location can overcome the presumption of ownership arising from the possession of such ore bodies through showing, by preponderance of evidence, that the apex and the strike of the vein or lode are within the vertical planes of his own surface location, and that between planes drawn vertically downward through the end lines of his location and a certain parallel line, the vein or lode from its apex on its dip is continuous, and that the continuity extended to and through the adjoining claim in controversy, and that the ore bodies, the subject of the controversy, form a part of such vein or lode.[46]

In the absence of evidence as to the course or strike of a discovery vein or lode, a court will assume that the surface location was made along the course of the vein or lode, and that the lines cross the discovery vein or lode and become the end lines for all veins or lodes having their apexes within the surface boundaries of the location.[47]

§ 684. Effect of Patent.

While one in possession of the surface of a mining claim under a patent from the United States is presumably in possession of all beneath the surface, and may sue to quiet title to a vein beneath such surface and to enjoin the removal of ore therefrom, if in certain proceedings in the land office for the procuring of such patent no adverse claim was made, the patent carries no presumption that anything was considered or determined except the question of the right to the surface.[48] The court, in Lawson vs. United States Co.,[49] said: "A patent

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[46] Id. See Doe vs. Waterloo Co., *supra* (32); Con. Wyoming Co. vs. Champion Co., *supra* (7); Penn Co. vs. Grass Valley Co., *supra* (26); Iron Co. vs. Campbell, 17 Colo. 267, 29 Pac. 513; see Calhoun Co. vs. Ajax Co., *supra* (5); St. Louis Co. vs. Montana Co., *supra* (5).

[47] Stewart Co. vs. Ontario Co., *supra* (2); see Calhoun Co. vs. Ajax Co., *supra* (5); Work Co. vs. Dr. Jack Pot Co., 194 Fed. 620; Ajax Co. vs. Hilkey, 31 Colo. 131, 72 Pac. 447. See Anaconda Co. vs. Pilot Butte Co., *supra* (7).

[48] Lawson vs. U. S. Co., *supra* (8). The presumption of ownership in the locator of all within his location lines throughout the entire depth prevails until it is shown that the veins or lodes within the planes of his lines extended downward vertically, having their tops or apices in the surface of some other valid location, in such a way as to give the owner of the latter location the right to pursue them on their downward course. See § 4618 U. S. Comp. St., note 35, and cases there cited; Costigan Min. Law, § 113. In Doe vs. Waterloo Co., *supra* (32), it was held that the mere possessor of a mining claim under license from the government would be entitled to this presumption. Of course, it must yield to a showing that such mineral is part of the vein apexing in the claim belonging to another, *but this is always a matter of defense*, Lawson vs. U. S. Co., *supra*, and it has been held that this presumption is not overturned by speculative conjecture or intelligent guess made by mining experts. Heinze vs. Butte & M. Co., *supra* (40); Collins vs. Bailey, 22 Colo. A. 149, 125 Pac. 543; U. S. Borax Co., *supra* (15). In which case the land department held that where the invalidity of a mining location is alleged and the ownership of the apex is a controlling fact in determining its validity, the land department has jurisdiction to inquire whether the apex of the discovered vein is within the claim attacked.

[49] Lawson vs. U. S. Co. *supra* (8). See, also, Butte & S. Co. vs. Clark-Montana, 248 Fed. 609; aff'g. 233 Fed. 547, aff'd. 249 U. S. 28; Cole vs. Ralph, *supra* (14); Star Co. vs. Federal Co., *supra* (9); New York Co. vs. Rocky Bar Co., 6 L. D. 320; Champion Co. vs. Con. Wyoming Co., *supra* (7); Bulwer Co. vs. Standard Co., 83 Cal. 598, 23 Pac. 1102; *but see* Del Monte Co. vs. Last Chance Co., *supra* (5).

Mr. Lindley says (3 Lindl. Mines (3d ed), p. 1928, § 783): "The following excerpts from the opinions of the courts state succinctly the rule and the reason for it: The priority of right is not determined by the dates of the entries or patents of the respective claims, and priority of discovery may be shown by testimony other than entries and patents. Lawson vs. U. S. Co., 207 U. S. 1.

"While a patent is evidence of the patentee's priority of right to the ground described, it is not evidence that the right was initiated prior to the patentee of adjoining tract to the ground within his claim. Id. This case involved surface conflicts, patents having been issued without adverse claims having been asserted in the patent proceeding.

"It may be conceded that a patent is conclusive that the patentee has done all required by law as a condition of the issue; that it relates to the initiation of the patentee's right and cuts off all intervening claims. It may also be conceded that discovery of mineral is the initial fact. But when did the initial fact take place?

is issued for the land described, and all that is necessarily determined in an adverse claim is the priority of right to the land. This is evident from § 2325, Revised Statutes, which says: 'A patent for any land claimed and located for valuable deposits may be obtained in the following manner.' In the section the only matters mentioned for examination and consideration relate to the surface of the ground. There is no suggestion or provision for any inquiry or determination for subterranean rights.''

§ 685. Effect of Exclusion of Conflicting Area.

No reason can exist why the right of an owner of a mining claim after patent should forfeit extralateral rights because in his application for patent he excluded certain areas in conflict with prior claims which resulted in patented surface boundaries of irregular shape. The securing of a patent for a mining claim should not leave the patentee with less rights than he had before. The fact that the boundaries of the

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Are all other parties concluded by the locator's unverified assertion of the date or the acceptance by the government of his assertion as sufficient with other matters to justify the issue of a patent? Undoubtedly, so far as the patent is essential to the right, the patent is conclusive, but is it beyond that? Creede Co. vs. Uinta Co., 196 U. S. 337, 353.

"A locator might, if so disposed, place the date of discovery before it was in fact made, and at any time within three months prior to the filing of the certificate. Id.

"If, therefore, the entry and patent do not of themselves necessarily determine the order of the prior proceedings, why may not anyone who claims rights anterior to the entry and dependent on that order show as a matter of fact what it was? Id. Lawson vs. U. S. Co., 207 U. S. 1, is to the same effect."

Mr. Lindley continues: "Although the doctrine of relation is but a fiction of law, it is resorted to whenever justice requires it. U. S. vs. Detroit Co., 200 U. S. 321.

"The fact and date of discovery or lack of discovery prior to entry may, and necessarily in many cases, must be, inquired into. Uinta Co. vs. Ajax Co., 141 Fed. 563, 566, following the rule in Creede Co. vs. Uinta Co., 196 U. S. 337, 353.

"This is not inconsistent with the doctrine as to the conclusiveness of a patent. There is no attempt to impeach that instrument. Eureka Co. vs. Richmond Co. It simply permits extrinsic evidence of a fact not required to be recited in the patent, for the sole purpose of showing the time to which the instrument relates. For this purpose, and this purpose alone, a patentee may show the date of the location upon which the patent proceeding is based. The patentee in establishing this fact, will necessarily be limited to the location appearing in the patent record. He can not be permitted to show the existence of any other or prior location. Jacob vs. Lorenz, 98 Cal. 332, 340, 33 Pac. 119, 122.

"Therefore, the patent record duly authenticated by the commissioner of the general land office is admissible for this special purpose. While these records are ordinarily received in the courts as evidence of the facts stated therein, Galt vs. Galloway, 4 Pet. 332, 343; Round Mt. Co. vs. Round Mt. Co. (Nev.), (35 Nev. 392), 129 Pac. 308, pending on rehearing, we are of the opinion that the original location and the date of actual discovery must also be proved by evidence other than that furnished by the patent record. This seems to be the rule sanctioned by the courts. Champion Co. vs. Con. Wyoming Co., 75 Cal. 78, 82, 16 Pac. 513, 514; Kahn vs. Old Tel Co., 2 Utah 174; Last Chance Co. vs. Tyler Co., 61 Fed. 557, 566; Uinta Co. vs. Creede Co., 119 Fed. 164, 169; Uinta Co. vs. Ajax Co., 141 Fed. 563; Hickey vs. Anaconda Co., 33 Mont. 46, 81 Pac. 806, 812. See Round Mt. Co. vs. Round Mt. Co. (Nev.), (35 Nev. 392), 129 Pac. 308 (pending on rehearing).

"According to a majority of the Supreme Court of Montana, in order to apply the doctrine of relation to any date prior to the entry, the date of which is inserted in the patent, a valid location complete under the state law must be shown, and that date is the date of the performance of the last of a series of acts required by the state law, i.e., the recording of the certificate. If this certificate when offered in evidence does not comply with the state law and is invalid, the date of its recording can not be made available for purposes of relation. Hickey vs. Anaconda Co., 33 Mont. 46, 81 Pac. 806, 811. "Chief Justice Brantly, concurring in the result reached by the majority, is of the opinion that it should relate to the discovery, and in this we think the chief justice is sustained by the weight of authority.

"The certificate or notice of location is not evidence of the fact of discovery, even if the fact is recited in the certificate, unless the statute of the state requires such recitals to be made. Fox vs. Myers, 29 Nev. 169, 86 Pac. 793, 797. See, also, Mutchmor vs. McCarty, 149 Cal. 603, 87 Pac. 85, 86; Daggett vs. Yreka Co., 49 Cal. 357, 86 Pac. 968, 969. See on this subject the language of the Supreme Court of the United States in Lawson vs. U. S. Co., *supra* [8], referring to notices of location and stipulations of counsel as to such notices."

In the more recent case of Cole vs. Ralph, *supra* [14], the court said: "The general rule is that recitals of discovery in the location notice are mere *ex parte*, self serving declarations on the part of the locators and not evidence of discovery."

surface of a patented mining claim are so irregular in shape as not to present parallel end lines due to the exclusion of conflicts, can not be held to result in loss of extralateral rights, as this would be to place upon the mining statute a construction contrary to its purpose.[50]

§ 686. Pleading.

It is not strictly necessary in an action for trespass upon the extralateral dip of that part of a vein or lode which has its apex within a valid location for the plaintiff to allege in his complaint the existence of a vein or lode having its apex within his surface lines, but departing from his side line on its downward course and that his end lines are parallel; but it would be better pleading to allege the facts specifically, in order to present the issues more definitely and prevent surprise.[51]

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[50] Jim Butler Co. vs. West End Co., *supra* (3); Min. Regs. par. 38.

[51] Daggett vs. Yreka Co., *supra* (25); Central Eureka Co. vs. East Central Eureka Co., *supra* (41). As to suit to quiet title and injunctional proceedings to vein beneath the surface, see Lawson vs. U. S. Co., *supra* (8).

CHAPTER XXXVIII.

LOCATION NOTICES.

§ 687. Federal Law.

The federal mining law does not require a notice of location of a mining claim to be either posted [1] or recorded [2] as essential to a valid location. Such matters are left to local statutes or district rule,[3] with the proviso that when a record is made it must contain the name or names of the locators; the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim.[4]

§ 688. Local Law.

The mining laws of the locality govern the location.[5] Additional recitals are usually prescribed by such supplemental legislation or

[1] Book vs. Justice Co., 58 Fed. 106; Perigo vs. Erwin, 85 Fed. 906; aff'd. 93 Fed. 608; Walton vs. Wild Goose Co., 123 Fed. 217; McCulloch vs. Murphy, 125 Fed. 151; Daggett vs. Yreka Co., 149 Cal. 357, 86 Pac. 969; Allen vs. Dunlap, 24 Or. 229, 33 Pac. 675. The mere posting of a notice of location, without discovery, confers no right. Eilers vs. Boatman, 111 U. S. 356; aff'g. 3 Utah 159, 2 Pac. 66; Erhardt vs. Boaro, 113 U. S. 527; Helena Co. vs. Baggaley, 34 Mont. 473, 87 Pac. 455. The posted notice required by local statute or district rule is valuable chiefly as a temporary protection to the locator while the other acts of location are being performed. Erhardt vs. Boaro, *supra*; Donahue vs. Meister, 88 Cal. 131, 25 Pac. 1096; Sanders vs. Noble, 22 Mont. 110, 55 Pac. 1037; Street vs. Delta Co., 42 Mont. 371, 112 Pac. 701.

[2] Haws vs. Victoria Co., 160 U. S. 33; aff'g. 7 Utah 515, 27 Pac. 695; Peters vs. Tonopah Co., 120 Fed. 587 and cases therein cited; Sturtevant vs. Vogel, 167 Fed. 450; Anthony vs. Jillson, 83 Cal. 296, 23 Pac. 419; Carter vs. Bacigalupi, 83 Cal. 187, 23 Pac. 361; Southern Cross Co. vs. Europa Co., 15 Nev. 383; Deeney vs. Mineral Creek Co., 11 N. M. 279, 67 Pac. 724; Payton vs. Burns, 41 Or. 430, 69 Pac. 134. In Peters vs. Tonopah Co., *supra*, the court said: "The certificate of location is separate and distinct from the location notice. It is the 'certificate of location,' not the notice of location, of the claim, that is required by the Nevada state law to be recorded. * * * There being no law requiring the recording of the notice of location, it is wholly immaterial whether it was recorded or not."

[3] Haws vs. Victoria Co., *supra* [2]; Butte City Co. vs. Baker, 196 U. S. 119, aff'g. 28 Mont. 222, 72 Pac. 617; Clason vs. Matko, 223 U. S. 654, aff'g. 10 Ariz. 175, 85 Pac. 721. In the absence of a local law or rule a mining location would be valid without either posting or recording a notice of location. Sturtevant vs. Vogel, *supra* [2]. See also Dwinnell vs. Dyer, 145 Cal. 12, 78 Pac. 247; 7 L. R. A. N. S. 763; Daggett vs. Yreka Co., *supra* [1]; Madeira vs. Sonoma Co., 20 Cal. A. 731, 130 Pac. 175; Golden Fleece Co. vs. Cable Con. Co., 12 Nev. 312.

[4] Hammer vs. Garfield Co., 130 U. S. 291; aff'g. 6 Mont. 53, 8 Pac. 153; Bennett vs. Harkrader, 158 U. S. 441; Chapman vs. Toy Long, Fed. Cas. 2610; Gird vs. California Oil Co., 60 Fed. 532; Gillis vs. Downey, 85 Fed. 487; Smith vs. Cascaden, 148 Fed. 793; Cook vs. Klonos, 164 Fed. 535; Sturtevant vs. Vogel, *supra* [2]; Conway vs. Hart, 129 Cal. 483, 62 Pac. 44.

The *record* of location, when required, must, under the federal mining law, describe the claim, by reference to a natural object or permanent monument; but this requirement does not apply to the posted location *notice*. Poujade vs. Ryan, 21 Nev. 449, 33 Pac. 659; Brady vs. Husby, 21 Nev. 453, 33 Pac. 801.

It will be presumed that a claim given as a permanent monument or natural object in the description is such, in the absence of evidence to the contrary. Haws vs. Victoria Co., *supra* [2]; Smith vs. Cascaden, *supra*; whether it is patented or unpatented, Londonderry Co. vs. United Co., 38 Colo. 480, 88 Pac. 455; Carter vs. Bacigalupi, *supra* [2]; County of Kern vs. Lee, 129 Cal. 362, 61 Pac. 1124; Allen vs. Dunlap, *supra* [1].

[5] Butte City Co. vs. Baker, *supra* [3]; Clason vs. Matko, supra [3]; Hickey vs. Anaconda Co., 33 Mont. 46, 81 Pac. 806. In Thompson vs. Barton Gulch Co., 63 Mont. 190, 207 Pac. 115, it is said that where a state statute, or local rule, requires the posting of a notice of location or the verification of a recorded notice or the marking of the boundaries in a specified manner or the doing of certain preliminary work upon the location such requirements are not invalid as in conflict with the federal law, but merely add to its general terms. See Butte City Co. vs. Baker, *supra*; Clason vs. Matko, *supra* [3]; Butte & S. Co. vs. Clark-Montana Co., 249 U. S. 12; aff'g. 248 Fed. 609, aff'g. 233 Fed. 547; Northmore vs. Simmons, 97 Fed. 386; Nevada Sierra Oil Co. vs. Home Oil Co., 98 Fed. 678; O'Donnell vs. Glenn, 8 Mont. 254, 19 Pac. 302; Wright vs. Lyons, 45 Or. 172, 77 Pac. 81; Copper Globe Co. vs. Allman,

district rule;[6] the absence or insufficiency of which in the notice of location may operate to defeat the title to the claim.[7]

§ 689. Place of Posting.

It is essential that the notice of location, whether original or amended, should be posted in the place prescribed by local law.[8] It

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23 Utah 417, 64 Pac. 1019. They are as binding as if a part of the federal law itself. Gird vs. California Oil Co., *supra* [4]; Deeney vs. Mineral Creek Co., *supra* [2]; see Faxon vs. Barnard, 4 Fed. 702; Mallett vs. Uncle Sam Co., 1 Nev. 188.

In other words, § 2322 of the Revised Statutes of the United States provides that in the location of mining claims there must be not only compliance with the laws of the United States, but with the "state, territorial and local regulations." The rule as supported by decisions of courts is that the requirements of state statutes are inoperative only when they conflict with the United States statutes, and the failure to comply with a state or territorial law or local regulation renders a mining claim destitute of legal sufficiency and leaves a valid location subsequent in time prior and superior to an older location when the older locator failed to comply with such local laws and regulations. Butte & S. Co. vs. Clark-Montana Co., *supra*; see Butte City Co. vs. Baker, *supra*; Baker vs. Butte City Co., 28 Mont. 222, 72 Pac. 617, aff'd. 196 U. S. 119; Cloninger vs. Finlaison, 230 Fed. 100; *but see* § 305.

See § 691.

[6] Butte City Co. vs. Baker, *supra* [3]; Clason vs. Matko, *supra* [3]; Northmore vs. Simmons, *supra* [5]; Mares vs. Dillon, 30 Mont. 117, 75 Pac. 963. The land department must take notice not only of acts of congress, but of local laws and regulations. Work Co. vs. Doctor Jack Pot Co., 194 Fed. 620. As a general rule, local laws provide that the notice must contain a designation of the lode; the name of the locator or locators; the date of the location; the number of feet claimed on each side of the center of the discovery shaft, or its equivalent; the general course of the vein or lode; the manner of monumenting the claim, together with such a description of the claim by reference to some natural object or permanent monument as will identify the claim. See Erhardt vs. Boaro, *supra* [1]; Marshall vs. Harney Peak Co., 1 S. Dak. 360, 47 N. W. 290. See also, Wright vs. Lyons, *supra* [5].

[7] See Butte City Co. vs. Baker, *supra* [3]; Clason vs. Matko, *supra* [3]; *but see* Butte & S. Co. vs. Clark-Montana Co., *supra* [5]; Stock vs. Plunkett, 181 Cal. 193, 183 Pac. 657; Thompson vs. Underwood, 138 Ark. 323, 211 S. W. 164. Where a local statute requires one who locates a mining claim to file a verified declaratory statement, a failure to do so will defeat the title to the claim. Hickey vs. Anaconda Co., *supra* [5]; see McCowan vs. McClay, 16 Mont. 234, 40 Pac. 602; Ringling vs. Mahurin, 59 Mont. 38, 197 Pac. 829.

A declaratory statement, in practical mining operations, is a term applied to the statutory certificate of location, and is a certificate or statement of the location, containing a description of the mining claim, verified by the oath of the locator, performing, when recorded, a permanent function, and is the beginning of the locator's paper title, is the first muniment of such title, and is constructive notice to all the world of its contents. Gird vs. California Oil Co., *supra* [4]; Peters vs. Tonopah Co., *supra* [2]; Magruder vs. Oregon Co., 28 L. D. 177. See *infra*, note 48.

See Local Rules, Regulations and Customs. See Supplemental State Legislation.

[8] In California a notice of a lode location must be posted at the point of discovery, Civil Code § 1426; of a placer location within the boundaries thereof, *Id.* § 1426*e*; of a tunnel claim at the point of commencement of the tunnel, *Id.* § 1426*e*; of a mill site location within the boundaries thereof, *Id.* § 1126*j*. Batt vs. Stedman, 36 Cal. A. 608, 173 Pac. 99; citing Butte Co. vs. Radmilovich, 39 Mont. 157, 101 Pac. 1078, in which case it was said that where a local statute requires that the location notice shall be posted "at the point of discovery" a posting of another place will not prevail as against an intervening right and the locator's right will be of the date when he complied with the statute. See, also, Cheesman vs. Shreeve, 40 Fed. 787; Smart vs. Staunton, 29 Ariz. 1, 239 Pac. 514. McMillen vs. Ferrum Co., 32 Colo. 38, 74 Pac. 461.

"Location notice must not only be placed upon the monument, but in a manner sufficiently conspicuous to be observed. According to the locator's own story, every notice was placed under a rock or rocks, none of which were four feet high, as required by statute, and this notwithstanding that in more than one instance trees had been chosen as discovery posts.

"The court found that 'none of these location notices were actually posted upon the discovery posts, but in the case of three of them placed upon a flat rock, with another rock or rocks placed upon the notice; in the case of the fourth notice it was placed in a tobacco can,' which can was placed upon the ground." The location was held to be invalid, the court saying: "the requirements of the statute are mandatory. Upton vs. Santa Rita Co., 14 N. M. 96, 89 P. 275; Purdum vs. Laddin, 23 Mont. 387, 59 P. 153." Buckeye Co. vs. Powers, 43 Ida. 532, 257 Pac. 833; *but see* Donahue vs. Meister, *supra* [1]. Proof of posting of location notice at a certain point, containing recital therein that a discovery had there been made, would not be evidence *prima facie* of a discovery where the local statute does not require the making of such a declaration in the notice. Proof, however, that a notice was posted at a certain point establishes that at that point the locator claims a discovery. Fox vs. Myers, 29 Nev. 169, 86 Pac. 707. But, as elsewhere stated (see Chapter on Locations, note 178), the recitals in a location notice that a discovery has been made are not evidence of discovery. Independent Co. vs. Levelle, 50 L. D. 9. A location notice does not of itself constitute evidence of the mineral character of the land included therein. U. S. vs. Bunker Hill Co., 48 L. D. 598. See dissenting opinion in Cole vs. Ralph, 249 Fed. 81.

depends upon the provisions of the local statute as to whether or not the recorded notice of location shall be a true copy of the notice posted,[9] or be supported by the oath of the claimant.[10]

§ 690. Actual Knowledge.

The failure to comply with a local statute or rules that do not prescribe a forfeiture of title for noncompliance is immaterial as to persons having actual knowledge of the location.[11]

§ 691. Where Posted.

The notice of location usually is posted at the place of discovery;[12] but, unless its position is fixed by local statute or district rule it may be placed upon or off the location.[13]

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[9] Gird vs. California Oil Co., *supra* (4); Sanders vs. Noble, *supra* (1); see Silver King Co. vs. Conkling Co., 256 U. S. 18; rehearing of 255 U. S. 151, rev'g. 239 Fed. 553. The posted notice depends upon the local statute or district rules as to the sufficiency of its contents in relation to the record. See Costigan Min. Law, p. 205, § 56, and see Carter vs. Bacigalupi, *supra* (2). It has been said that it may be presumed from a recital in the record that the notice of location, in fact, was posted. Jantzen vs. Arizona Co., 3 Ariz. 6, 20 Pac. 93.

[10] See Hopkins vs. Walker, 244 U. S. 491; Peters vs. Tonopah Co., *supra* (2); Clark-Montana Co. vs. Butte & S. Co., 233 Fed. 548, aff'd. 248 Fed. 609, aff'd. 249 U. S. 12.

[11] Clark-Montana Co. vs. Butte & S. Co., *supra* (10); Smart vs. Staunton, *supra* (8); Thompson vs. Underwood, *supra* (7); Stock vs. Plunkett, *supra* (7); see Hedrick vs. Lee, 39 Ida. 42, 227 Pac. 27. Courts are not inclined to defeat the claim of him who has in good faith attempted to comply with the law. Gird vs. California Oil Co., *supra* (4); Hagan vs. Dutton, 20 Ariz. 476, 181 Pac. 581; Gold Creek Co. vs. Perry, 94 Wash., 624; 162 Pac. 996; Berquist vs. W. Virginia Co., 18 Wyo. 234, 106 Pac. 678; *but see* Ringling vs. Mahurin, *supra* (7); Blake vs. Cavins, 25 N. M. 574, 185 Pac. 374. If a third party intending to locate a mining claim can readily ascertain from what has been done by the prior locator, the extent and boundaries of the claim located, then the object of the statute has been accomplished. Walton vs. Wild Goose Co., *supra* (1); Sturtevant and Vogel, *supra* (2); Providence Co. vs. Burke, 6 Ariz. 323, 57 Pac. 641; Wiltsee vs. King Co., 7 Ariz. 95, 60 Pac. 896; Kern County vs. Crawford, 143 Cal. 298, 76 Pac. 1111; Sanders vs. Noble, *supra* (1); Gleeson vs. Martin White Co., 13 Nev. 442; Bonanza Co. vs. Golden Head Co., 29 Utah 159, 80 Pac. 736. See Fuller vs. Harris, 29 Fed. 814. The object and purpose of a location notice is to give notice to subsequent locators; but if a subsequent locator has actual notice of a prior location he will be bound thereby, although the notice may be defective. In Bismark Co. vs. North Sunbeam Co., 14 Ida. 516, 95 Pac. 14, the court said: "If Oster had actual notice of the location and boundaries of said claims, he, nor his grantees, will be permitted to take advantage of some technical defect in the location notice, where it appears that said claims were located in good faith." Ninemire vs. Nelson, 140 Wash. 511, 249 Pac. 992. A description in the location notice was not sufficiently definite to give constructive notice of the location of a claim, but where the proposed locator was informed of an existing location and was shown the actual markings and monuments upon the ground, these were sufficient to inform him of the rights of the prior locator. Thompson vs. Underwood, *supra* (7); Stock vs. Plunkett, *supra* (7); Huckaby vs. Northam, 68 Cal. A. 83, 228 Pac. 717. A location notice controls where there is no discrepancy between the calls of the location notice and the stakes upon the ground, where it is shown that the adverse claimant had actual knowledge of the contents of the notice. Cardoner vs. Stanley Co., 193 Fed. 519. See Flynn Co. vs. Murphy, 18 Ida. 266, 109 Pac. 851; Swanson vs. Koeninger, 25 Ida. 361, 137 Pac. 8913. A person with knowledge of the existence of a mining location can take no advantage of the locator's failure to post two notices required by local rules where he had posted but one. Clark-Montana Co. vs. Butte & S. Co., *supra* (10), or of a failure to record. Stock vs. Plunkett, *supra* (7).

[12] Haws vs. Victoria Co., *supra* (2); McKinley Creek Co vs. U. S. Co., 183 U. S. 563; Kern Co. vs. Crawford, 134 Cal. 298, 76 Pac. 1111; Sanders vs. Noble, *supra* (1). See Worthen vs. Sidway, 72 Ark. 215, 79 S. W. 777. "It is urged that the notice posted was not placed upon the vein located. The evidence is that it was placed upon a part of said vein—a spur thereof. It was not necessary that the notice should be placed upon the croppings of the vein. If near by the same, it would be sufficient if it indicated the vein sought to be located. Phillpotts vs. Blaisdell, 8 Nev. 61, 4 Morr. Min. R. 341. Parks and his associates had no trouble in determining what was the vein Newbill sought to locate." Doe vs. Waterloo Co., 70 Fed. 461, aff'g. 55 Fed. 11. Where a notice of location claims a certain number of feet of "this vein or lode" it indicates that such notice as posted upon the ground was placed on the croppings of the lode, or in such close proximity to the point where the croppings appeared, or had been exposed, as to make the expression "this vein or lode" mean what it said. Daggett vs. Yreka Co., *supra* (1). In Carter vs. Bacigalupi, *supra* (2), the court said: "The notice was posted upon the vein or lode itself, and stated that it was for a specified portion of this vein or lode. That identified and fixed the lode, and it was not necessary to go on and give the geography of the locality." See, also, Phillpotts vs. Blaisdell, *supra*, although as a fact, no vein or lode then was exposed. Book vs.

§ 692. Description in Notice.

Unless required by local statute or district rule the posted notice need not contain a reference to a natural object or permanent monument,[14] nor the words "dated on the grounds,"[15] nor need the record be an exact and literal copy of the notice posted on the claim.[16]

§ 693. Defective Description.

Where a notice is indefinite in stating the number of feet claimed along the lode or vein from the discovery point, or the monuments referred to, the locator's rights will be limited to an equal length on each side of such point or monument along the course of the vein or lode.[17] It is not fatal to the title if the notice, whether posted or recorded, does not set forth the state, county or mining district within which it is situate,[18] nor the proper legal subdivision within which it may be located, if the remaining description sufficiently identifies the land.[19] The notice may misdescribe the character of the monuments,[20] or the location of the "tie,"[21] or mistake the course and distance of

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Justice Co., *supra* (1); Willeford vs. Bell, 5 Cal. Unrep. Cas. 679, 49 Pac. 6. Where a local statute requires that the notice of location shall be posted at the point of discovery, a posting of such notice within seventy-five feet of such point is not a sufficient compliance with the statute and does not constitute a valid location. Batt vs. Stedman, *supra* (5).

In DeWitt vs. Sides, 81 Cal. A. 643, 254 Pac. 670, the court said: "The authorities further hold, however, that when notice is properly posted, but the locator does not remain in possession of said claim or distinctly mark the same on the ground so that its boundaries can be readily traced, the location is invalid as against a subsequent locator who complies with the requirements of the statute. Holland vs. Auburn Co., 53 Cal. 149; Funk vs. Sterrett, 59 Cal. 613; Donahue vs. Meister, *supra* (1); Eaton vs. Norris, 131 Cal. 561, 63 Pac. 856; Newbill vs. Thurston, 65 Cal. 420, 4 Pac. 409. In other words, as said in Funk vs. Sterrett, *supra*, a party can show a right to the possession of a mining claim (when no patent has issued) only by showing an actual *pedis possessio* as against a mere intruder, or by showing a compliance with the requirements of the law." See *supra*, note 8.

[13] Haws vs. Victoria Co., *supra* (2); Green vs. Gavin, 11 Cal. A. 506, 101 Pac. 931; McCleary vs. Broaddus, 11 Cal. A. 60, 111 Pac. 125; Upton vs. Santa Rita Co., *supra* (8).

[14] Gleeson vs. Martin White Co., *supra* (11). The description in the location notice must be sufficient to identify the claim with reasonable certainty or the location is void. U. S. vs. Sherman, 288 Fed. 497; see, also, Miehlich vs. Tintic Co., 60 Utah 569, 211 Pac. 686.

[15] Preston vs. Hunter, 67 Fed. 998.

[16] Gird vs. California Oil Co., *supra* (1).

[17] Talmadge vs. St. John, 129 Cal. 430, 62 Pac. 79; Metcalf vs. Prescott, 10 Mont. 283, 25 Pac. 1037; Bramlett vs. Flick, 23 Mont. 95, 57 Pac. 869; Bonanza Co. vs. Golden Head Co., *supra* (11). In Erhardt vs. Boaro, *supra* (1), the location notice reads, "We, the undersigned, claim fifteen hundred feet on this mineral-bearing lode, vein or deposit," and the court *held* "that this notice, posted at the point of discovery, would hold seven hundred and fifty feet each way along the vein until the ground could be prospected and a better location made." See, also, Omar vs. Soper, 11 Colo. 380, 18 Pac. 443; Berquist vs. W. Virginia Co., *supra* (11).

[18] Duryea vs. Boucher, 67 Cal. 141, 7 Pac. 421; Carter vs. Bacigalupi, *supra* (2); Talmadge vs. St. John, *supra* (17); Green vs. Gavin, *supra* (13).

[19] Duryea vs. Boucher, *supra* (18); see Metcalf vs. Prescott, *supra* (17).

[20] Sturtevant vs. Vogel, *supra* (2); see Poujade vs. Ryan, *supra* (4); Brady vs. Husby, *supra* (4).

[21] In Sturtevant vs. Vogel, *supra* (2), the defect in the location notice was that the permanent monument to which the claim was "tied" was erroneously located. Any one finding the location notice posted on one of the stakes which marked the boundaries of the claim could observe the error at a glance. It would then devolve upon him to trace out the claim by reference to the calls and distances set forth in the notice, and to discover where it lay, and to disregard the obvious error in the reference to a permanent monument. Stakes driven in the ground are not the most certain means of identification. A notice of location which describes the claim by metes and bounds and by reference to stakes set in the ground, adding that the claim "lies about one mile" from a specified mountain in a southeasterly direction, is not defective because it fails to state any particular beginning point in the mountain. Flavin vs. Mattingly, 8 Mont. 242, 19 Pac. 384. In Blake vs. Cavins, *supra* (11), it is said: "While there was evidence to the effect that there had been a misdescription in the call for the permanent monument to which the claim was tied, this, of itself would not necessarily invalidate the location, if as a matter of fact, the senior locator had properly monumented the claim and had done the other acts required by the statutes, and the junior locator had knowledge of the senior locator's claim and its boundaries. National Co. vs. Piccolo, 54 Wash. 617, 104 Pac. 128. It

the boundaries,[22] or the points of the compass,[23] or state an erroneous date,[24] or no date at all,[25] as such defects do not necessarily vitiate the notice of location.[26]

§ 694. Liberal Construction.

It is universally said that location notices should be liberally construed, having reference to the circumstances under which, and the character of the parties by whom they generally are made. In the determination of the sufficiency of the notice the most important guide is the purpose of the notice, which is to identify the land with reasonable certainty.[27] Therefore, as before stated, mere imperfections in the notice will not necessarily render it void.[28]

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is contended further that the description of the claim was insufficient, both in the complaint and in the notices of location. We think the description sufficient when added by the respondent's long continued possession. Moreover, it is manifest that the appellant was not deceived nor misled by any false or deficient description. It plainly appears that he knew the boundaries of the claims and entered within them for the purpose of acquiring for himself the benefit of the respondent's labor and expenditures, believing that the respondent had forfeited his rights, not in ignorance of such rights, nor for want of a sufficient description of the property in the location notices. The purpose of description is to give notice, and since the appellant had notice, it would seem that he was not in a position to complain of technical defects which in no way affected his rights."

[22] Smith vs. Newell, 86 Fed. 57. Upton vs. Larkin, 7 Mont. 449, 17 Pac. 728, aff'd. 144 U. S. 19. Hansen vs. Fletcher, 10 Utah 266, 37 Pac. 480. See Book vs. Justice Co., *supra* [1]. Where the recorded distances and courses of the location notice do not correspond with the markings made upon the ground, the latter will prevail and will determine the *locus in quo* of the location regardless of the description as recorded. Meydenbauer vs. Stevens, 78 Fed. 793.

[23] Walton vs. Wild Goose Co., *supra* [1]; Providence Co. vs. Burke, *supra* [11].

[24] Webb vs. Carlon, 148 Cal. 555, 83 Pac. 998; see, also, Muldoon vs. Brown, 21 Utah 121, 59 Pac. 720, in which case the date proved to be false. A location notice which is antedated, with fraudulent intent, is void. Bramlett vs. Flick, *supra* [17]. By statute in Nevada, false dating of a location notice is a felony. Nev. St. 1907, p. 373. A posted location notice is not invalidated by the fact that it is posted after midnight of the date it bears, no fraud appearing and the notice being posted before the initiation of a conflicting claim. Berquist vs. W. Virginia Co., *supra* [11].

[25] Stock vs. Plunkett, *supra* [7]; *but see* Bunker Hill Co. vs. Empire State Co., 108 Fed. 192, aff'd. 109 Fed. 538, and see Hickey vs. Anaconda Co., *supra* [ ]; Thompson vs. Barton Gulch Co., *supra* [5]; Wright vs. Lyons, *supra* [5]. In Stock vs. Plunkett, *supra*, it was held that a subsequent locator, having seen the notice of the prior location, which complied with the federal mining law, can not take advantage of the fact that such notice was neither dated nor recorded as required by the local mining statute, it not providing a penalty for such default.

[26] Kinney vs. Lundy, 11 Ariz. 75, 89 Pac 496; Green vs. Gavin, *supra* [13]; *but see* Mutchmor vs. McCarty, 149 Cal. 603, 87 Pac. 85; Dillon vs. Bayliss, 11 Mont. 171, 27 Pac. 725; Londonderry Co. vs. United Co., *supra* [4] See Bennett vs. Harkrader, *supra* [4]; Vogel vs. Warsing, 146 Fed. 949.

[27] Book vs. Justice Co., *supra* [1]; Walton vs. Wild Goose Co., *supra* [1]; McCulloch vs. Murphy, *supra* [1]; Tonopah Co. vs. Tonopah Co., 125 Fed. 392; Zerres vs. Vanina, 134 Fed. 616; aff'd. 150 Fed. 564; Green vs. Gavin, *supra* [13]; Batt vs. Stedman, *supra* [9]; Sydney vs. Richards, 40 Cal. A. 685, 181 Pac. 394; Independence Co. vs. Knauss, 32 Ida. 269, 181 Pac. 701; Sanders vs. Noble, *supra* [1]; Bonanza Co. vs. Golden Head Co., *supra* [11]. For an approved form of location notice under the mining law of California, see Sydney vs. Richards, *supra*. The object and function of location notices do not extend to conferring full title to mining property. Other acts of location must also be performed to confer rights. The object and function of a location notice as it relates to title have been discussed in many cases. Copper Queen Co. vs. Stratton, 17 Ariz. 127, 149 Pac. 393. In Carter vs. Bacigalupi, *supra* [2], the court said, in construing location notices: "it must be remembered that, as a rule, miners are unacquainted with legal forms and requirements, and are frequently out of the reach of assistance; and in view of this it has been wisely held that their proceedings are to be regarded with indulgence, and liberally construed." In Bismark Co. vs. North Sunbeam Co., *supra* [11], is found a clear statement of the purpose of the notice. The court said: "It is the well-settled doctrine of all of the later decisions that location notices and records should receive a liberal construction, to the end of upholding a location made in good faith. In Londonderry Co. vs. United Co., *supra* [1], where the court was considering the sufficiency of a location notice, it is said: 'Every case where this question is raised must therefore depend upon its own circumstances. As previously stated, the purpose of such location certificate is to give notice to subsequent locators; and, if by any reasonable construction the language descriptive of the situs of a claim, aided or unaided by testimony *aliunde*, will do so, it is sufficient in this respect. In other words, the object of requiring a reference to a natural object or permanent monument is to furnish a means by which to identify the claim, and whatever reference will accomplish this object satisfies the law.'" Ninemire vs. Nelson, *supra* [11].

§ 695. Protecting Posted Notice.

It is manifest that some precaution must be taken by a locator to protect his posted notice of location from destruction by the elements.[29] This, some locators seek to do, by covering such notice with glass, or folding it in a box and placing the box in a conspicuous place, or putting the notice upon a mound of rock,[30] or putting the notice within a tin can.[31]

§ 696. Notice as a Marking.

The posted notice serves as one kind of a marking and aid in determining the situs of the monuments defining the boundaries of the location.[32]

§ 697. Sufficiency of Notice.

The sufficiency of the notice is a question of fact.[33] If it is uncertain it may be aided by evidence of possession and the erection of monuments.[34]

§ 698. Recording Before Posting.

In the absence of any intervening right the recording of a notice of location before it is posted upon the ground will not vitiate the location.[35]

§ 699. The Amended Notice of Location.

An amended notice of location is made for the purpose of correcting errors and defects in the original notice,[36] or as evidence of the chang-

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In Vedin vs. McConnell, 22 Fed. (2d) 756, the court says: "The courts treat with great indulgence inaccuracies and uncertainties in initial notices and markings prescribed for mining locations. But the same considerations do not apply to the recorded certificate of location, where, as here, a liberal length of time is given in which to make such record."

[28] Farmington Co. vs. Rhymney Co., 20 Utah 363, 58 Pac. 832; Londonderry Co. vs. United Co., *supra* (4).

[29] Hagan vs. Dutton, *supra* (11).

[30] Donahue vs. Meister, *supra* (1). It can not be said as a matter of law that the notice of location is insufficient where the notice was written on a piece of white paper and placed on a stick leaning up against the side of a cut on the surface rock, and another rock put on top of the paper so that it would not blow away; the paper being large enough to show under the rock, but the writing itself was not exposed. Emerson vs. Akin, 26 Colo. A. 40, 140 Pac. 481, *but see* Buckeye Co. vs. Powers, *supra* (8).

See *supra*, note 8.

[31] Gird vs. California Oil Co., *supra* (4); Donahue vs. Meister, *supra* (1). See Buckeye Co. vs. Powers, *supra* (8).

[32] Meydenbauer vs. Stevens, *supra* (22); Eaton vs. Norris, *supra* (12); Madeira vs. Sonoma Co., *supra* (3); Huckaby vs. Northam, *supra* (11); see Jupiter Co. vs. Bodie Con. Co., 11 Fed. 666; Willeford vs. Bell, *supra* (12).

[33] Eilers vs. Boatman, *supra* (1); McIntosh vs. Price, 121 Fed. 718; Blake vs. Cavins, *supra* (11). Its falsity may be shown. Dillon vs. Bayliss, *supra* (26). A location notice upon its face uncertain and without evidence of what land was occupied, can not be evidence for any purpose. Tombstone Town Site Cases, 2 Ariz. 272, 15 Pac. 26, dis. 145 U. S. 629, 630, 647. See, also, Vedin vs. McConnell, *supra* (27).

[34] Tombstone Town Site Cases, *supra* (33).

[35] Thompson vs. Spray, 72 Cal. 528, 14 Pac. 182; see Con. Mutual Oil Co. vs. U. S., 245 Fed. 524.

[36] Bunker Hill Co. vs. Empire State Co., *supra* (25); Hall vs. Arnott, 80 Cal. 348, 22 Pac. 203; Milwaukee Co. vs. Gordon, 37 Mont. 209, 95 Pac. 997. In Copper Queen Co. vs. Stratton, *supra* (27), it is said: "other authorities have recognized the amendable character of location notices when defective, and we consider the question of the power to amend errors and defects in the notice and the effect of the amendment as well settled in the western mining states, including this jurisdiction, but a reference to some of the cases and a presentation of some of the discussions in the authorities will not be amiss here." The court then cited and quotes from McEvoy vs. Hyman, 25 Fed. 596; Frisholm vs. Fitzgerald, 25 Colo. 290, 53 Pac. 1109; Strepey vs. Stark, 7 Colo. 614, 5 Pac. 111; Duncan vs. Fulton, 15 Colo. A. 140, 61 Pac. 244;

ing of the boundaries of the original location,[37] provided, such readjustment of the lines does not interfere with intervening rights of others.[38] In the absence of such rights the amended notice relates back to the original location without loss of rights not inconsistent with the amendment,[39] and both notices are admissible as evidence[40] as showing a completed location.[41]

Morrison vs. Regan, 8 Ida. 291, 67 Pac. 955; 2 Lindl. Mines (3d ed.), p. 929, § 398 (citing some additional cases upon this proposition).

For the purpose of curing imperfections in the original location, correcting errors, or supplying omissions, the same latitude of amendment is allowed in the case of placers as in lodes. Ortman, 52 L. D. 467. In this case the department said that "the fact that a mining claim was located in the shape and had the usual dimensions of a lode and that the mineral surveyor characterized it as a lode upon an official plat is not conclusive that it was the intention to make a lode location where the propriety of locating the land as placer ground is not questioned and the recorded notice of location describes it as placer."

The law does not require an amended notice of location to state the object or purpose of making such amendment, but a general statement that it is made to cure errors or defects is sufficient, and the filing of such amended notice is effectual for all purposes enumerated in the statute whether they are mentioned in the amended notice or not. Tonopah Co. vs. Tonopah Co., *supra* [27]; Johnson vs. Young, 18 Colo. 629, 34 Pac. 173.

[37] Porter vs. Tonopah Co., 133 Fed. 756; Sullivan vs. Sharp, 33 Colo. 346, 80 Pac. 1054; Bismark Co. vs. North Sunbeam Co., *supra* [11]; Wilson vs. Freeman, 29 Mont. 470, 75 Pac. 84. The name of the claim may be changed. Butte Co. vs. Barker, 35 Mont. 327, 90 Pac. 177. See Doe vs. Waterloo Co., *supra* [12]; Seymour vs. Fisher, 16 Colo. 188, 27 Pac. 240; Fisher vs. Seymour, 23 Colo. 542, 49 Pac. 30; *but see* Lockhart vs. Leeds, 195 U. S. 434, rev'g. 10 N. M. 568, 63 Pac. 48. See, also, Shoshone Co. vs. Rutter, 87 Fed. 801.

[38] Tonopah Co. vs. Tonopah Co., *supra* [27]; Hall vs. Arnott, *supra* [36]; Washington Co. vs. O'Laughlin, 46 Colo. 503, 105 Pac. 1092.

[39] Bunker Hill Co. vs. Empire State Co., *supra* [25]; Gobert vs. Butterfield, 23 Cal. A. 1, 136 Pac. 516. It is not strictly speaking a relocation. Belk vs. Meagher, 104 U. S. 279; Zerres vs. Vanina, *supra* [9]; Quigley vs. Gillett, 101 Cal. 462, 35 Pac. 1040.

An amended location of a lode mining claim made for the purpose of correcting an error in the course of the vein, and in consequence of which the original side lines become end lines, does not operate as an abandonment of all the rights under the original location, where such amended location expressly states that such is not the intention; and if such new end lines do not entirely coincide with the original side lines a court may treat as abandoned only so much of the original claim with its planes extended as lay outside the extended end line planes of the amended location. Empire State Co. vs. Bunker Hill Co., *supra* [25]; see McEvoy vs. Hyman *supra* [36]; Thompson vs. Spray, *supra* [35]; Hallack vs. Traber, 23 Colo. 14, 46 Pac. 110; Morrison vs. Regan, *supra* [39].

[40] Berquist vs. W. Virginia Co., *supra* [11]; see Van Zandt vs. Argentine Co., 8 Fed. 725; Frisholm vs. Fitzgerald, *supra* [30]; Milwaukee Co. vs. Gordon, *supra* [38]; Moyle vs. Bullene, 7 Colo. A. 308, 44 Pac. 69. The original notice of location and its amendment should be construed together, and, if sufficient when so construed, the location record will be valid, although neither standing alone would be sufficient. Dean vs. "Omaha-Wyoming" Co., 21 Wyo. 133, 128 Pac. 881. See, also, Duncan vs. Fulton, *supra* [36]; Olympic Co. vs. Downing, ___ Wash. ___, 287 Pac. 872.

[41] Tonopah Co. vs. Tonopah Co., *supra* [27]; Street vs. Delta Co., *supra* [1]; see Kirk vs. Meldrum, 28 Colo. 453, 65 Pac. 634. An amended notice of location, when made, becomes the completed location and has the same validity as if it had been made in the first instance, and third persons can acquire no rights subsequent thereto. Tonopah Co. vs. Tonopah Co., *supra*. See Baker vs. Pugh, 17 Colo. 243, 13 Pac. 906. But the original location must be valid, though imperfect. Moyle vs. Bullene, *supra* [40]; Sullivan vs. Sharp, *supra* [37]; *compare* Frisholm vs. Fitzgerald, *supra* [30]. In Ortman, *supra* [39], placer ground was located as a lode claim. The land department said: "Nothing is observed in the placer-mining laws nor is the department aware of any authority that impels the conclusion that the locators gained no rights by their location and that it was absolutely void for want of conformity to the subdivisions of the public land surveys. The defect, in the absence of adverse claim to the added land, was curable either by suitable amendment or by relocation, provided the acreage limitation of the statute was observed." A location which is imperfect by reason of the failure to record the location within the statutory time would, nevertheless, be superior to any subsequent location by any party seeking to take advantage of such defect. Butte & S. Co. vs. Clark-Montana Co., *supra* [6]; Stock vs. Plunkett, *supra* [7]; Dripps vs. Allison's Co., 45 Cal. A. 95, 187 Pac. 448.

Mr. Costigan says: "If the location or location certificate was so defective as to enable third parties to disregard it and to locate for themselves, then the intervening rights acquired by such third parties can not be cut out by amendment and relation back, though, if the original location or location certificate is merely irregular, such intervening rights may be cut out by amendment." Costigan Min. Law, p. 223, § 57*a*, and numerous cases cited by him in support of the text.

§ 700. Contents of Amended Notice.

Provision for amended location notices is found in the laws of the various mining states.[42] As a general rule such laws do not require that the object or purpose of making the amended notice should be specified therein. A general statement that it is made to cure errors or defects is sufficient as the making of such notice is effected for all purposes enumerated in the local statute, whether such purposes are mentioned in such notice or not.[43] When the amended notice contains names other than those set forth in the original notice the amended notice may be treated as an original notice of location as to the persons whose names do not appear in the first notice and as an amended notice as to those whose names appear upon both.[44]

§ 701. New Discovery Unnecessary.

When making an amended location it is not necessary to make a new discovery nor perform such location acts as may be required to perfect an original location or a relocation.[45]

§ 702. Time of Filing Amendment.

There is no prescribed time within which an amended notice of location must be filed. Such notice may be filed after suit brought concerning the claim with the same effect as if filed before.[46]

§ 703. Relocation Notice.

The law makes a distinction between a relocation and an amended location notice, though both may be designated as amendments in such location notices.[47] Unless required by local statute or district rule, it is not necessary to state in the notice of relocation the fact of relocation; but when so required the absence of such a recital may render the relocation void.[48]

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[42] See Thompson vs. Spray, *supra* (35); Copper Queen Co. vs. Stratton, *supra* (27). The federal mining law makes no provision for an amended or additional location. Teller, 26 L. D. 484.

[43] Tonopah Co. vs. Tonopah Co., *supra* (27); Carlin vs. Freeman, 19 Colo. A. 334, 75 Pac. 26.

[44] Tonopah Co. vs. Tonopah Co., *supra* (27); Thompson vs. Spray, *supra* (35). In this case the court said that where several persons post a notice of location upon a mining claim and sign the same as locators, a subsequent notice posted upon the same claim, signed by some of the original locators and by other persons whose names did not appear in the first notice, is an original notice so far as the new locators are concerned, but does not affect the rights of the prior locators whose names are omitted, nor operate as an abandonment of the first location by the persons whose names are signed to both notices; and in an action by all the persons whose names are signed to the notices to quiet their title as against an adverse claimant, the second notice is admissible in evidence.

[45] Tonopah Co. vs. Tonopah Co., *supra* (27); Smart vs. Staunton, *supra* (8); Hallack vs. Traber, *supra* (39); King Solomon Co. vs. Mary Verna Co., 22 Colo. A. 528, 127 Pac. 129; *but see* Biglow vs. Conradt, 159 Fed. 868; Weed vs. Snook, 144 Cal. 439, 77 Pac. 1023. Tonopah Co. vs. Tonopah Co., *supra*, presents an exhaustive and interesting opinion on the subject.

[46] Strepey vs. Stark, *supra* (36); Butte Co. vs. Barker, *supra* (37); Milwaukee Co. vs. Gordon, *supra* (36); Olympic Co. vs. Downing, *supra* (40).

[47] See Teller, *supra* (42).

[48] Worthen vs. Sidway, *supra* (12); Ware vs. White, 81 Ark. 220, 108 S. W. 83; *see, also,* Butte City Co. vs. Baker, *supra* (5); Daggett vs. Yreka Co., 149 Cal. 357, 86 Pac. 968; Hickey vs. Anaconda Co., *supra* (7). The federal mining law does not use the term "declaratory statement," by by usage among miners the term has reference to the recorded instrument required by local statutes or district rules. When such a record is required it should contain all the provisions enumerated in the paramount law. Peters vs. Tonopah Co., *supra* (2); Sanders vs. Noble, *supra* (1); and, also, whatever is supplemental by such subsidiary laws and rules. Power vs. Sla, 24 Mont. 243, 61 Pac. 468; Baxter Co. vs. Patterson, 3 N. M. 269, 3 Pac. 741; Slothower vs. Hunter, 15 Wyo. 201, 88 Pac. 36. But a failure to state in the notice that it is a relocation is excused in Ninemire vs. Nelson, *supra* (11), by lack of evidence upon the ground of

§ 704. Effect of Statement of Relocation.

A statement in a notice that it is a relocation of a named mining claim is the equivalent of an admission of the validity of such claim; that the relocator claims a forfeiture or abandonment on the part of the prior claimant [49] and precludes the relocator from asserting to the contrary.[50]

§ 705. Record of Location.

The federal mining law does not require the recording of the notice of location.[51] The provisions of that law as to the contents of a

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any previous location; and see Murray vs. Osborne, 33 Nev. 267, 111 Pac. 31; Paragon Co. vs. Stevens Co., 45 Wash. 59, 87 Pac. 1068. See, generally, Clason vs. Matko, *supra* (3).

[49] Zerres vs. Vanina, *supra* (27); Shattuck vs. Costello, 8 Ariz. 22, 68 Pac. 529; Quigley vs. Gillett, *supra* (39); Golden vs. Murphy, 31 Nev. 395, 103 Pac. 394; Murray vs. Osborne, *supra* (48); Wills vs. Blain, 5 N. M. 238, 20 Pac. 798; Jackson vs. Prior Hill Co., 19 S. Dak. 453, 104 N. W. 207; see Belk vs. Meagher, *supra* (39).

In Cunningham vs. Pirrung, 9 Ariz. 293, 80 Pac. 330, the court makes the matter clear in these words: "Where, therefore, the new locator's right is based upon the loss of the possessory right acquired by a former locator, a location cetificate which fails to state that the claim is located as forfeited or abandoned property is void, and the new locator acquires no rights under it. * * * If a claim be relocated as a forfeited or abandoned claim, such relocation admits the validity of the former location, and the issue then is, conceding such prior location, whether the prior locator has lost his right by forfeiture or by abandonment, but where a subsequent locator bases his right upon the contention that the prior locator never made a valid location under the law, then he is not relocating a forfeited or abandoned claim, but is making an original location of a claim, the prior attempted location of which is invalid. In such a case the issue is not whether the prior locator has lost a possessory right once legally established, but whether the prior locator ever established a legal right. In such case the statute referred to has no application, and it not only would not be proper for the new locator to state in his location notice that he located the claim as abandoned property, but such statement, if made, would preclude him from contesting the question to be determined, namely, the validity of the proper location."

[50] Zerres vs. Vanina, *supra* (27); Peachy vs. Frisco Co., 204 Fed. 659; Cunningham vs. Pirrung, *supra* (49); Manhattan Co., 2 L. D. 698; Zeiger vs. Dowdy, 13 Ariz. 331, 114 Pac. 565; Murray vs. Osborne, *supra* (48); Wills vs. Blain, *supra* (49); Heilman vs. Loughrin, 57 Mont. 380, 188 Pac. 370.

Many cases go further, the later ones especially, and are to the effect that, as the court said in Smart vs. Staunton, *supra* (5): "He—a relocator or 'jumper'—is in no position to claim a forfeiture for defects" in posting the notice; see Stock vs. Plunkett, *supra* (7), that knowledge of the existence and limits of a former location estops the later locator to take advantage of defects in the former location. (This is treated more fully in Chapter on Locations.) See, also, Yosemite Co. vs. Emerson, 208 U. S. 30, aff'g. 149 Cal. 50, 85 Pac. 122, where the court quotes the testimony of one McWhirter, who admits he was attempting to 'jump' the Slap Jack mine, and adds: He knew all that any notice could have told him. Having this knowledge, we hold that McWhirter could not claim a forfeiture of title for want of preliminary notices under the former location"; *but see* Blake vs. Cavins, *supra* (11), to the effect that a relocator may defend on the ground of defects in the location as well as on the ground of forfeiture for failure to do the assessment work. See, also, cases cited on this point in Chapter on Locations.

[51] Haws vs. Victoria, *supra* (2), citing North Noonday Co. vs. Orient Co., 1 Fed. 533; Peters vs. Tonopah Co., *supra* (2); Anthony vs. Jillson, *supra* (2); Anderson vs. Caughey, 3 Cal. A. 22, 84 Pac. 223; Deeney vs. Mineral Creek Co., *supra* (2); Southern Cross Co. vs. Europa Co., *supra* (2); Bonanza Co. vs. Golden Head Co., *supra* (11). The description given in the record must be sufficient to apprise others of the precise location of the claim, as for example, a prospector, Eilers vs. Boatman, *supra* (1); or an officer seeking to execute process, Darger vs. Le Sieur, 8 Utah 160, 30 Pac. 363; or to sustain a judgment, Tracy vs. Harmon, 17 Mont. 465, 43 Pac. 500. In case of a failure or discrepancy between the boundary marks and the record the former will prevail as superior evidence of the particular ground located and its boundaries. Sturtevant vs. Vogel, *supra* (2); see Cardoner vs. Stanley Co., *supra* (11); see, also, Bennett vs. Harkrader, *supra* (4); Meydenbauer vs. Stevens, *supra* (22); Steen vs. Wild Goose Co., 1 Alaska 255; *but see* Swanson vs. Koeninger, *supra* (11); see Ringling vs. Mahurin, *supra* (11); Dripps vs. Allison's Co., *supra* (41); Courtney vs. Ward, 67 Colo. 105, 187 Pac. 517; Heilman vs. Loughrin, *supra* (50); Muldoon vs. Brown, *supra* (24). The federal mining act does not require that the record shall show that the location is so marked that the boundaries of the claim can be readily traced. McCann vs. McMilan, 129 Cal. 350, 62 Pac. 31. It is a question of fact, Taylor vs. Middleton, 67 Cal. 656, 8 Pac. 594; Farmington Co. vs. Rhymney Co., *supra* (28); and not of law, Blake vs. Cavins, *supra* (11).

As to the sufficiency of the reference in the record to show some natural object or permanent monument, see McIntosh vs. Price, *supra* (33); Bonanza Co. vs. Golden Head Co., *supra* (11); Sydney vs. Richards, *supra* (27); Brady vs. Husby, *supra* (4). A statement in the record that the claim "is situated on the north side of Iowa Gulch.

recorded notice, or certificate of location, although mandatory,[52] apply only when a record is required by local law or district rule,[53] which usually fixes the time and place for recordation.[54]

§ 706. Failure to Record.

Failure to make the record within the time prescribed by local statute or district rule does not work a forfeiture of title, unless expressly so provided, or no intervening right has accrued.[56] The

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above timber line, on the west side of Bald Mountain" is not such a reference to a natural object as would render the record admissible in evidence. Faxon vs. Barnard, *supra* [35]. A statement in the record that the claim (described as containing a certain number of feet each way from the discovery shaft, with surface ground of certain width) is situated "on the southwest side of Mount Hardin, in Portland Gulch, about fifteen hundred feet north of the Hawkeye lode" is not a sufficient description of the *locus* of the claim to render the record admissible in evidence. Drummond vs. Long, 9 Colo. 538, 13 Pac. 543. A description in the record to the effect that two mountain peaks bear in certain directions; that the claim is on a certain river near a named city; and that the shaft is on a certain small creek, at a place a certain distance from falls therein, is sufficient. Jackson vs. Dines, 13 Colo. 90, 21 Pac. 918. The statement that a mining claim is "situated about fifteen hundred feet NW. by N. of the Mountain Pride lode, in the record, is, in the absence of a showing to the contrary, a sufficient description of the *locus* of the claim. Gleeson vs. Martin White Co., *supra* [11]. A reference in the record to a patented mining claim is sufficient. Hammer vs. Garfield Co., *supra* [4]. Book vs. Justice Co., *supra* [1]. As to admission of evidence to explain or supply any defect or omission and to identify the object or monument to which the location is tied, see Hammer vs. Garfield Co., *supra*; Carter vs. Bacigalupi, *supra* [2]; Strepey vs. Stark, *supra* [36]; Dillon vs. Bayless, *supra* [20]; Seidler vs. Maxfield, 5 N. M. 197, 20 Pac. 794; Seidler vs. Lafave, 5 N. M. 44, 20 Pac. 789; Farmington Co. vs. Rhymney Co., *supra* [28].

[52] Clason vs. Matko, *supra* [5]; see Copper Queen Co. vs. Stratton, *supra* [27]; Paragon Co. vs. Stevens Co., *supra* [48]; see, also, Cook vs. Klonos, *supra* [4].

[53] See *supra*, note 49.

[54] Meydenbauer vs. Stevens, *supra* [22]; Butler vs. Good Enough Co., 1 Alaska, 246. A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations. Belk vs. Meagher, *supra* [39]; Creede Co. vs. Uinta Co., 196 U. S. 346; aff'g. 119 Fed. 164; Yard, 38 L. D. 59. See, also, U. S. vs. Sherman, *supra* [34]. Costigan Min. Law, p. 211, § 57 (head note). By local statute in the various mining states and in Alaska a record of a mining claim is provided for. It will be seen therefrom that their various provisions, though giving the instrument to be recorded a different name, such as "notice," "declaratory statement," "certificate of location," and though differing in detail and to some extent as to the period of time within which the record is required to be made, are substantially the same, consisting in most of them, of a requirement for the record within a specified number of days after discovery or posting notice of location, of an instrument containing the name of the locator, the name of the claim, the date of the location, the number of feet claimed along the lode each way from the point of discovery, the width on each side of the lode, the general course or strike of the vein or lode as near as may be, and such a description by reference to some natural object or permanent monument as will identify the claim. Filing for record is equivalent to record and no errors or omission to record by the recorder will prejudice the locator. Meyers vs. Spooner, 55 Cal. 257; Weise vs. Barker, 7 Colo. 178, 2 Pac. 919; Shepard vs. Murphy, 26 Colo. 350, 58 Pac. 588. The office of the county recorder of the county within which the location is situate usually is fixed by local statute as the place of record, and, also, sometimes, in addition thereto, the office of the mining recorder. See Fox vs. Myers, *supra* [8]. See, generally, Haws vs. Victoria Co., *supra* [2]; Jupiter Co. vs. Bodie Con. Co., *supra* [32]; Fuller vs. Harris, 29 Fed. 816; Rose Claim, 22 L. D. 83.

See *supra*, note 6.

[55] Lockhart vs. Leeds, *supra* [37]; Clark-Montana Co. vs. Butte & S. Co., *supra* [10]. See, also, Last Chance Co. vs. Bunker Hill Co., 131 Fed. 579; dis. 200 U. S. 617; Sturtevant vs. Vogel, *supra* [2]; Stock vs. Plunkett, *supra* [7]; Dripps vs. Allison's Co., *supra* [41]; Flynn Co. vs. Murphy, *supra* [11]; Ford vs. Campbell, 29 Nev. 578, 92 Pac. 206.

The omission to record can not be taken advantage of by a subsequent locator having the actual knowledge of location. Butte & S. Co. vs. Clark-Montana Co., *supra* [5]; Stock vs. Plunkett, *supra* [7]. Where the relative priority of conflicting locations depends upon the exact hour of the day of filing the record, fractions of a day are taken into account. Washington Co. vs. O'Laughlin, 46 Colo. 503, 105 Pac. 1092.

[56] Preston vs. Hunter, *supra* [15]; Zerres vs. Vanina, *supra* [27]; Sturtevant vs. Vogel, *supra* [2]; Buffalo Zinc Co. vs. Crump, 70 Ark. 525, 69 Pac. 572; Co. of Kern vs. Lee, *supra* [4]; Daggett vs. Yreka Co., *supra* [3]; Cravens vs. Degner, 34 N. M. 323, 281 Pac. 22. See Stock vs. Plunkett, *supra* [7]; Columbia Co. vs. Duchess Co., 13 Wyo. 244, 79 Pac. 385; Slothower vs. Hunter, *supra* [48]; see Kendall vs. San Juan Co., 144 U. S. 658; aff'g. Lockhart vs. Johnson, 181 U. S. 527. It is held in Ford vs. Campbell, *supra* [55], that the making and recording of a certificate of location of a mining claim was not essential, and in Gibson vs. Hjul, 32 Nev. 360, 108 Pac. 759,

failure to record may be supplied by oral proof of the location.[57] Such law is directory [58] and designed as a rule of evidence only to determine the rights of an adverse claimant of the premises under a subsequent location.[59]

§ 707. Effect of Record.

The record has no greater effect than that given by the registration laws of the state,[60] and conclusively proves no more than its own recordation; as all other necessary steps of location, when contested, must be established by proof outside of such record.[61] It does not exclude parole proof of actual possession, and, to the extent of that

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that the notice of location of a mining claim is not required to be strictly exact, and that the filing of a defective notice of location does not invalidate the claim. In Clark vs. Mitchell, 35 Nev. 452, 134 Pac. 449, the record failed to carry the boundary of the location to the northwest corner, and the court said: "This apparent clerical mistake, made by omitting any reference to the northwest corner, should not deprive parties of their rights to valuable property, if the claim was actually located and staked at the northwest corner, as distinguished from the north side center." See, also, Walsh vs. Erwin, 115 Fed. 531. In Butte Co. vs. Radmilovich, *supra* [8], the court said: "We do not agree with the conclusion of the trial court that a notice of location describing the course of the vein as north and south will not support a location of a claim along a vein the general course of which is east and west." 'Northerly' and 'southerly' must not be taken to mean 'due north' and 'due south.' Wiltsee vs. King Co., *supra* [11]; Glass vs. Basin Co., 22 Mont. 151, 55 Pac. 1047. In Upton vs. Santa Rita Co., *supra* [5], 'west' was read 'east.'

[57] Wailes vs. Davies, 158 Fed. 667; see Zerres vs. Vanina, *supra* [27]; Slothower vs. Hunter, *supra* [48].

[58] Wailes vs. Davies, *supra* [57].

[59] Lockhart vs. Leeds, *supra* [37]; Clark-Montana Co. vs. Butte & S. Co., *supra* [10]. See, also, Last Chance Co. vs. Bunker Hill Co., *supra* [55]; Sturtevant vs. Vogel, *supra* [2]; Stock vs. Plunkett, *supra* [7]; Dripps vs. Allison's Co., *supra* [71]; Flynn Co. vs. Murphy, *supra* [11]; Ford vs. Campbell, *supra* [55]; Sharkey vs. Candiani, 48 Or. 112, 85 Pac. 219, 7 L. R. A. N. S., 791. The failure to record merely shifts the burden of proof. Indiana Co. vs. Gold Hills Co., 35 Nev. 158, 126 Pac. 965. If no record at all is made until after a subsequent locator claims a right to the ground the original locator is allowed to prove, if he can, that he had in all respects fully complied with the law. Zerres vs. Vanina, *supra* [27]; Wailes vs. Davies, *supra* [57]; Stock vs. Plunkett, *supra* [7]. See, generally, Preston vs. Hunter, *supra* [15]; McGinnis vs. Egbert, 8 Colo. 41, 5 Pac. 652; Nelson vs. Chittenden, 53 Colo. 30, 123 Pac. 656. For cases involving priority where all parties are in default, see Lockhart vs. Johnson, *supra* [50]; Faxon vs. Barnard, *supra* [5]; Copper Co. vs. Allman, *supra* [5]. The analogous subject of failure to make record of assessment work is discussed in Yosemite Co. vs. Emerson, *supra* [50]; Zerres vs. Vanina, *supra* [27]; Harris vs. Kellogg, 117 Cal. 484, 49 Pac. 708.

[60] Campbell vs. Rankin, 99 U. S. 261; Jordan vs. Duke, 6 Ariz. 55, 53 Pac. 197.

[61] Zerres vs. Vanina, *supra* [27]; Campbell vs. Rankin, *supra* [60]; Mutchmor vs. McCarty, *supra* [20]; McInerny vs. Allebrand, 107, Cal. A. 457, 290 Pac. 530. See, also, Uinta Co. vs. Creede Co., 119 Fed. 164, aff'd. 196 U. S. 346; Jordan vs. Duke, *supra* [60]; Strepey vs. Stark, *supra* [36].

A location and its record are different things. Discovery vests an immediate fixed right of present and exclusive enjoyment in the locator. The record is incidental machinery to secure the claim and give notice to others. Clark-Montana Co. vs. Butte & S. Co., *supra* [10]. Creede Co. vs. Uinta Co., *supra* [54]; Cole vs. Ralph, *supra* [8]; U. S. vs. Bunker Hill Co., 48 L. D. 598; Golden Fleece Co. vs. Cable Con. Co., *supra* [3]; Fox vs. Myers, *supra* [8]; Round Mt. Co. vs. Round Mt. Co., 36 Nev. 560, 138 Pac. 71, rev'g. 129 Pac. 308.

In discussing the effect of a recorded notice of location, the court in Mutchmor vs. McCarty, *supra* [20], said: "A notice of the claim was recorded * * * and besides, if it had contained every essential requisite of a location notice, the copy of the record would have proved nothing except the bare fact that such notice had been recorded. It would not have proved that it was posted on the claim, or that the location was so marked on the ground that the boundaries could be readily traced. * * * Every one of these things, with the possible exception of the posting of the notice, was essential to the validity of the claim, but it is difficult to find in the record any satisfactory evidence upon a single point." See, also, Guerin vs. American Co., 28 Ariz. 160, 236 Pac. 687; see, also, Cole vs. Ralph, *supra* [8]; Thomas vs. South Butte Co., 211 Fed. 106; Niles vs. Kennan, 27 Colo. 502, 62 Pac. 360; Childers vs. Lahann, 19 N. M. 301, 142 Pac. 924; Bonanza Co. vs. Golden Head Co., *supra* [11]. The record, however, is made *prima facie* evidence of the recitals therein contained, by statute in Montana. Stats. 1907, p. 20, and in Nevada, Stats. 1907, p. 419. In Porter vs. Tonopah Co., 133 Fed. 763, aff'd. 146 Fed. 385, it is said: "The real purpose of the record is to operate as constructive notice of the fact of an asserted claim and its extent. When the locator's right is challenged, he should be compelled to establish by proof outside of the certificate all the essential facts, without the existence of which the certificate possesses no potential validity." These facts, once proved, the recorded certificate may be considered

possession as *prima facie* evidence of title.[62] A false record does not make the possessory title good; and a subsequent locator is not precluded from showing its falsity.[63]

§ 708. Record Not Title.

The record of the location of a mining claim is not a title nor proof of title, nor does it constitute, nor of itself establish the possessory right to which it relates[63a] although in part the basis of the right to the location,[64] and one of the steps to perfect the same.[65]

§ 709. Color of Title.

When the recorded notice is coupled with possession it may be sufficient color of title.[66]

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as *prima facie* evidence of such other facts as are required to be stated therein. "But the subsequent locator, notwithstanding the fact that a perfect record had been made, would not be estopped from showing that it was false." Zerres vs. Vanina, *supra* (27). In California it is provided that: "Where a locator or his assigns has the boundaries and corners of his claim established by a United States deputy mineral surveyor or a licensed surveyor of this state, and his claim connected with the corner of the public or minor surveys of an established initial point and incorporates into the record of the claim the field notes of such survey, and attaches to and files with such location notice a certificate of the surveyor, setting forth first: that such survey was actually made by him, giving the date thereof; second: the name of the claim surveyed and the location thereof; third: that the description incorporated in the declaratory statement (?) is sufficient to identify; such survey and certificate become a part of the record, and such record is *prima facie* evidence of the facts therein contained." Civil Code, § 1426. To the same effect see Nevada Rev. Laws, 1912, §§ 2122, 2416, sub'd. 8.

See § 708.

[62] Campbell vs. Rankin, *supra* (30); Eaton vs. Norris, *supra* (12); Webb vs. Carlon, *supra* (21); *but see* Brown vs. Oregon King Co., 110 Fed. 728. When made so by local statute or when not objected to in the course of judicial proceedings, the record is *prima facie* evidence of the citizenship of the locator. Jantzen vs. Arizona Co., *supra* (9), and of all the law requires such record to contain and which are therein sufficiently set forth, O'Reilly vs. Campbell, 116 U. S. 418; Jantzen vs. Arizona Co., *supra*; Strepey vs. Stark, *supra* (36); see Uinta Co. vs. Creede Co., *supra* (34), as, for instance, that the reference therein to a natural object or permanent monument is sufficient to identify the location. Brady vs. Husby, *supra* (3); *but see* Smith vs. Newell, *supra* (22); and that the locator has fully complied with the law in making the location. Cheesman vs. Shreeve, *supra* (8); Cheesman vs. Hart, 42 Fed. 98; *but see* Cole vs. Ralph, *supra* (8); Magruder vs. Oregon Co., 28 L. D. 174.

While the notice of location may be *prima facie* evidence of all facts recited therein nevertheless the *prima facie* case made by it does not prevent an attack upon it by showing that the mandatory provisions of the statute declaring what steps are necessary to make a valid location have not, in fact, been complied with. Mares vs. Dillon, *supra* (19); Ferris vs. McNally, 45 Mont. 20, 121 Pac. 890; *but see* Cole vs. Ralph, *supra*.

See *supra*, note 24.

[63] Zerres vs. Vanina, *supra* (27); Dillon vs. Bayliss, *supra* (25); Muldoon vs. Brown, *supra* (24). A recorded notice of location gives no information of a claim not actually located upon the ground; nor does even a notice posted upon the ground unless it appears that the party posting it is proceeding with reasonable diligence to indicate, or is about to indicate, the boundaries by marking them. Gregory vs. Pershbaker, 73 Cal. 109, 14 Pac. 401; see Doe vs. Waterloo Co., *supra* (12); dist'g. Newbill vs. Thurston, *supra* (12).

[63a] Strepey vs. Stark, *supra* (36).

[64] Id. Recordation of mining locations can not be a condition precedent, for the estate arises before recordation is to be performed. Zerres vs. Vanina, *supra* (27); see, also, Clark-Montana Co. vs. Butte & S. Co., *supra* (10). See Hopkins vs. Walker, *supra* (10).

The introduction of the location notice is but a preliminary step in the order of proof necessary to establish the rights of the claimant to the mining claim in controversy. Walton vs. Wild Goose Co., 123 Fed. 214.

[65] Pollard vs. Shively, 5 Colo. 317. See *supra*, note 61.

[66] Protective Co. vs. Forest City Co., 51 Wash. 643, 99 Pac. 1033. See, also, Attwood vs. Fricot, 17 Cal. 37. The definition of "color of title" would include an invalid or defective location notice or certificate, when possession is taken thereunder. "Color of title is a defective muniment of title." Verder vs. Gilmer, 47 Tex. C. A. 464, 105 S. W. 331–3. It is that which, in appearance, is a title, but in fact is not a good title. U. S. vs. Casterlin, 164 Fed. 437–9; Johnson vs. Hurst, 10 Ida. 308, 77 Pac. 784, 791; Cameron vs. U. S., 148 U. S. 301–8. It exists wherever there is a reasonable doubt regarding the validity of an apparent title (Id.). It is sufficient basis for an adverse possession and extends the constructive possession to the full limits of the boundaries given in the writing or the transaction that gives colorable title to the land. 1 Am. & Eng. Ency. of L. (2d ed.), p. 862.

§ 710. Estoppel.

An original locator of a mining claim, after the record is made, is estopped to deny the validity of the original location.[67]

§ 711. Amended Record.

Where a record is found to be defective[68] or erroneous it may be amended,[69] when not detrimental to an intervening locator.[70] The amended record takes effect by relation back to the date of the original location[71] and is admissible in evidence in connection with the original defective record.[72]

§ 712. Mistakes of Recorder.

A mistake in the record made by the recorder does not, necessarily, impair the title to the location.[73]

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[67] Speed vs. McCarthy, 181 U. S. 275, dism'g. 12 Dak. 7, 80 N. W. 135; Blake vs. Thorne, 2 Ariz. 347, 16 Pac. 270; Philes vs. Hickies, 2 Ariz. 47, 18 Pac. 596; Allyn vs. Schultz, 5 Ariz. 152, 48 Pac. 963. The description of the location as shown by the record ordinarily will bind the locator and his grantees as to the *locus* of the claim. Meydenbauer vs. Stevens, *supra* (22).

[68] Protective Co. vs. Forest City Co., *supra* (66). Everyone who is at all familiar with mining locations knows that in practice the first record must usually, if not always, be imperfect. Recognizing these difficulties, it has never been the policy of the law to avoid a location for the defects in the record, but rather to give the locator an opportunity to correct his record, whenever defects may be found in it. This is the function and proper office of amendments: To put the original in as perfect condition as if it had been complete in the first instance. Tonopah Co. vs. Tonopah Co., *supra* (27). See, also, Craig vs. Thompson, 10 Colo. 517, 16 Pac. 24.

The recorded notice of location gives no notice of a claim not actually located upon the ground. Gregory vs. Pershbaker, *supra* (63). The description of the location as appears from the record is binding on the locator except that if it varies from the markings upon the ground the latter prevail, although they may include less ground than called for by the record. Meydenbauer vs. Stevens, *supra* (22); *but see*, Cardoner vs. Stanley Co., *supra* (11); see, generally, McEvoy vs. Hyman, *supra* (36); Book vs. Justice Co., *supra* (1); Garrard vs. vs. S. P. Mines, 82 Fed. 585, aff'd. 94 Fed. 983; Smith vs. Newell, *supra* (22); San Miguel Co. vs. Bonner, 33 Colo. 212, 79 Pac. 1025; Brady vs. Husby, *supra* (4). The rule that in the location or description of a mining claim monuments shall control courses and distances is recognized only in cases where the monuments are clearly ascertained, but where there is doubt as to the monuments, as well as to the courses and distances, then there can be no reason for saying that monuments shall prevail rather than the courses given in the patent. Thallman vs. Thomas, 102 Fed. 936, aff'g. 111 Fed. 283; Duncan vs. Eagle Rock Co., 48 Colo. 569, 111 Pac. 588; see Silver King Co. vs. Conkling Co., *supra* (9).

[69] McEvoy vs. Hyman, *supra* (36); Hyman vs. Wheeler, 29 Fed. 352; Tonopah Co. vs. Tonopah Co., *supra* (27); Bunker Hill Co. vs. Empire State Co., 134 Fed. 268; Butte Co. vs. Barker, *supra* (37); see, Duncan vs. Fulton, 15 Colo. A. 140, 61 Pac. 244. It is not the policy of the law to avoid a location for defects in the record, but rather to give the claimant an opportunity to correct his record whenever defects may be found therein. If at any time the record appears to be defective or erroneous it may be amended. Copper Queen Co. vs. Stratton, *supra* (27), if without prejudice to the rights of others. Bunker Hill Co. vs. Empire State Co., *supra* (25); Giberson vs. Tuolumne Co., 41 Mont. 396, 109 Pac. 974. See Hall vs. Arnott, *supra* (36); Beals vs. Cone, 27 Colo. 494, on rehearing 62 Pac. 948; and see, McEvoy vs. Hyman, *supra* (36); Cheesman vs. Shreeve, *supra* (8); Craig vs. Thompson, *supra* (66). The record may be amended after suit brought involving the location. Strepey vs. Stark, *supra* (36); Butte Co. vs. Barker, *supra*.

[70] Bunker Hill Co. vs. Empire State Co., *supra* (25).

[71] An amended record relates back to the original notice, notwithstanding intervening locations, if made to cure obvious defects without including any new ground. Gobert vs. Butterfield, *supra* (30); Milwaukee Co. vs. Gordon, *supra* (36). See Moyle vs. Bullene, *supra* (40); see Frisholm vs. Fitzgerald, *supra* (36).

[72] McEvoy vs. Hyman, *supra* (36); Tonopah Co. vs. Tonopah Co., *supra* (27); Butte Co. vs. Barker, *supra* (37); Berquist vs. West Virginia Co., *supra* (11). See Strepey vs. Stark, *supra* (36); Duncan vs. Fulton, *supra* (69); Frisholm vs. Fitzgerald, *supra* (36). The amended record must be based upon an original location, valid though imperfect. Sullivan vs. Sharp, *supra* (37); Johnson vs. Young, *supra* (36). No loss of right necessarily follows the making of the amended location. King Solomon Co. vs. Mary Verna Co., *supra* (5); Butte Co. vs. Barker, *supra*. It is immaterial whether the amended record is made by the original locator or his grantee.

[73] Myers vs. Spooner, *supra* (54); Weise vs. Barker, *supra* (54).

§ 713. Record in Land Department.

Record evidence of a location is not made in the United States Land Office, but in the local place of record [74]; hence, a mining location is not of record before or connected with the land department, and is not so connected nor usually within its knowledge until application for patent is filed or it properly is called in question by another.[75]

§ 714. County Recorder.

The office of the county recorder of the county within which the location is situated usually is fixed by local statute as the place of record and also, sometimes in addition thereto, the office of the proper mining recorder.[76] If it be required that the notice be filed with the mining recorder and his place of business is publicly known it is essential that such be done.[77]

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[74] Caribou Lode, 24 L. D. 488.

[75] Clipper Co. vs. Eli Co., 34 L. D. 408. In agricultural entries all the record is made within the land office. Caribou Lode, *supra* [74]. The admitting of instruments to record and the effect of their being recorded are controlled in this country very generally by statutory enactments, and the recognized law on the subject is very well stated in 2 Devlin on Real Estate (3d ed.), § 656, as follows: "The registry acts authorize the recording of certain specified instruments, and their registration operates as notice. But the fact that an instrument is recorded is not sufficient to raise the presumption of notice, unless it is an instrument whose registration is authorized by statute. Otherwise the voluntary recording of it would be a nullity." See effect of recordation of notice of local land office proceedings in the office of a county recorder, 50 L. D. 199, in which it is said: "The rules relating to notices *lis pendens* that are applicable to the courts have no application to proceedings before an executive department, and recordation in the office of the recorder of the county in which the lands are situated of proceedings in a local land office, there being no statutory requirement to that effect, neither constitutes constructive notice nor raise a presumption of notice." See, also, U. S. vs. Wesley, 189 Fed. 276; Adams vs. Smith, 273 Fed. 652.

[76] Comp. Laws Nev. 1900, § 210; Laws 1907, 420; Rev. Laws 1912, § 2424. Fox vs. Myers, *supra* [8].

[77] In Attwood vs. Fricot, *supra* [66], the trial court excluded an entry of a transfer of a mining claim made on the books of the mining recorder, as proof of the fact of transfer. The Supreme Court said: "We think the ruling right. The book was admissible as evidence of a compliance with the rules of the mining district, and this particular entry admissible to show the compliance with the miner's rule requiring the recording of transfers. But we see no mining regulation which makes this memorandum of the recorder primary evidence of the fact of transfer; and we know of no principle of the law of evidence which would authorize such effect to be given to it."

CHAPTER XXXIX.

LOCATIONS.

§ 715. Character of Locations.

Strictly speaking there are only two kinds of mineral locations, viz: lode and placer.[1] A proper location in either of these classes fully maintained by use, enjoyment or patent is not subject to adverse location by a claimant of the same class or any other class, because it has become private property, and no longer open to new appropriation.[2] The exception to this rule is the right of any person to locate a "known vein" within the limits of a patented or unpatented placer mining claim.[3]

§ 715a. Errors of Location.

A mistake as to the manner of locating a mineral deposit, as for instance, locating a placer deposit as a lode claim [3a] or where the notice of location is invalid, under the provisions of a local law,[3b] the error is not, necessarily, a fatal defect. For, in the absence of an intervening right an amended location will correct the error [3c] or the statute of limitations will create the presumption that a proper location has been made as required by law [3d]; in which latter case all facts and

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[1] South Star Lode, 20 L. D. 204; see Cole vs. Ralph, 252 U. S. 296, rev'g. 249 Fed. 81. The validity of a location is determined by the form of the mineral deposit therein. Cole vs. Ralph, *supra*; Webb vs. American Co., 157 Fed. 203; *compare* Gregory vs. Pershbaker, 73 Cal. 109, 14 Pac. 401, with Jones vs. Prospect Co., 21 Nev. 339, 31 Pac. 642.

For the distinction between placer and oil locations, see U. S. vs. McCutchen, 238 Fed. 583.

[2] Calhoun Co. vs. Ajax Co., 27 Colo. 1, 59 Pac. 607, aff'd. 182 U. S. 499.

A location and discovery on land withdrawn *quoad hoc* from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right. Swanson vs. Sears, 224 U. S. 181, aff'g. 17 Ida. 321, 105 Pac. 1059; Geyman vs. Boulware, 47 Nev. 409, 224 Pac. 409. See, also, Cole vs. Ralph, *supra* [1]; Hagan vs. Dutton, 20 Ariz. 484, 181 Pac. 582. This doctrine is not qualified in its proper meaning by Del Monte Co. vs. Last Chance Co., 171 U. S. 55, for that case attributes effect to the overlapping location only for the purpose of securing extralateral rights on the dip of a vein the apex of which was within the second and outside of the first; rights consistent with all those acquired by the first location, see Creede Co. vs. Uinta Co., 196 U. S. 337, aff'g. 119 Fed. 164. The contrary reasoning in Lavagnino vs. Uhlig, 198 U. S. 443, aff'g. 26 Utah, 11 Pac. 1046, is qualified and the older precedents recognized and in full force in Farrell vs. Lockhart, 210 U. S. 147, rev'g. 31 Utah 155, 86 Pac. 1077, for error in not ruling on the question of abandonment. See, also, Lehman vs. Sutter, 60 Mont. 102, 198 Pac. 1102. See Mason vs. Washington-Butte Co., 214 Fed. 35, distinguishing this rule and the cases sustaining the same from the exception to rule stated in the text. See, also, *infra*, notes 3, 112, 113, 114, 121.

[3] Mt. Rosa Co. vs. Palmer, 26 Colo. 56, 56 Pac. 176; see, Reynolds vs. Iron Co., 116 U. S. 687; Clark-Montana Co. vs. Ferguson, 218 Fed. 965; Aurora Lode vs. Bulger Hill Placer, 23 L. D. 95; see Daphne Lode, 32 L. D. 413; *but see* South Butte Co. vs. Thomas, 260 Fed. 814.

See Lode Within Placer Claims.

[3a] Cole vs. Ralph, *supra* [1]; Ortman, 52 L. D. 470; Springer vs. S. P. Co., 67 Utah 590, 248 Pac. 819, distinguishing Cole vs. Ralph.

For an instance of an attempted placer location being embraced within a subsequent valid lode location see Ortman, *supra*.

For an instance of an attempted lode location upon an unmineralized lode being held invalid see Henderson vs. Fulton, 35 L. D. 652.

For the upholding of a lode location of a placer deposit see Springer vs. S. P. Co., *supra*.

[3b] Newport Co. vs. Bead Lake Co., 110 Wash. 120, 188 Pac. 27.

[3c] Ortman, *supra* [3a].

[3d] Springer vs. S. P. Co., *supra* [3a].

circumstances showing good faith are to be considered[3e]; but no presumption of discovery can be indulged in.[3f]

§ 716. No Limitation.

The mining law prescribes a limitation of the size of a location, but there is no limit as to the number thereof that an individual, association of persons, or a corporation may locate or acquire[4] except in Alaska,[5] Oregon[6] and formerly in Nevada.[7] A mining claim may include as many adjoining locations as the owner may acquire by location or otherwise, and the ground covered by all will constitute a "mining claim" and is so designated.[8] The terms "location" and "mining claim," however, are often used indiscriminately to denote the same thing.[9]

§ 717. Form of Lode Locations.

Theoretically a lode location following its outcroppings on the surface for a certain distance with a definite extension on each side of the vein or lode, would generally take the form of a parallelogram.[10] Such

[3e] Id. See Cole vs. Ralph, *supra* (1); Humphreys vs. Idaho Co., 21 Ida. 126, 120 Pac. 823; Upton vs. Santa Rita Co., 14 N. M. 96, 89 Pac. 275.

[3f] Cole vs. Ralph, *supra* (1). See *infra*, note 72.

[4] Carson City Co. vs. North Star Co., 73 Fed. 597; O'Connell vs. Pinnacle Co., 131 Fed. 106; aff'd. 140 Fed. 854; Last Chance Co. vs. Bunker Hill Co., 131 Fed. 583; U. S. vs. Brookshire Oil Co., 242 Fed. 721; Con. Mutual Oil Co. vs. U. S., 245 Fed. 527; U. S. vs. California Midway Oil Co., 259 Fed. 351; Riverside Co. vs. Hardwick, 16 N. M. 479, 120 Pac. 324; see, St. Louis Co. vs. Kemp, 104 U. S. 636.

In U. S. vs. Dominion Oil Co., 264 Fed. 955, it is said: "Proof that the persons who located the oil claim in controversy also located on the same day two hundred and seven claims, even if creating an assumption that the locator's purpose was not to develop all the claims, does not affect the validity of the claim in controversy, if the locators did intend to do development work thereon." But each location must be based upon discovery therein. See Union Oil Co. vs. Smith, 249 U. S. 337, aff'g. 166 Cal. 217, 135 Pac. 966; Poplar Creek Mine, 16 L. D. 1; Reiner vs. Schroeder, 146 Cal. 411, 80 Pac. 517; Reynolds vs. Paseoe, 24 Utah 219, 66 Pac. 1064.

The quantity of ground or number of claims which may be located by one person or an assocaition of persons may be limited by local law. Prosser vs. Parks, 18 Cal. 47; Rosenthal vs. Ives, 2 Ida. 244, 12 Pac. 906, and cases therein cited.

[5] Placer Claims, 41 L. D. 347.

[6] B & C Codes, § 3974. 2 Olsen Gen. Laws Or., 1920, § 7617.

[7] Stats. Nev. 1925, p. 29, limits the number of locations to six. But this statute was repealed by Stat. Nev. of 1926–7, p. 7; in effect February 11, 1927.

[8] St. Louis Co. vs. Kemp, *supra* (4); Carson City Co. vs. North Star Co., *supra* (4).

[9] Territory vs. Mackey, 8 Mont. 173, 19 Pac. 395; Peabody Co. vs. Gold Hill Co., 97 Fed. 657; aff'd. 106 Fed. 241; St. Louis Co. vs. Kemp, *supra* (4); McFeters vs. Pierson, 15 Colo. 201, 24 Pac. 1076. In Tredinnick vs. Red Cloud Co., 72 Cal. 78, 13 Pac. 152, the court said: "It was proved that the entire property known as the 'Red Cloud Mine' was made up of what were originally several mining locations, but that these locations or claims had been conveyed to the Red Cloud Consolidated Mining Company, and had been by it consolidated together and held, worked, and treated as one mine or claim. Under the circumstances shown, we do not think the section (1188 C. C. P.) invoked applies. It has been common in this state to consolidate two or more mining locations into one claim, and thereafter to treat and work them as one claim. After such a consolidation, the different locations cease to constitute different claims, and become in law, as they are in fact, only parts of one claim." To the same effect see St. Louis Co. vs. Kemp, *supra*; Jackson vs. Roby, 109 U. S. 440; Rice Oil Co. vs. Toole County, 86 Mont. 427, 284 Pac. 145; Peaceable Creek Co. vs. Jackson, 26 Okla. 1, 108 Pac. 409; Park Co. vs. Comstock Co., 36 Utah 145, 103 Pac. 255.

[10] Iron Co. vs. Elgin Co., 118 U. S. 205; Del Monte Co. vs. Last Chance Co., *supra* (2). In Tyler Co. vs. Sweeney, 54 Fed. 284, Judge Hawley, speaking for the court, said: "It will thus be seen that great difficulty may often arise in making locations under the law so far as to secure the lode for fifteen hundred feet in length, within a surface width of six hundred feet, which is in all cases the principal object sought to be accomplished by the locator. Hence it follows in some instances that the locator makes his location where the lode crops out from the surface in various shapes and forms varying from a plain parallelogram, which is required by law, to an isosceles triangle, or a curve, in the shape of a horseshoe.

When the location is properly made along the course of the lode in the form of a parallelogram, and the lode extends within the side lines from one end line to the other, the law declares in plain terms what the rights of the locator are, and there is nothing left for the courts to construe."

form is not essential to the validity of the location [11] but parallelism of the end lines is essential to the exercise of the extralateral right, on locations made subsequent to the law of 1872.[12] It is the intent of the law that lode locations shall be made lengthwise in the general direction of the vein or lode on the surface of the earth where they are discoverable; and that the end lines are to cross such lode or vein and extend perpendicularly downward, and are to be continued in their own direction either way horizontally.[13]

§ 718. Size of Lode Locations.

A lode location must not exceed fifteen hundred feet in length by six hundred feet in width,[14] nor be limited by local rule to less than twenty-five feet on each side of the middle of the vein or lode at the surface.[15]

§ 719. Excessive Size of Lode Locations.

A location that exceeds the maximum size is void only as to the excess,[16] unless fraudulent [17] or misleading.[18] When the excess is innocently made the claimant may select the ground to be retained and draw in his lines accordingly [19] or the court may do so. This should be done within a reasonable time, pending which an adverse location of any part thereof is a nullity.[20]

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[11] Empire Co. vs. Tombstone Co., 100 Fed. 910.

[12] Iron Co. vs. Elgin Co., *supra* [10].

[13] Flagstaff Co. vs. Tarbet, 98 U. S. 463.

[14] 5 U. S. Comp. St., p. 5429, § 4615; see Parley's Park Co. vs. Kerr, 130 U. S. 256; King vs. Amy Co., 152 U. S. 222; Con. Wyoming Co. vs. Champion Co., 63 Fed. 540.

[15] *Id.* Parley's Park Co. vs. Kerr, *supra* [10].

[16] Richmond vs. Rose, 114 U. S. 579, aff'g. 17 Nev. 25, 27 Pac. 1105; Cardoner vs. Stanley Co., 193 Fed. 517; Howeth vs. Sullinger, 113 Cal. 547, 45 Pac. 841; McElligott vs. Krogh, 151 Cal. 126, 90 Pac. 823; Burke vs. McDonald, 2 Ida. 679, 33 Pac. 49; Hauswirth vs. Butcher, 4 Mont. 299, 1 Pac. 714; Nelson vs. Smith, 42 Nev. 302, 176 Pac. 261; McPherson vs. Julius, 17 S. Dak. 98, 95 N. W. 428; Hansen vs. Fletcher, 10 Utah 266, 37 Pac. 480. In Madeira vs. Sonoma Co., 20 Cal. A. 719, 130 Pac. 175, the court said: "It does not follow that the location is invalid where the locator includes within the boundaries of his claim more than the law permits. 'He is entitled nevertheless to hold to the limits which the law authorizes within the limits laid out, and only the territory embraced within his boundaries which is in excess of these limits is to be rejected.'" This rule presupposes a location which 'injures no one at the time it is made, and where it has been made in good faith.' See Thompson vs. Barton Gulch Co., 63 Mont. 190, 207 Pac. 115. The mere fact, then, that in establishing his exterior boundaries, the locator has marked out too great a quantity of land, does not necessarily invalidate his location. Where, however, the locator relies upon the courses he has established, or has attempted to mark, as *indicia* of the location of the lode or vein, a different question may arise and a different rule may govern. If the courses are so widely separated from where they ought to be as to bear no apparent relation to the lode, i.e., are so remote as to justify a reasonable inference by one seeing the corners that they were not intended to apply to the lode in question, they would add little, if any, force to the claim that the law had been complied with. And this would be especially true if the notice once posted at the discovery point had disappeared or the lode line was not distinctly marked. "If the preliminary notice is wanting, there would be nothing to guide the subsequent locator, and the excessive location should be held worthless for any purpose (Ledoux vs. Forester, 94 Fed. 600)."

See, also, Stemwinder Co. vs. Emma Co., 147 U. S. (officially unreported), 37 L. ed. 941, aff'g. 2 Ida. 456, 21 Pac. 1040.

See Boundaries.

[17] Walsh vs. Mueller, 16 Mont. 180, 40 Pac. 292; Gohres vs. Illinois Co., 40 Or. 516, 67 Pac. 666. If the claim is so excessive in size as to preclude presumption of innocent error, fraud will be presumed and the ground open to adverse location. Flynn Group Co. vs. Murphy, 18 Ida. 266, 109 Pac. 851. As to necessity for pleading fraudulent location, see, Walsh vs. Mueller, *supra*.

[18] Ledoux vs. Forester, *supra* [16]; Hauswirth vs. Butcher, *supra* [16].

[19] Hansen vs. Fletcher, *supra* [16]; see Cardoner vs. Stanley Co., *supra* [16]; McElligott vs. Krogh, *supra* [16]; Madeira vs. Sonoma Co., *supra* [16].

[20] Jones vs. Wild Goose Co., 177 Fed. 95; s. c. 29 L. R. A. N. S. 392; see Flynn Group Co. vs. Murphy, *supra* [17].

See § 723.

§ 720. Measurement.

The length and width (that is the distance between the side lines [21]) may be measured from the point of discovery.[22] In the absence of a contrary statement in the location notice,[23] knowledge of the locus of the vein or lode,[24] or proof to the contrary, it will be presumed that the point of discovery was in the middle of the vein or lode.[25]

§ 721. Form of Placer Locations.

The location, whether upon surveyed or unsurveyed lands, is required to conform as nearly as practicable to the United States system of public land surveys.[26] Long and irregularly shaped placer locations are not favored [27]; but a placer location laid within the narrow con-

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[21] Flagstaff Co. vs. Tarbet, *supra* [13]; Davis vs. Shepherd, 31 Colo. 141, 72 Pac. 57. Neither the end lines nor the side lines need, necessarily, be equi-distant from the discovery. Taylor vs. Parenteau, 23 Colo. 368, 48 Pac. 505; see Zerres vs. Vanina, 134 Fed. 610, aff'd. 150 Fed. 564; Hawley vs. Romney, 42 Ida. 645, 247 Pac. 1069.

[22] Iron Co. vs. Elgin Co., *supra* [10]; Hope Co., 5 C. L. O. 116; Johnson, 7 C. L. O. 35; Breece Co., 3 L. D. 12. In Copper Globe Co. vs. Allman, 23 Utah 410, 64 Pac. 1019, it is said: "The place where the notice of location is posted is the initial point on the lode of the United States Survey of the claim, and from which the boundaries of the claim can only be determined when it is six hundred feet in width. See Taylor vs. Parenteau, *supra* [21].

Many decided cases like Stemwinder Co. vs. Emma Co., *supra* [16], and Taylor vs. Parenteau, *supra* [21] which hold that an excess over the width allowed by the federal statute, measuring from the discovery on each side, is void, speaking of measuring the width particularly, as well as the length of the location, from the discovery. But an examination of such cases shows that in so doing the point of discovery and the discovery shaft and the vein and its middle line are treated as meaning the same thing in this connection. The federal statute requires the width to be measured from the middle of the vein or lode, three hundred feet each way. The discovery point and the discovery shaft are usually on the lode and near the middle thereof, but they are not identical with the starting point fixed by said statute.

[23] Stemwinder Co. vs. Emma Co., *supra* [16].

[24] Farmington Co. vs. Rhymney Co., 20 Utah 363, 58 Pac. 832.

[25] See *supra*, notes 21, 22 and 24; Hawley vs. Romney, *supra* [21].

[26] Miller Claim, 30 L. D. 225; Mitchell vs. Hutchinson, 142 Cal. 407, 76 Pac. 55; Strickland vs. Commercial Co., 55 Or. 51, 104 Pac. 965. There is no difficulty in applying the rule requiring placer claims on unsurveyed lands to correspond to the system of surveys, and it may be done by locating such claim in rectangular form of lawful dimensions with east-and-west and north-and-south boundary lines. Roman Placer Co., 34 L. D. 260. See, Snow Flake Fraction, 37 L. D. 250; Dripps vs. Allison's Co., 45 Cal. A. 95, 187 Pac. 448. The fact that a placer location, if made to conform to legal subdivisions of the public surveys, would embrace all, or a portion of the land covered by a prior valid location, is not sufficient reason for failure to conform the placer location to legal subdivisions as required by law. The fact that portions of other claims, already entered, may be embraced within a placer location by conforming the same to legal subdivisions, does not make such conformity "impracticable" within the meaning of the placer law, inasmuch as under the law such entered claims may be excluded from patent proceedings involving the placer. Rialto Claims, 34 L. D. 44; see, also, Mary Darling, 31 L. D. 64; Green vs. Gavin, 10 Cal. A. 330, 101 Pac. 931.

Whether placer claims conform to the United States system of public land surveys and the rectangular subdivisions of such surveys is a question of fact to be determined by the land department. Snow Flake Fraction, *supra*.

Plaintiff's grantors in locating a placer claim on surveyed land posted a notice thereon and set up stakes at the supposed corners, marked "N. E. corner section 32" and "S. E. corner section 32" and set up several laths between them to mark the line which was believed to be the east line of the quarter section and the east line of the location. These stakes were in reality some distance west of the true line. On the strip between the true line and that marked by said locators defendant made an adverse location of a placer claim. The court said: "In this case the defendant had ample notice of the location of the quarter section by plaintiff's grantors; she knew what they intended to take. If they made a mistake as to the location as to the west line, it did not in any way injure defendant. She will not be allowed to take advantage of a mistake which in no way injured her. She knew she was attempting to locate land claimed by the original locator. It appears the defendant found the lines. She thought that the locators had not found them, and although she was told by the notice that the quarter section had been located and entered, she acted upon her peril in regarding a portion of it as vacant. Kern Oil Co. vs. Crawford, 143 Cal. 298, 78 Pac. 1111. See Temescal Oil Co. vs. Salcido, 137 Cal. 211, 69 Pac. 1010; *compare* Worthen vs. Sidway, 72 Ark. 215, 79 S. W. 777.

[27] Snow Flake Fraction, *supra* [26]; see Hanson vs. Craig, 170 Fed. 65; Miller Claim, *supra* [26]; Golden Chief Claim, 35 L. D. 557; Ortman, *supra*, note 3a; see, also, Green vs. Gavin, *supra* [26].

fines of a canyon has been sustained.[28] Noncontiguous tracts may not be joined in a single location,[29] nor should the boundary marks be placed upon adjoining territory.[30]

§ 722. Size of Placer Locations.

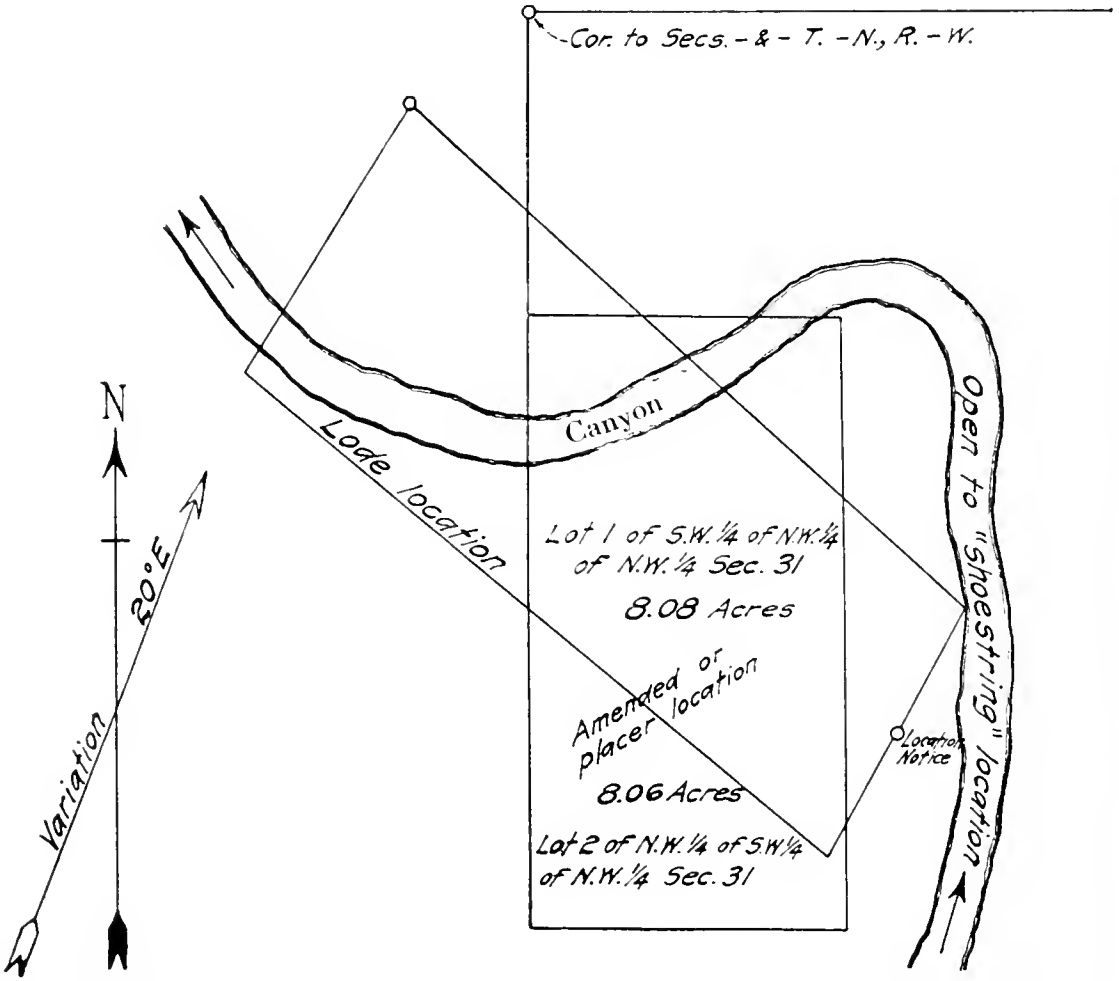
The maximum size of a placer location is twenty acres for an individual and one hundred and sixty acres for an association of not less

[28] Mitchell vs. Hutchinson, *supra* [26]; see Rablin, 2 L. D. 764; Ferrell vs. Hoge, 29 L. D. 12; see, also, Snow Flake Fraction, *supra* [26]. In these cases placer locations not conformable to survey were upheld on the ground that they need not conform to regular subdivisions of survey only so far as reasonably practicable and that such conformity need not be made where it would require claimant to take in land unfit for mining and not placer ground. See Ortman, *supra*.

[29] Stenfjeld vs. Espe, 171 Fed. 825.

[30] It is unreasonable, impracticable, and not in harmony with the conformity provisions of the statute to require a mineral claimant, particularly in Alaska, to conform to legal subdivisions of the public survey, and the rectangular subdivisions thereof, when such requirement would compel him to place his lines on prior located claims or when his claim is surrounded by prior locations, and this whether the claim is on surveyed or unsurveyed lands. Snow Flake Placer, *supra* [26]; see Stenfield vs. Espe, *supra* [29]. But if so placed as to include the property of others the error may be cured by the exclusion of such portion improperly included, when patent is applied for. Gould, 51 L. D. 131. See *supra*, note 26. See, generally, Dripps vs. Allison's Co., *supra* [26].

In the case of Ortman, *supra* [3a], the original claim was located in the shape and with the usual dimensions of a lode claim. The location was, therefore, defective and not subject to entry and patent in such form. The defect, in the absence of an adverse claim, was curable either by suitable amendment or by relocation for the purpose of conforming to the public land surveys. The following diagram is illustrative of the text of this decision.



Plat Showing Improper Lode, Amended Placer, and Valid "Shoe String" Locations.

than eight persons,[31] or, correspondingly, if the association is composed of a less number.[32]

§ 723. Excessive Size of Placer Locations.

Mere excess over the maximum amount may not invalidate the location,[33] unless the excess be great.[34] If exercised within a reasonable time the claimant may select the ground to be retained and draw in his lines accordingly.[35] The selection should be made within a reasonable time after discovery, or notice given of its existence, pending which an adverse location of any part of the location is void for all purposes.[36]

§ 724. Dummy Locations of Placer Claims.

The law does not permit one person to locate more than twenty acres of placer ground in one location by the device of using the names of employees or friends as locators.[37] But persons innocently involved in a fraudulent "association" location are not prejudiced as to their individual rights therein.[38]

§ 725. Tunnel Site Locations.

The federal mining law does not provide how a tunnel location shall be made,[39] nor that a vein or lode discovered within a tunnel shall be located on the surface.[40] The right to a tunnel site should, therefore,

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[31] Nome & Sinook Co. vs. Snyder, 187 Fed. 385; Union Oil Co., 25 L. D. 351; see Cook vs. Klonos, 164 Fed. 529.

[32] Kirk vs. Meldrum, 28 Colo. 453, 65 Pac. 633.

Legal subdivisions of forty-acre tracts may be subdivided into ten-acre tracts; and two or more persons or association of persons having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof. Rev. St., § 2330. This provision is intended to meet conditions peculiar to the assertion of placer claims, where the placer deposits are limited in extent to tracts smaller than forty acres. Roman Placer Claim, 34 L. D. 260; see, also, Reins vs. Murray, 22 L. D. 409; American Co., 39 L. D. 299; Meiklejohn vs. Hyde, 42 L. D. 144; McNabb, 42 L. D. 413.

There is no authority under the mining law for making entry and obtaining patent for a placer claim composed of tracts as small as five acres in extent, though rectangular in form. Roman Placer Claim, *supra*; Snow Flake Fraction, *supra* [26].

[33] Walton vs. Wild Goose Co., 123 Fed. 209; Waskey vs. Hammer, 170 Fed. 31, aff'd. 223 U. S. 90; Zimmerman vs. Funchion, 161 Fed. 859; Thompson vs. Spray, 72 Cal. 528, 14 Pac. 182; Hansen vs. Fletcher, *supra* [16].

[34] Pratt vs. U. S., 1 Alaska 95; *see supra*, note 17.

[35] See *supra*, note 19.

[36] Jones vs. Wild Goose Co., *supra* [27]; Adams vs. Yukon Co., 251 Fed. 229. See § 719.

[37] Mason vs. U. S., 260 U. S. 557; Cook vs. Klonos, *supra* [31]; Gird vs. California Oil Co., 60 Fed. 531; Hall vs. McKinnon, 193 Fed. 572; U. S. vs. California Midway Oil Co., *supra* [4]; U. S. vs. Brookshire Co., *supra* [3]; Chanslor-Canfield Co. vs. U. S., 268 Fed. 145; Mitchell vs. Cline, 84 Cal. 409, 24 Pac. 164. The fraud of locating by means of dummies is a fraud upon the government and not upon a party who might wish to locate. The fraud being a fraud upon the government, it would seem clear that the government alone can complain except in adverse proceedings. Riverside Co. vs. Hardwick, *supra* [4].

See Locators.

[38] Cook vs. Klonos, *supra* [31]; see Nome & Sinook Co. vs. Snyder *supra* [31]. Subsequent locations made to protect a prior one will not be held fraudulent, even though the later locators had no intention of claiming the land. And an oil location of one hundred and sixty acres, if made in good faith by eight locators for eight other persons eligible as locators is not fraudulent. U. S. vs. McCutchen, 217 Fed. 650.

[39] Creede Co. vs. Uinta Co., *supra* [2]. A tunnel site is sometimes termed a mining claim. *Id.* It may be located in unappropriated territory for the discovery of blind veins or lodes, not previously known to exist therein, but without inherent right in prosecuting such work to enter through property adversely held. Calhoun Co. vs. Ajax Co., *supra* [2]. See St. Louis Co. vs. Montana Co., 194 U. S. 235. Fissure Co. vs. Old Susan Co., 22 Utah 438, 63 Pac. 587.

[40] Campbell vs. Ellet, 167 U. S. 116; aff'g. 18 Colo. 521, 33 Pac. 521.

be secured according to local statutes or district rules,[41] which differ in various localities.

§ 726. Federal Provisions.

The paramount law limits the length of a tunnel to three thousand feet from its face.[42] It does not limit the width of the tunnel,[43] nor make discovery or assessment work essential to create or to maintain possession of the tunnel.[44] But failure to prosecute the work on the tunnel for six months is considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.[45] The line of the tunnel is "the width thereof and no more."[46]

§ 727. Excessive Tunnel Site Location.

An excessive tunnel site location will not render it void. The location will be good to the extent of three thousand feet in length, at least.[47]

§ 728. Location of Vein Discovered in Tunnel.

Although it has been held that the conditions surrounding a vein or lode discovered in a tunnel are such as naturally make against the idea or necessity of a surface location,[48] yet when a vein or lode is discovered, the tunnel owner is called upon to make a location upon the

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[41] Enterprise Co. vs. Rico-Aspen Co., 167 U. S. 108; aff'g. 66 Fed. 201, rev'g. 53 Fed. 321; see Creede Co. vs. Uinta Co., *supra* (2); see Cal. Civ. Code, § 1426*e*.
See note to Form No. 50.

[42] Glacier Co. vs. Willis, 127 U. S. 481; Enterprise Co. vs. Rico-Aspen Co., *supra* (41).

[43] Creede Co. vs. Uinta Co., *supra* (2); see Bodie Tunnel Co. vs. Bechtel Co., 1 L. D. 584; Corning vs. Pell, 4 Colo. 507; Hope Co. vs. Brown, 11 Mont. 379, 19 Pac. 218; see, also, Back vs. Sierra Nevada Co., 2 Ida. 420, 17 Pac. 83.

[44] Creede Co. vs. Uinta Co., *supra* (2).

[45] Enterprise Co. vs. Rico-Aspen Co., *supra* (41); Fissure Co. vs. Old Susan Co., *supra* (39).

[46] Corning Co. vs. Pell, 3 C. L. O. 130; Bodie Tunnel Co. vs. Bechtel Co., *supra* (43).

[47] Glacier Co. vs. Willis, *supra* (42); see Richmond Co. vs. Rose, *supra* (16); Gohres vs. Illinois Co., *supra* (17).

[48] Campbell vs. Ellet, *supra* (40).

surface of the ground containing the vein or lode,[49] as required by statutory provisions or mining regulations.[50]

[49] Creede Co. vs. Uinta Co., *supra* [2]. The decision, upon this point, is criticised in Costigan Min. Law, p. 241, §§ 65–66. The discovery in the tunnel is like a discovery on the surface. Until one is made there is no right to locate a claim in respect to the vein, and the time to determine where and how it shall be located arises only upon the discovery—whether such discovery be made on the surface or in the tunnel. Enterprise Co. vs. Rico-Aspen Co., *supra* [41].

[50] Enterprise Co. vs. Rico-Aspen Co., *supra* [47].

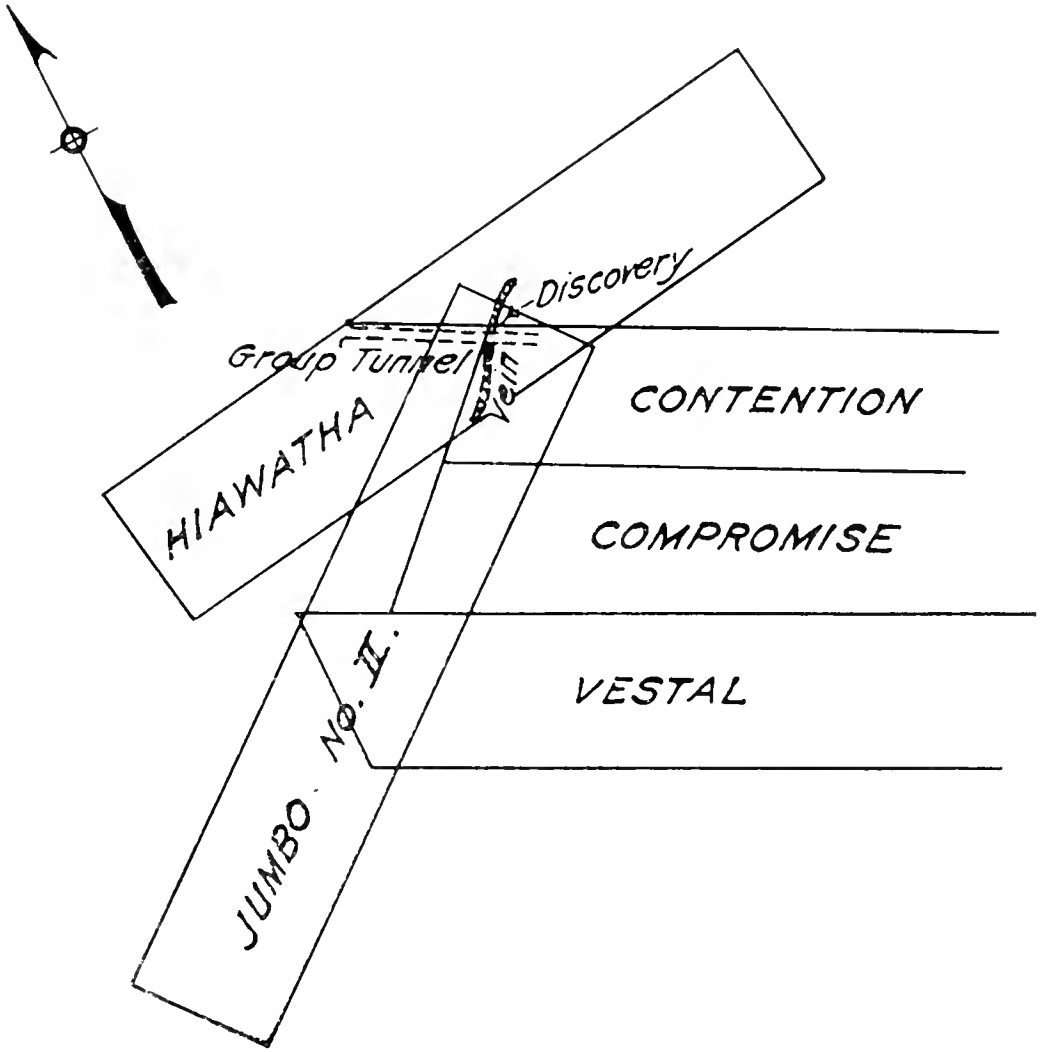

Diagram showing the ground in controversy in the Enterprise-Rico-Aspen case.

In this case the complainants asserted title to the Vestal located in 1879, the Contention located on January 1, 1888, and the Compromise located on November 18, 1889. These locations are in the general course east and west, and nearly coincident with the line of the Group tunnel, which is owned by the respondents. The Contention claim, in its western end, comes upon the eastern extension of the tunnel; the Compromise and the Vestal are adjacent on the south and parallel with it.

Jumbo No. II is respondents' location, traversing the west ends of complainants' locations, embracing some parts of each. It extends across the line of the Group tunnel, fifty-four feet being northeast from that line and fourteen hundred and sixteen feet southwest from that line.

Respondents assert that they located the Group tunnel on July 25, 1887, and that they discovered the lode upon which this location was made in the Group tunnel on June 15, 1892. After discovery they went upon the surface, set their discovery stake immediately over the Group tunnel, marked out the Jumbo No. II, and recorded a certificate of location. In discussing this case, the court said in Enterprise Co. vs. Rico-Aspen Co., *supra*,: "We hold, therefore, that the right to a vein discovered in the tunnel dates by relation back to the time of the location of the tunnel site, and also that the right of locating the vein arises upon its discovery in the tunnel, and may be exercised by locating that claim the full length of fifteen hundred feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire."

§ 729. Mill Site Locations.

A tract of nonmineral land not exceeding five acres, not adjacent to a vein or lode,[51] and not within reserved lands, as a petroleum reserve,[52] or a grant to a state,[53] or to a railroad company,[54] but, possibly, when within a national forest,[55] may be "located" for "mining or milling purposes" by the proprietor of a vein or lode or the owner of a quartz mill or reduction works not owning a mine in connection therewith.[56] A mill site may be laid only upon mineral lands which do not contain valuable mineral-bearing veins or lodes or mineral deposits.[57] A mill site may be secured by a serip location.[58]

§ 730. Perfected Location.

The location of a mining claim must be good when made. When perfected it has the effect of a grant by the United States of the present and exclusive right of possession, and a prior location operates as a bar to any subsequent location. Each claimant must stand on his own location and can take only what it will give him under the law.[59]

§ 731. Right of Possession.

The right of possession of a mining claim comes only from a valid location, and if there is no valid location there can be no right of possession.[60] A mining location does not necessarily follow from

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[51] S. P. Mines vs. Valcalda, 79 Fed. 886, aff'd. 86 Fed. 94; Yankee Mill Site, 37 L. D. 674; the words "vein or lode" as here used are intended to be understood in each instance in a larger sense, indicating the location rather than in the restricted sense, indicating a body of mineralized rock in place, technically known as a vein or lode. Brick Pomeroy Mill Site, 34 L. D. 323; Yankee Mill Site, 42 L. D. 436.

[52] Emerald Oil Co., 48 L. D. 243.

[53] Keystone Co. vs. Nevada, 15 L. D. 259.

[54] Mongrain vs. N. P. R. Co., 18 L. D. 105.

[55] See Walker, 47 L. D. 224.

[56] U. S. Comp. St., p. 5691, § 5645. It is possible that a mill site may properly be located for dumping purposes. See § 1, subd. LIV.

[57] Cleary vs. Skiffich, 28 Colo. 362, 65 Pac. 59. See U. S. vs. Kostelak, 207 Fed. 453. A mill site can not be located or appropriated for purposes other than for reduction works, such as for roads or water courses between mines. Hales and Symons, 51 L. D. 123. Nor can land improved and used as a site for a rock crusher to prepare gypsum for the market, though the gypsum be mined near by, be located as a mill site. Pacific Co., 51 L. D. 459.

[58] Weise, 2 C. L. O. 130; Porterfield Scrip, 3 C. L. O. 83; Moore, 11 C. L. O. 326. See Mill Sites.

[59] Belk vs. Meagher, 104 U. S. 284; Con. Mutual Oil Co. vs. U. S., *supra* [4]; Lockhart vs. Farrell, *supra* [2]; Wilbur vs. Krushnic, 280 U. S. 306, aff'g. 30 Fed. (2d) 742. See, Larkin vs. Upton, 144 U. S. 19, aff'g. 7 Mont. 449, 17 Pac. 728; Gwillim vs. Donnellan, 115 U. S. 45. See, also, Omar vs. Soper, 11 Colo., 380, 18 Pac. 443; Sierra Blanca Co. vs. Winchell, 35 Colo. 13, 85 Pac. 628; Hagan vs. Dutton, *supra* [2]. Where lines are drawn inaccurately and irregularly, a court can only give to the locator such rights as his improper location warrants under the statute. It can not relocate his claim and make new side lines or end lines. Where the court finds that what are called side lines are in fact end lines, it will, in determining lateral rights, treat such side lines as end lines and such end lines as side lines, but it will not make a new location for him and thereby enlarge his rights. King vs. Amy Co., *supra* [14]; Del Monte Co. vs. Last Chance Co., *supra* [2]; McWilliams vs. Winslow, 34 Colo. 344, 82 Pac. 538; Fitzgerald vs. Clark, 17 Mont. 130, 42 Pac. 273; aff'd. 171 U. S. 92; see, Last Chance Co. vs. Tyler Co., 157 U. S. 683; rev'g. 61 Fed. 557; Daggett vs. Yreka Co., 149 Cal. 373, 86 Pac. 968.

See *supra*, note 2.

[60] Belk vs. Meagher, *supra* [59]; see, Mason vs. U. S., *supra* [37].

There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law purporting to transfer to him the title, or to give him the right of possession. And there can be no such thing as good faith in an adverse holding, where the party knows that he has no title, and that under the law, which he is presumed to know, he can acquire none by his occupation. Deffeback vs. Hawke, 115 U. S. 404.

Although a valid location is necessary to vest the legal right of possession in a claimant to land under the mining laws, yet possession without location is good as against a mere intruder or one having no higher or better right than the prior

possession, but possession from location.[61] This, however, must be taken in a qualified sense, as the title of a locator without discovery is good against every person contending against it, except the paramount owner, the government of the United States. The actual possession of a person making such a location can not be disturbed by strangers.[62] But the actual possession must be connected with active diligent work in good faith towards the discovery.[63] In other words, a location must be on unappropriated territory,[64] and one person can not locate ground for a mining claim of which another is in actual possession under claim or color of right; and especially, where the person in possession is sinking a discovery shaft, or, in good faith, is engaged in complying with the mining laws.[65]

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occupant. The right to a location can not be based upon a trespass. Ritter vs. Lynch, 123 Fed. 932; McLemore vs. Express Oil Co., 158 Cal. 559, 112 Pac. 59; see, also, Atherton vs. Fowler, 96 U. S. 513; U. S. vs. Carpenter, 111 U. S. 347; Erhardt vs. Boaro, 113 U. S. 534; Berquist vs. W. Virginia Co., 18 Wyo. 270, 106 Pac. 673; Nash vs. McNamara, 30 Nev. 142, 93 Pac. 405; Lockhart vs. Wills, 9 N. M. 361, 54 Pac. 336, aff'd. 181 U. S. 516; Garvey vs. Elder, 21 S. Dak. 79, 109 N. W. 508. See *infra*, notes 62 to 65.

[61] Nelson vs. Smith, *supra* [(16)]; see, also, *supra*, note 60, *but see*, Springer vs. S. P. Co., *supra* [(33)], § 715*a*.

[62] Eilers vs. Boatman, 111 U. S. 357, aff'g. 3 Utah 159, 2 Pac. 66; McIntosh vs. Price, 121 Fed. 716; Hullinger vs. Big Sespe Co., 28 Cal. A. 69, 151 Pac. 369; see McKenzie vs Moore, 20 Ariz. 1, 176 Pac. 668; Miller vs. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, aff'd. 197 U. S. 313; New England Oil Co. vs. Congdon, 152 Cal. 211, 92 Pac. 180; Whiting vs. Straup, 17 Wyo. 23, 95 Pac. 850. A locator can not be deprived of his inchoate rights by the tortious acts of others; nor can an intruder and trespasser initiate any rights which will defeat those of a prior discoverer. Erhardt vs. Boaro, *supra* [(59)]; Gobert vs. Butterfield, 23 Cal. A. 1, 136 Pac. 516.

[63] *Id.* Clark, 18 L. D. 630; U. S. vs. Hurliman, 51 L. D. 258.

[64] Belk vs. Meagher, *supra* [(59)]; Rooney vs. Barnette, 200 Fed. 700; Tuolumne Co. vs. Maier, 134 Cal. 583, 66 Pac. 863; Upton vs. Santa Rita Co., 14 N. M. 97, 89 Pac. 275.

A location can not be made upon lands actually covered at the time by another valid and subsisting location. This is true not only against a prior location, but all the world, because the law does not permit it to be done. Correction Lode, 15 L. D. 67; Buffalo Zinc Co. vs. Crump, 70 Ark 539, 69 S. W. 572; Batterton vs. Douglas Co., 20 Ida. 765, 120 Pac. 827; Berquist vs. W. Virginia Co., *supra* [(59)]; see, U. S. vs. Steenerson, 50 Fed. 504; Murray vs. Polglase, 23 Mont. 401, 59 Pac. 439. In the absence of physical markings upon the surface of the claim the right of the mineral claimant does not extend beyond the *possessio pedis*. Hanson vs. Craig, *supra* [(27)]; Hess vs. Winder, 30 Cal. 358; Roberts vs. Wilson, 1 Utah 296; see, Dower vs. Richards, 151 U. S. 658, aff'g. 81 Cal. 44, 22 Pac. 304; s. c. 73 Cal. 447, 15 Pac. 105; Johanson vs. White, 160 Fed. 901; New England Co. vs. Congdon, *supra* [(62)]; Copper Globe Co. vs. Allman, *supra* [(22)].

The law does not prohibit the location of a mining claim upon land classified as agricultural land. All public unoccupied land is open for exploration and purchase, and the location of a mining claim upon land returned as agricultural land raises the presumption that the land is, in fact, mineral in character. Creede Co. vs. Uinta Co., *supra* [(2)]; Washington Co. vs. McBride, 18 L. D. 199; Sweeney vs. N. P. R. Co., 20 L. D. 394; Walker vs. S. P. R. Co., 24 L. D. 172. In U. S. vs. Hurliman, *supra* [(63)], actual possession by a mining claimant, whose location lacks discovery, and who is not diligently prosecuting work to make the same, is no bar to the allowance of a stock-raising homestead, where force was not required to initiate such right. Doing assessment work merely is not prosecuting work diligently. Pacific Midway Oil Co., 44 L. D. 420; Mt. States Co. vs. Tayler, 50 L. D. 348; McLemore vs. Express Oil Co., *supra* [(59)].

Under the statute, 39 U. S., p. 862, § 9, the minerals in a stock-raising homestead are open to location even after its allowance. But the surface is the property of the entryman. Mt. States Co. vs. Tyler, *supra*.

[65] McIntosh vs. Price, 1 Alaska 286; Biglow vs. Conradt, 3 Alaska 134; aff'd. 159 Fed. 868; Springer vs. S. P. Co., *supra* [(33)]; see Atherton vs. Fowler, *supra* [(60)]; Weed vs. Snook, 144 Cal. 439, 77 Pac. 1023. But until discovery, the location is not complete, and no grant from the government has been obtained. Creed Co. vs. Uinta Co., *supra* [(2)]; Union Oil Co. vs. Smith, *supra* [(1)]; Cole vs. Ralph, [(1)]; Last Chance Co. vs. Tyler Co., *supra* [(59)]; U. S. vs. McCutchen, 238 Fed. 575; U. S. vs. Sherman, 288 Fed. 497; Hagan vs. Dutton, *supra* [(2)]; Tuolumne Co. vs. Maier, *supra* [(64)]. See, Waterloo Co. vs. Doe, 56 Fed. 689. It has been held that where locators of overlapping claims are sinking shafts at the same time, the first to discover mineral has priority, though the location was staked after the other. Hanson vs. Craig, *supra* [(27)]; Hall vs. McKinnon, *supra* [(37)]; U. S. vs. Stockton Midway Co., 240 Fed. 1006. See, also, Horswell vs. Ruiz, 67 Cal. 111, 7 Pac. 197; Winters vs. Burkland, 123 Or. 137, 260 Pac. 231.

§ 732. Conditions as to Possession.

A mining claim, until patent therefor has been issued, is held by a peculiar title which never is complete and absolute, and which can only be maintained from adverse relocation by the required annual expenditure thereon.[66] In order to maintain a right to an unpatented mining claim after it is acquired, the locator, or his grantee, must continue substantially to comply with the laws of congress, the valid laws of the state, and the valid rules established and *in force*, by the miners in the district. It has been held that a failure to do so will work a forfeiture whether the laws and rules provide for a forfeiture or not.[67] Actual physical possession of a perfected location is not necessary.[68] Possession of a part of a claim gives the right of possession to the whole.[69]

§ 733. Equivalent to Location.

In the absence of an adverse claim filed in the land office in patent proceedings,[70] the possession and working of a mining claim for a period equal to the time and compliance with the conditions prescribed by the local statute of limitations is equivalent to valid location[71]; provided that discovery has been made therein.[72]

§ 734. Trespass.

No mining right or title can be initiated upon government lands which are in the actual possession of another by a forcible, fraudulent, surreptitious or clandestine entry thereof.[73]

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[66] El Paso Co. vs. McKnight, 233 U. S. 256; rev'g. 16 N. M. 721, 120 Pac. 694; Bay State Co. vs. Brown, 21 Fed. 168; see, Guerin vs. American Co. 28 Ariz. 160, 236 Pac. 687; Watterson vs. Cruse, 179 Cal. 379, 176 Pac. 870.

Until a sufficient actual discovery of mineral is made within a mining claim, a location is not perfected, and no question of the doing of annual assessment work is involved. It is only after such discovery, when actual possession is no longer necessary to protect the location against subsequent locators, that annual assessment work is essential to prevent a forfeiture. Borgwardt vs. McKittrick Oil Co., 164 Cal. 650, 130 Pac. 419.

[67] Wilbur vs. Krushnic, *supra* (59); Zerres vs. Vanina, *supra* (21); Sisson vs. Sommers, 24 Nev. 379–387, 55 Pac. 829; *but see* Stock vs. Plunkett, 181 Cal. 193, 183 Pac. 657. See De Witt vs. Sides, 81 Cal. A. 643, 254 Pac. 668.

[68] Belk vs. Meagher, *supra* (59); Oscamp vs. Crystal River Co., 58 Fed. 293; McCarthy vs. Speed, 11 S. Dak. 470, 77 N. W. 590, aff'd. 181 vs. 269, same, 12 S. Dak. 7, 80 N. W. 135.

[69] Bulette vs. Dodge, 2 Alaska 427; English vs. Johnson, 17 Cal. 108; Smith vs. Union Oil Co., *supra* (4); Jose vs. Utley, 185 Cal. 663, 199 Pac. 1037; *compare* Hanson vs. Craig, *supra* (27).

See § 1105.

[70] McCowan vs. McClay, 16 Mont. 240, 40 Pac. 602.

[71] 5 U. S. Comp. St., p. 5665, § 4631; § 2332 Rev. Stats; Glacier Co. vs. Willis, *supra* (42); Newport Co. vs. Bead Lake Co., *supra*, § 715*a*, note 2a. A statement that the "locators" have fully complied with the requirements of the law and local customs simply is a conclusion of law and not the statement of any fact. McCowan vs. McClay, *supra* (70).

[72] Cole vs. Ralph, *supra* (1); Humphreys vs. Idaho Co., *supra*, § 715*a*, note 3a. See Springer vs. S. P. Co. *supra* (3a); dist'g. Cole vs. Ralph, *supra*.

Possession for the time fixed by the statute of limitations is not enough to entitle plaintiff to recover without proof of discovery, marking the boundaries properly, and doing of the assessment work, citing Humphreys vs. Idaho Co., *supra*, 40 L. R. A. N. S. 817; approved in Cole vs. Ralph, *supra* (1). Possession under § 2332 Rev. Stat. means here actual possession and working of the claim. Buckeye Co. vs. Powers, 43 Ida. 532, 257 Pac. 833.

[73] Haws vs. Victoria Co., 160 U. S. 303; aff'g. 7 Utah 515, 27 Pac. 695; Thallman vs. Thomas, 111 Fed. 279; Ritter vs. Lynch, *supra* (60); Little Sespe Co. vs. Bacigalupi, 167 Cal. 381, 139 Pac. 802; Springer vs. S. P. Co., *supra*, § 715*a*, note 3a; see Big Three Co. vs. Hamilton, 157 Cal. 143, 107 Pac. 301; Whiting vs. Straup, *supra* (62); Granlick vs. Johnston, 29 Wyo. 349, 213 Pac. 98. A person who is in the course of acquiring title to government land may maintain an action to quiet title or in ejectment, the same as against parties to whose claims of title his

§ 735. Amended or Additional Locations.

The federal mining act makes no provision for an amended or additional location.[74] It may be made as of course[75] and usually is provided for in the local mining laws.[76] When made it relates back to the original location and completes the same.[77] It is not, strictly speaking, a relocation.[78]

§ 736. Basis of Amendment.

The amended or additional location must be based upon a preexisting but not necessarily a perfect location.[79] It works no forfeiture of previously acquired rights not inconsistent with the amendment.[80] It must not interfere with the rights of others acquired between the time of making the original location and the amendment.[81] It does not

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equities are superior. Martin vs. Bartmus, 189 Cal. 90, 207 Pac. 550; see, also, Gauthier vs. Morrison, 232 U. S. 452.

An entry upon a valid location against the will of the owner for the purpose of prospecting by sinking shafts or otherwise undoubtedly is a trespass, and such a trespass can not be relied upon to sustain a claim of a right to veins or lodes. Clipper Co. vs. Eli Co., 194 U. S. 231; Traphagen vs. Kirk, 30 Mont. 574, 77 Pac. 58. Where a vein or lode is not known to exist within the boundaries of a valid placer claim, no person other than the owner of the placer claim has the right to enter upon the same for the purpose of discovering such vein or lode and locating the same, and one who attempts to do so without the owner's consent, or without his knowledge, is a trespasser, and can acquire no rights to such lode, but a location upon a known lode within the boundaries of the placer claim, if the entry and discovery were made peaceably and in good faith, the locator has the right to make. Campbell vs. McIntyre, 295 Fed. 45.

A prospector has no right to enter upon the surface of a valid placer mining claim for the purpose of making a lode location; but if an attempted placer location is void because the mineral attempted to be located was in veins or lodes and not subject to placer location, then a prospector may, upon peaceable entry, make a valid location of the same mineral as a lode claim on the theory that the attempted placer location being void, the ground was unappropriated mineral land within the meaning of the law, and subject to lode location. San Francisco Co. vs. Duffield, 201 Fed. 835, aff'd. 205 Fed. 480, rev'g. 198 Fed. 942, *certiorari* denied, 229 U. S. 609; see Cole vs. Ralph, *supra* [(1)].

It has been held that a person may make an original location of a mining claim upon land marked and occupied under an attempted prior location where such prior location is void by reason of failure to comply with the law as to location notice or recording the same, as such land is unappropriated public land subject to location notwithstanding the prior proceedings. Zerres vs. Vanina, 150 Fed. 565, aff'g. 134 Fed. 610; Cook vs. Johnson, 3 Alaska, 527; see, Clason vs. Matko, 223 U. S. 646, aff'g. 10 Ariz. 213, 85 Pac. 773; *but see* Stock vs. Plunkett, *supra* [(67)]; Ninemire vs. Nelson, 140 Wash. 511, 249 Pac. 990. Where the exterior of a mining location includes such an unreasonably excessive area that its boundary lines can not be said to impart notices to a prospector of a mining location or discovery within the reasonable distance of a lawful claim as located under the statute, then such a location is void on the ground that its boundaries have not been marked and established as required by law. Nicholls vs. Lewis & Clark Co., 18 Ida. 232, 109 Pac. 846; see Flynn Co. vs. Murphy, *supra* [(17)]; and see Ledoux vs. Forester, *supra* [(16)]; Madeira vs. Sonoma Co., *supra* [(16)]; *but see* Stemwinder Co. vs. Emma Co., *supra* [(16)].

[74] Teller, 26 L. D. 484.

[75] Thompson vs. Spray, *supra* [(33)]. It can not be made by one who has parted with his title. Gray Lode, 26 L. D. 486; see Tam vs. Story, 21 L. D. 440; Auerbach, 29 L. D. 208.

[76] See Morrison's Mining Rights (15th ed.) 161.

[77] Tonopah Co. vs. Tonopah Co., 125 Fed. 389; Bunker Hill Co. vs. Empire State Co., 134 Fed. 268, aff'd. 131 Fed. 591, dis. 200 U. S. 613; Gobert vs. Butterfield, *supra* [(62)]; McGinnis vs. Egbert, 8 Colo. 41, 5 Pac. 652; Las Vegas Co. vs. Summerfield, 35 Nev. 229, 129 Pac. 303; see Brown vs. Oregon King Co., 110 Fed. 728.

[78] Belk vs. Meagher, *supra* [(59)]; Cheesman vs. Shreeve, 40 Fed. 787; Zerres vs. Vanina, *supra* [(21)]; Teller, *supra* [(74)]; Quigley vs. Gillett, 101 Cal. 462, 35 Pac. 1040. See § 738.

[79] Teller, *supra* [(74)]; Sullivan vs. Sharp, 33 Colo. 346, 80 Pac. 1054; Milwaukee Co. vs. Gordon, 37 Mont. 209, 95 Pac. 995; Ortman, *supra* [(3a)]; see Hallack vs. Traber, 23 Colo. 14, 46 Pac. 110; Washington Co. vs. O'Laughlin, 46 Colo. 503, 105 Pac. 1092; Moyle vs. Bullene, 7 Colo. A. 308, 44 Pac. 69.

[80] *Id.* U. S. Phosphate Co., 43 L. D. 232; King Solomon Co. vs. Mary Verna Co., 22 Colo. A 528, 127 Pac 130; Street vs. Delta Co., 42 Mont. 371, 112 Pac. 701; see Kirk vs. Meldrum, *supra* [(32)].

[81] *Id.*; and see Stemwinder Co. vs. Emma Co., *supra* [(16)]; Bakersfield Co., 39 L. D. 460; Ware vs. White, 81 Ark. 220, 108 S. W. 832; Giberson vs. Tuolumne Co., 41 Mont. 396, 109 Pac. 974; *but see* Copper Queen Co. vs. Stratton, 17 Ariz. 127, 149 Pac. 389; Strepey vs. Stark, 7 Colo. 614, 5 Pac. 111.

require additional discovery in the added ground, physical possession [82] nor additional annual expenditure thereon.[83] It may be made at any time when not prejudicial to the rights of others.[84]

§ 737. Objects and Purposes of Amendment.

By virtue of an amended location the boundaries of the claim may be changed,[85] additional ground be secured,[86] error in the course of the vein or lode corrected,[87] the description of the claim made more specific,[88] the name of the location changed,[89] or the ownership of the location be enlarged.[90] In other words, the purpose of an amended location is to cure defects or supply omissions in the original location and thereby put the locator, or those claiming under him, in case of no intervening rights, in the same position as if there had been no such defects or omissions.[91]

Unless otherwise required by local law or local rule an amended location notice need not state the object or purpose for which it is made,[92] as a general statement that it is made to cure errors or defects usually is sufficient.[93]

§ 738. Constitute One Instrument.

The original notice of location and the amended notice are deemed in law to be but one instrument, though, perhaps, neither as a whole is absolutely correct and in conformity to the law, if in substantial compliance therewith.[94]

§ 739. When Amendment Precluded.

A placer location of twenty acres by one person can not be amended for the purpose of effecting conformity to the public land survey, or for any other purpose, so as to include a greater area than twenty acres, whether such amendment is attempted by one or more claimants.[95] Nor can the owner of two or more contiguous placer mining

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[82] Tonopah Co. vs. Tonopah Co., *supra* (77); Hallack vs. Traber, *supra* (79); *but see* Biglow vs. Conradt, 159 Fed. 868, aff'g. 3 Alaska 134; Weed vs. Snook, *supra* (65).

[83] Tonopah Co. vs. Tonopah Co., *supra* (77).

[84] Strepey vs. Stark, *supra* (81); Butte Co. vs. Barker, 35 Mont. 327, 89 Pac. 304, 90 Pac. 177; King Solomon Co. vs. Mary Verna Co., *supra* (80). See Ortman, *supra* (3a).

[85] Tonopah Co. vs. Tonopah Co., *supra* (7); see Porter vs. Tonopah Co., 133 Fed. 756; Duncan vs. Fulton, 15 Colo. A. 140, 61 Pac. 244; Sullivan vs. Sharp, *supra* (79); Bismark Co. vs. North Sunbeam Co., 14 Ida. 516, 95 Pac. 14; Wilson vs. Freeman, 29 Mont. 470, 75 Pac. 84; see, also, Tyler Co. vs. Sweeney, 54 Fed. 291; Bunker Hill Co. vs. Empire State Co., *supra* (77).

[86] Seymour vs. Fisher, 16 Colo. 188, 27 Pac. 240. See Hallack vs. Traber, *supra* (79).

[87] Duncan vs. Fulton, *supra* (85). An amended location of a lode claim made for the purpose of correcting an error in the course of the vein, and in consequence of which the original side lines become end lines, does not operate as an abandonment of all rights under the original location, where such amended location expressly states that such is not the intention; and if such new end lines do not entirely coincide with the original end lines a court may treat as abandoned only so much of the original claim with its planes extended as lay outside the extended end line planes of the amended location. Empire State Co. vs. Bunker Hill Co., 131 Fed. 603; see McAvoy vs. Hyman, 25 Fed. 596; Thompson vs. Spray, *supra* (33); Hallack vs. Traber, *supra* (82); Duncan vs. Fulton, *supra*; Morrison vs. Regan, 8 Ida. 291, 67 Pac. 955.

[88] See *supra*, note (85).

[89] Shoshone Co. vs. Rutter, 87 Fed. 801; Seymour vs. Fisher, *supra* (86); Johnson vs. Young, 18 Colo. 625, 34 Pac. 173; Butte Co. vs. Barker, *supra* (84).

[90] Tonopah Co. vs. Tonopah Co., *supra* (77); Thompson vs. Spray, *supra* (33).

[91] Butte Co. vs. Barker, *supra* (84);; see Duncan vs. Fulton, *supra* (85). See Ortman, *supra* (3a).

[92] Tonopah Co. vs. Tonopah Co., *supra* (77); Johnson vs. Young, *supra* (89).

[93] Duncan vs. Fulton, *supra* (85); see Giberson vs. Tuolumne Co., *supra* (81); and see, also, Van Zandt vs. Argentine Co., 8 Fed. 725; Frisholm vs. Fitzgerald, 25 Colo. 294, 53 Pac. 1109; Berquist vs. W. Virginia Co., *supra* (60).

[94] Duncan vs. Fulton, *supra* (85); Berquist vs. W. Virginia Co., *supra* (60); see Giberson vs. Tuolumne Co., *supra* (81).

[95] Head, 40 L. D. 137.

locations substitute therefor a single location under the guise of amending one.[96] Hence, a claimant of a placer location can not by an amended or a supplemental location enlarge a twenty-acre location so as to cover forty acres, as this would be essentially another and a new location.[97]

§ 740. Overlapping Locations.

Mining locations often overlap each other through accident,[98] innocent mistake[99] or by design.[100] It does not necessarily follow that either must fail or that the conflicting area shall be awarded to the senior locator.[101] Acts or circumstances entirely consistent with the true order of location may intervene which require that the overlap be awarded to the junior locator.[102] At the date of the location the ground embraced therein must partly be laid upon the public domain [103] and possess independent discovery.[104]

§ 741. Legal Overlapping.

A valid location can not be made upon a subsisting senior claim by a forcible, fraudulent, or clandestine entry thereon.[105] But the boundary marks of a lode location may be placed upon or across the surface of privately claimed or owned land [106] whether the same be patented or unpatented mining or agricultural land [107] and the extralateral right to irregularly shaped or fractional pieces be secured to the junior location.[108] The consent of the claimant or owner of the land encroached upon is not essential to the making of the overlap.[109] In the absence of such consent, however, the overlapping location must be peaceably and openly made.[110]

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[96] Garden Gulch Placer, 38 L. D. 31; Ortman, *supra* (26).

[97] Head, *supra* (95).

[98] Del Monte Co. vs. Last Chance Co., *supra* (2); Doe vs. Tyler, 73 Cal. 21, 14 Pac. 375.

[99] Doe vs. Tyler, *supra* (98); Upton vs. Santa Rita Co., *supra* (64).

[100] Del Monte Co. vs. Last Chance Co., *supra* (2); See Biglow vs. Conradt, *supra* (82); Weed vs. Snook, *supra* (65).

[101] U. S. Co. vs. Lawson, 134 Fed. 769, aff'd. 207 U. S. 1; Johanson vs. White, *supra* (64); Doe vs. Tyler, *supra* (98); Street vs. Delta Co., *supra* (80).

See succeeding note.

[102] U. S. Co. vs. Lawson, 207 U. S. 1; aff'g. 134 Fed. 769; Johanson vs. White, *supra* (64); Garthe vs. Hart, 73 Cal. 541, 15 Pac. 93; Gemmell vs. Swain, 28 Mont. 331, 72 Pac. 662; McPherson vs. Julius, *supra* (36); Florence Rae Co. vs. Iowa Co., 105 Wash. 503, 178 Pac. 462. See Grand Prize Mines vs. Boswell, 83 Or. 1, 162 Pac. 1063.

[103] Belk vs. Meagher, *supra* (59); Brown vs. Gurney, 201 U. S. 184; Farrell vs. Lockhart, *supra* (2); Crown Point Co. vs. Buck, 97 Fed. 462; Bunker Hill Co. vs. Empire State Co., *supra* (77); Swanson vs. Kettler, *supra* (2); Berquist vs. W. Virginia Co., *supra* (60); see Lavagnino vs. Uhlig, *supra* (2).

[104] Branagan vs. Dulaney, 2 L. D. 744; Emerson vs. Akin, 26 Colo. A. 40, 140 Pac. 481. A discovery without the limits of a claim, no matter what its proximity, does not suffice. Star Co., 47 L. D. 38; see Waskey vs. Hammer, 223 U. S. 91, aff'g. 170 Fed. 31; Tonopah Ralston Co. vs. Mt. Oddie Co., 49 Nev. 20, 248 Pac. 833; *but see* Erhardt vs. Boaro, 113 U. S. 527; Diamond Coal Co. vs. U. S., 233 U. S. 236; U. S. vs. S. P. Co., 251 U. S. 1; Kern Oil Co. vs. Clotfelter, 30 L. D. 587; Jefferson-Montana Co., 41 L. D. 320.

Discovery fixes the date of location within the boundaries of overlapping claims. Hall vs. McKinnon, *supra* (3); see Biglow vs. Conradt, *supra* (82); Cook vs. Klonos, *supra* (31); Horswell vs. Ruiz, *supra* (65); Garthe vs. Hart, *supra* (102); Gemmell vs. Swain, *supra* (102). Where two locators are in possession of overlapping claims before discovery, it becomes a race of diligence between them to discover mineral and the one first making such discovery obtains the prior right, but such discovery does not relate back, but any prior or pretended location is made valid by the discovery and takes effect as a valid mining location from that date, and gives him the full right in the claim to the exclusion of the other as to any overlapping ground occasioned by the mere prior surface marking. Johanson vs. White, *supra* (64); see Belk vs. Meagher, *supra* (59). A lode claim intersected by a prior placer location can not be allowed to include ground not contiguous to that containing the dis-

§ 742. Priority of Title.

Where there is any surface conflict whatsoever of mining claims and there is a failure to adverse on proper application and notice, after patent issues to the applicant, the question of priority of title is conclusively determined in favor of the applicant.[111]

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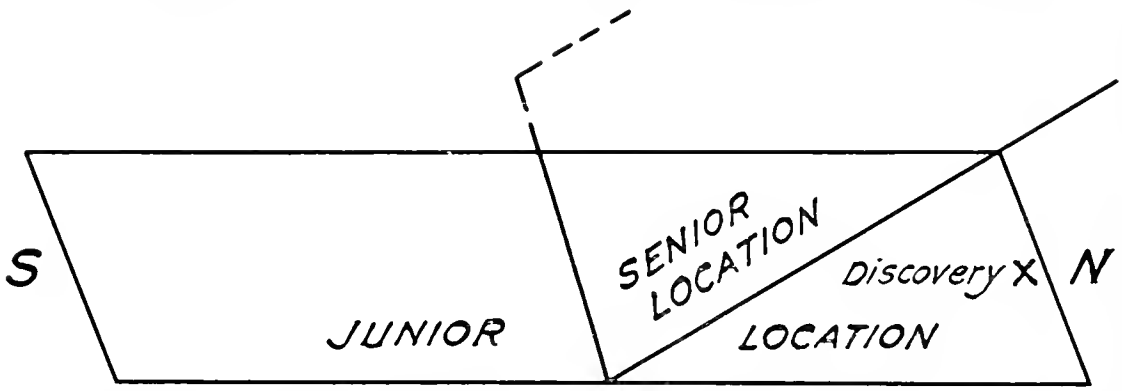
covery. Silver Queen Lode, 16 L. D. 186; Woods vs. Holden, 26 L. D. 198. Where a lode location is bisected by a senior location a patent will issue for only one of the segregated parts, selected by the claimant. Brown vs. Gurney, *supra* [103]; Mabel Lode, 26 L. D. 675. 2 Lindl. Mines (3d. ed.), p. 842, § 363. *Compare* Miller vs. Hamley, 31 Colo. 495, 74 Pac. 980. The fact that a location included an original discovery shaft of another claim would not destroy its validity where long prior to such location the owner of the senior location had located a new shaft and developed his mine in that shaft. Lowry vs. Silver City Co., 179 U. S. 196; see 19 Utah 334, 57 Pac. 11.

While a locator is in possession it is not competent for others upon a discovery made upon adjoining ground to project the location over the first occupied premises. Weed vs. Snook, *supra* [65]; Phillips vs. Brill, 17 Wyo. 39, 95 Pac. 856.

The following diagram illustrates the situation in Brown vs. Gurney, *supra*:



[103] Atherton vs. Fowler, *supra* [60]; Belk vs. Meagher, *supra* [59]; Erhardt vs. Boaro, *supra* [60]; McBrown vs. Morris, 59 Cal. 72.

[106] Del Monte Co. vs. Last Chance Co., *supra* [2]; Bunker Hill Co. vs. Empire State Co., *supra* [77]; McElligott vs. Krogh, *supra* [16]; Cleary vs. Skiffich, *supra* [57]; Davis vs. Shepherd, *supra* [21]; see Hustler Lode, 29 L. D. 668; Clark vs. Mitchell, 35 Nev. 447, 130 Pac. 764, 134 Pac. 449. No title is acquired in the overlap by the junior locator. Del Monte Co. vs. Last Chance Co., *supra* [2]; Crown Point Co. vs. Buck, *supra* [103]; Anderson vs. Caughey, 3 Cal. A. 22, 84 Pac. 223; Hoban vs. Boyer, 37 Colo. 185, 85 Pac. 837; except such portion of the senior claim as may not be legally held by the prior claimant. McPherson vs. Julius, *supra* [16].

The acts of a second locator in locating his claims, so far as they overlap or conflict with existing claims, are ineffectual for the purpose of vesting any right thereto in such locator unless there had been an abandonment of such existing claims or a forfeiture of the rights of the first locator by reason of the failure to do the annual assessment work. Musser vs. Fitting, 26 Cal. A. 746, 148 Pac. 536; see Zerres vs. Vanina *supra* [21]; Cook vs. Johnson, *supra* [73]. A prospector has no right to enter upon the surface of a valid placer mining claim for the purpose of making a lode location; but if an attempted placer location is void because the mineral attempted to be located was in veins or lodes and not subject to placer location, then a prospector may, upon peaceable entry, make a valid location of the same mineral as a lode claim on the theory that the attempted placer location being void the ground was unappropriated mineral land within the meaning of the law and subject to lode location. San Francisco Co. vs. Duffield, *supra* [73]; see Belk vs. Meagher, *supra* [59]; Nevada Sierra Oil Co. vs. Home Oil Co., 98 Fed. 673; Thallman vs. Thomas, *supra* [73]; Henderson vs. Fulton, 35 L. D. 652. For an instance of conflicting lode and placer locations see Cole vs. Ralph, *supra* [1]; Duffield vs. San Francisco Co., *supra* [3].

[107] Empire State Co. vs. Bunker Hill Co., *supra* [77]; Hidee Co., 30 L. D. 420.

[108] Alice Lode, 30 L. D. 481; Paul Jones Lode, 31 L. D. 359.

[109] Del Monte Co. vs. Last Chance Co., *supra* [2]; Empire State Co. vs. Bunker Hill, Co., *supra* [77]; Bunker Hill Co. vs. Empire State Co., *supra* [77]; Alice Lode, *supra* [108]; *but see* Anaconda Co. vs. Court, 25 Mont. 504, 65 Pac. 1020.

[110] Del Monte Co. vs. Last Chance Co., *supra* [2]; McElligott vs. Krogh, *supra* [16]; Cleary vs. Skiffich, *supra* [57]; see Montana Co. vs. Clark, 42 Fed. 626.

An entry by a locator upon property in private ownership for the purpose of setting stakes or erecting monuments, though without opposition, gives such locator no rights as to the part or ground thus *overlapped*. Biglow vs. Conradt, *supra* [82].

[111] See Jefferson vs. Anchoria Co., 32 Colo. 176, 75 Pac. 1070. A failure to assert an adverse claim will not estop the adverse claimant from protesting and bring to the notice of the land department any facts that tend to show no compliance by the applicant for patent with the requirement of the law. Round Mt. Co. vs. Round Mt. Co., 36 Nev. 543, 138 Pac. 71, rev'g. 35 Nev. 392, 129 Pac. 308. See Back vs. Sierra Nevada Co., *supra* [43].

§ 743. The Lavagnino Case.

In the case of Lavagnino vs. Uhlig [112] the court held that the relocator of a forfeited claim in proceedings adversing an application for patent by a junior locator, a part of whose location overlapped the senior location and the ground as relocated, can not offer evidence to establish the validity of such senior location at the time of the making of the junior overlapping location. In the later case of Farrell vs. Lockhart [113] the court virtually overruled the former case. Every court in which the question has arisen has either distinguished or denied the doctrine of the Lavagnino case, and since the decision in Farrell vs. Lockhart, it has not been regarded as an authority on the essential and vital proposition of the case.[114]

§ 744. Relocation of Overlapping Ground.

Upon forfeiture or abandonment by the former owner or claimant the overlapping area, properly, should be relocated by the junior locator [115]; although he possibly may acquire the conflicting ground by laches or limitation.[116]

§ 745. Relocations.

A relocation is made in the same manner and subject to the same conditions as an original location [117] after the preceding location has expired by forfeiture or abandonment, or in some way its former

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Priority of right is not determined by dates of entries or patents of the respective claims, but by priority of discovery and location, which may be shown by testimony other than the entries and patents.

In the absence from the record of an adverse suit there is no presumption that anything was considered or determined except the question of the right to the surface. Butte & S. Co. vs. Clark-Montana Co., 249 U. S. 12, aff'g. 233 Fed. 547, aff'g. 248 Fed. 609.

[112] 198 U. S. 443. See § 436.

[113] 210 U. S. 142.

[114] The views expressed in the text are supported by the following authorities: Belk vs. Meagher, *supra* (59); Brown vs. Gurney, *supra* (103); Swanson vs. Sears, *supra* (2); Montagne vs. Labay, 2 Alaska 575; Dufresne vs. Northern Light Co., 2 Alaska 592; Hoban vs. Boyer, *supra* (106); Moorhead vs. Erie Co., 43 Colo. 408, 96 Pac. 253; Rose vs. Richmond Co., 17 Nev. 57; Street vs. Delta Co., *supra* (80); Nash vs. McNamara, *supra* (60); Geyman vs. Boulware, *supra* (2).

See *infra*, note 122.

[115] Slavonian Co. vs. Perasich, 7 Fed. 331; Oscamp vs. Crystal River Co., *supra* (68); Biglow vs. Conradt, *supra* (52); Bingham Co. vs. Ute Co., 181 Fed. 748; McCann vs. McMillan, 129 Cal. 350, 62 Pac. 31; Musser vs. Fitting, *supra* (106); Johnson vs. Young, *supra* (92); Moorhead vs. Erie Co., *supra* (114). A location made within the limits of ground already appropriated is void *ab initio*, Street vs. Delta Co., *supra* (80), to the extent of the overlap.

[116] See *supra*, note 114.

[117] Armstrong vs. Lower, 6 Colo. 393; Pelican Co. vs. Snodgrass, 9 Colo. 339, 12 Pac. 206; see Belk vs. Meagher, *supra* (59); Porter vs. Tonopah Co., 125 Fed. 396, 400. A relocation may include additional vacant ground, bear another name and be conveyed under such name. Shoshone Co. vs. Rutter, *supra* (59).

Monuments existing on the ground at the time of the relocation may be adopted by a relocator, either by rebuilding partially existing monuments, or availing himself of existing monuments by using them, and this is a compliance with the law, and the use of such monuments for the purpose of marking the boundaries of a location is a sufficient compliance with the statute, and creates a valid relocation on the performance of other requirements. Hagan vs. Dutton, *supra* (2); see Gold Creek Co. vs. Perry, 94 Wash. 624, 162 Pac. 996. Florence-Rae Co. vs. Kimbel, 85 Wash. 162, 147 Pac. 881. A relocation record may be insufficient under a local statute, if it fails to state whether the whole or any part of the claim is located as abandoned property. Gibbons vs. Frazer, *supra* (2). See Clason vs. Matko, *supra* (73); Florence-Rae Co. vs. Kimbel, *supra*; see, also, Paragon Co. vs. Stevens Co., 45 Wash. 59, 87 Pac. 1068. The burden is on the relocator to show that the ground had been abandoned or forfeited. Ring vs. U. S. Gypsum Co., 62 Cal. A. 87, 216 Pac. 409; Buckeye Co. vs. Powers, 43 Ida. 532, 257 Pac. 833.

claimant's rights have come to an end [118]; hence a relocation can not depend for its validity upon the subsequent forfeiture or abandonment of the claim by the present claimant.[119]

§ 746. Relative Right of Locator and Relocator.

A locator and a relocator of a mining claim stand in different attitudes in relation thereto, and the first locator is a discoverer of the mineral therein contained, while a relocator is not the discoverer but an appropriator of the mineral and he can not hold the claim except upon proof that the previous location had been abandoned or forfeited.[120]

§ 747. No Privity.

There is no privity between the first locator of a mining claim and a subsequent relocator where the relocation was not made in furtherance of the prior location but was in fact made in hostility thereto.[121] An adverse relocation laid upon a valid subsisting mining claim confers no right present, or contingent, upon the junior claimant. Subsequent forfeiture or abandonment of the claim by the senior claimant opens the ground to relocation the same as if no location or relocation had been made by either of said claimants.[122] It necessarily follows

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[118] Belk vs. Meagher, *supra* (59); Del Monte Co. vs. Last Chance Co., *supra* (2); Swanson vs. Sears, *supra* (2); Porter vs. Tonopah Co., *supra* (55); Jones vs. Wild Goose Co., *supra* (20); Lockhart vs. Farrell, *supra* (2); Ninemire vs. Nelson, *supra* (73). There is no complete forfeiture until a third person acquires adverse title to the claim. Worthen vs. Sidway, *supra* (26); McCarthy vs. Speed, *supra* (68). See Oscamp vs. Crystal River Co., *supra* (68).

In Becker vs. Long, 196 Fed. 723, it is said: "The decision of the Supreme Court in Swanson vs. Sears, *supra*, broadly covers the whole question of location and discovery upon ground within a prior valid and subsisting location, and determines that such location is absolutely void, whether the discovery in the junior location is within or without the overlapping area"; *but see* Clack vs. Brethour, 31 Ariz. 24, 250 Pac. 253.

[119] Slavonian Co. vs. Perasich, *supra* (115); Mason vs. Washington-Butte Co., *supra* (2), C. M. L. 300; Hagan vs. Dutton, *supra* (2); Brown vs. Gurney, *supra* (103); Rooney vs. Barnette, *supra* (6). There may be a conditional abandonment. Walsh vs. Kilenschmidt, 55 Mont. 67, 173 Pac. 548; see McCann vs. McMillan, *supra* (115).

[120] Zerres vs. Vanina, *supra* (21). Gold Creek Co. vs. Perry, *supra* (117). A locator describing himself as such admits that he is not a discoverer of mineral, but an appropriator thereof on the ground that the original discoverer had perfected his right and his notice of relocation is an admission of record that such relocator claims a forfeiture by reason of a failure of the previous locator to make his annual expenditures. Zerres vs. Vanina, *supra* (105); Golden vs. Murphy, 31 Nev. 566, 103 Pac. 394, 105 Pac. 99; Willis vs. Blain, 4 N. M. 378, 20 Pac. 798. By claiming a relocation the locator admits the validity of the original location. Betsch vs. Umphrey, 252 Fed. 574; Copper Queen Co. vs. Stratton, *supra* (81). In Buckeye Co. vs. Powers, *supra* (72), it is said: "That appellant conceded the original validity of defendant's location is evident from its introduction of evidence probative of respondent's failure to do the required assessment work." But in Law vs. Fowler, 45 Ida. 1, 261 Pac. 667, the court held that the defense of invalidity of a prior location, and of its forfeiture by failure to perform the assessment work, are not inconsistent and not contradictory, and the defendant is allowed to plead both of them in his answer.

[121] Burke vs. S. P. R. Co., 234 U. S. 699; see U. S. vs. McCutchen, *supra* (38).

[122] Brown vs. Gurney, *supra*, (103); Farrell vs. Lockhart, *supra* (2); both cases overruling Lavagnino vs. Uhlig, *supra* (2); Swanson vs. Sears, *supra* (2). In the Lavagnino case, *supra*, the court held that the relocator of a forfeited mining claim in proceedings adversing an application by a junior locator, a part of whose location overlapped the senior location and the ground as relocated, could not offer evidence tending to establish the validity of such senior location at the time of making the junior overlapping location. The doctrine of this case either has been distinguished or denied in the following cases: Montague vs. Labay, *supra* (114); Dufresne vs. Northern Light Co., *supra* (114); Moorhead vs. Erie Co., *supra* (114); Swanson vs. Kettler, 17 Ida. 321, 105 Pac. 1059, aff'd. 224 U. S. 181; Street vs. Delta Co., *supra* (80); Nash vs. McNamara, *supra* (60). Since the decision in Farrell vs. Lockhart, *supra*, and in Swanson vs. Sears, *supra*, those cases have been regarded as authority on the essential and vital proposition of the case. Geyman vs. Boulware, *supra* (2). See § 733.

that such junior claimant can not secure title to his claim by an amended location.[123]

§ 748. Technical Defects Unavailable.

Where a relocator has actual knowledge of a subsisting location he is not in a position to complain of technical defects which in no way affect his rights.[124] It has been held that a relocation may be made without awaiting a judicial determination as to whether or not the ground was open to relocation; but the relocator assumes the risk of possible future litigation over his action.[125]

§ 749. Fiduciary Relationships.

A vendor of property, not acting in good faith,[126] a lessee in violation of the terms of his lease,[127] a mortgagor for the purpose of defeating a mortgage,[128] a cotenant for his own exclusive benefit,[129] an agent or

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[123] Brown vs. Gurney, *supra* (103); Brown vs. Oregon King Co., *supra* (77), 728; Bunker Hill Co. vs. Empire State Co., *supra* (77); Jordan vs. Schuerman, 6 Ariz. 79, 53 Pac. 579; Hall vs. Arnott, 80 Cal. 318, 22 Pac. 200; Beals vs. Cone, 27 Colo. 493, 62 Pac. 949; Moyle vs. Bullene, *supra* (79); Butte Co. vs. Barker, *supra* (84). *Compare* Johnson vs. Young, *supra* (92); Frisholm vs. Fitzgerald, *supra* (93); Sullivan vs. Sharp, *supra* (39). The right of a locator to file an amended location can only avail him where there was an original location, valid though imperfect. Sullivan vs. Sharp, *supra*; Strepey vs. Stark, *supra* (81); Butte Co. vs. Barker, *supra*. See Kirkpatrick vs. Curtiss, 138 Wash. 333, 244 Pac. 571, where a junior locator filed an amended notice of location, after suit brought against him by the senior locator, and prevailed, the owner of the senior location having failed for the space of a year prior to perform the assessment work required to hold his claim. In Strepey vs. Stark, *supra*, the court allowed evidence of an additional location notice, filed after suit brought, holding it admissible under the doctrine of relation.

[124] It is a well established law that a person having actual knowledge of a subsisting location can not take advantage of some technical defect or defects in the location proceedings and thus defeat the prior location. Butte & S. Co. vs. Clark-Montana Co., 249 U. S. 12, aff'g. 248 Fed. 609, aff'g. 233 Fed. 547, *certiorari* denied, 247 U. S. 516. Doe vs. Waterloo Co., 70 Fed. 455, aff'g. 55 Fed. 11; Overgaard vs. Westerberg, 3 Alaska, 168; Stock vs. Plunkett, *supra* (97); Madeira vs. Sonoma Co., *supra* (116); Bismark Co. vs. North Sunbeam Co., *supra* (85); Ninemire vs. Nelson, *supra* (73); see Law vs. Fowler, *supra* (120).

[125] Del Monte Co. vs. Last Chance Co., *supra* (2). Mineral ground covered by a valid location becomes segregated from the public domain and is the property of the locator; and so long as the locator complies with the laws of the United States and the state, and the local regulations, such locator has the exclusive right and enjoyment to all the surface included within the lines of his location against all the world; and during such time the ground so segregated is not open to location by another, and any relocation of such ground is void. Swanson vs. Kettler, *supra* (2); Becker vs. Long, *supra* (118); Miller vs. Chrisman, *supra* (62). Until a location is terminated by abandonment or forfeiture, no right nor claim to the property can be acquired by an adverse entry thereon with a view to the relocation of the same. Mason vs. Washington-Butte Co., *supra* (2); see, also, Gwillim vs. Donnelan, *supra* (50); Thornton vs. Phelan, 65 Cal. A. 484, 224 Pac. 259; Roses U. S. Notes, 18 R. C. L., pp. 1092–1135, title "Mines."

[126] Minah Co. vs. Briscoe, 89 Fed. 891; see McDermott Co. vs. McDermott, 27 Mont. 143, 69 Pac. 712.

[127] Lowry vs. Silver City Co., *supra* (104); Stewart vs. Westlake, 148 Fed. 349; Brash vs. White, 3 Ariz. 212, 73 Pac. 445; Yarwood vs. Johnson, 29 Wash. 643, 70 Pac. 123.

[128] Alexander vs. Sherman, 2 Ariz. 326, 16 Pac. 45.

[129] Turner vs. Sawyer, 150 U. S. 578; Lockhart vs. Leeds, 195 U. S. 427; Stevens vs. Grand Central Co., 133 Fed. 28; Mills vs. Hart, 24 Colo. 505, 52 Pac. 680; Perelli vs. Candiani, 42 Or. 625, 71 Pac. 537. An abandonment by a part of the cotenants and their relocation of the same ground does not affect the rights of the other cotenants thereto. Lehman vs. Sutter, *supra* (2). One of the several cotenants after default by all may relocate for his own benefit. Strang vs. Ryan, 46 Cal. 33; Doherty vs. Morris, 11 Colo. 12, 16 Pac. 911; Saunders vs. Mackey, 5 Mont. 527, 6 Pac. 361. See McCarthy vs. Speed, *supra* (68); Stevens vs. Grand Central Co., *supra*. A grantee taking with knowledge of the facts, is charged with the trust. Stevens vs. Golob, 34 Colo. 429, 83 Pac. 381. In Phillips vs. Homestake Co., 51 Nev. 226, 273 Pac. 657, it is held that tenants in common of a mining location hold no trust relation unless they are working the property, as otherwise they are not partners.

other party in a fiduciary capacity,[130] a discharged watchman,[131] or one operating under a grubstake, can not acquire title by relocating the property.[132] Such relocation inures to the benefit of the rightful owner.

§ 750. Relocation by Original Claimant.

The original claimant or one of several claimants, or their grantee, ordinarily may relocate the claim after the time for making the annual expenditure without such expenditure having been made. Such a relocation does not amount to a fraud either upon the United States or persons desiring to adversely relocate the same.[133]

§ 751. Severance of Improvements.

Prior to determination of his estate by the perfecting of an adverse relocation, the original claimant may sever and remove all machinery, buildings, fixtures and improvements that by the manner of their attachment to the soil have become a part of the freehold; but his right of entry for that purpose ceases when his estate is terminated by forfeiture or abandonment.[134] In other words, improvements or fixtures placed upon a mining location by a claimant thereof becomes a part of the realty and if not removed prior thereto by the original claimant a subsequent valid adverse relocation of the claim carries with it whatever may be affixed to it.[135]

§ 752. Not Subject to Adverse Relocation.

A mining claim becomes subject to adverse relocation when its claimant fails to perform the annual labor thereon, but there is no complete forfeiture until a third person acquires title to the claim. In other words, when a claim is open to relocation because of the failure of the

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[130] Haws vs. Victoria Co., *supra* (73); Shea vs. Nilima, 133 Fed. 209; Fisher vs. Seymour, 23 Colo. 542, 49 Pac. 30; Lockhart vs. Rollins, 2 Ida. 540; Largey vs. Bartlett, 18 Mont. 265, 44 Pac. 962; Atchley vs. Varner, 138 Okla. 156, 280 Pac. 616; Cooperative Co. vs. Law, 65 Or. 250, 132 Pac. 521; see, also, Fuller vs. Harris, 29 Fed. 814; Utah Co. vs. Dickert Co., 6 Utah 183, 21 Pac. 1002.

[131] A watchman may adversely relocate the property formerly in his care. Lockhart vs. Rollins, *supra* (130); see Lockhart vs. Leeds, *supra* (129). A location of vacant ground made by a miner knowing that his former employer's mining operations extended therein was upheld in Thallman vs. Thomas, *supra* (73). See, also, Lockhart vs. Johnson, 181 U. S. 516; Doherty vs. Morris, *supra* (129); Lockhart vs. Washington Co., 16 N. M. 223, 117 Pac. 834.

[132] Cascaden vs. Dunbar, 157 Fed. 84; Jennings vs. Rickard, 10 Colo. 395, 15 Pac. 677; Hawley vs. Romney, *supra* (21); Williams vs. Cordingly, 46 Nev. 313, 213 Pac. 105.

[133] Rohn vs. Iron Chief Co., 186 Cal. 703, 200 Pac. 644, and cases therein cited; Lockhardt vs. Johson, *supra* (131); Hunt vs. Patchin, 35 Fed. 818; Leedy vs. Lehfeldt, 162 Fed. 304; Peachy vs. Frisco Co., 204 Fed. 667; Sellers vs. Taylor, 48 Ida 1, 279 Pac. 618; Saunders vs. Mackey, *supra* (129); Legoe vs. Chicago Co., 24 Wash. 175, 64 Pac. 141; Warnock vs. DeWitt, 11 Utah 324, 40 Pac. 205, *but see* Ingemarson vs. Coffey, 41 Colo. 407, 92 Pac. 908; Lehman vs. Sutter, *supra* (2), holding that an original locator or claimant is inhibited from locating his claim for the purpose of avoiding the annual expenditure. The relocations in the Rohn case and the cases therein cited were, in each instance, made prior to the enactment of § 1426*s* of the Civil Code of Cal., inhibiting the relocation of mining claims by their owners until three years after the date of the original locations. This provision of the code became operative in the year 1909. A similar act was passed in Montana in the year 1907. Montana St. 1907, p. 22. Where persons interested in a mining location conveyed their interests to one of their number for the benefit of all, and he neglected to make the necessary expenditure for one year, he was not guilty of fraud in procuring others to relocate the property for the benefit of the original claimants. U. S. vs. McCutchen, *supra* (38); *but see* McCann vs. McMillan, *supra* (115); Cal. C. C., § 1426*s*; Emerson vs. Akin, 26 Colo. A. 40, 140 Pac. 481.

[134] Merritt vs. Judd, 14 Cal. 50; Watterson vs. Cruse, *supra* (66); Roseville Co. vs. Iowa Gulch Co., 15 Colo. 29, 24 Pac. 920; see Pennybacker vs. McDonald, 48 Cal. 160; Breyfogle vs. Tighe, 58 Cal. A. 301, 208 Pac. 1008; County of Placer vs. Lake Tahoe Co., 58 Cal. A. 764, 209 Pac. 900. Russell vs. Wilson, 30 L. D. 322; Mono Fraction, 31 L. D. 121; Sheldon, 43 L. D. 152.

[135] *Id.*

locator to make the annual expenditure for labor and improvements, if, thereafter, the work upon the claim is resumed in good faith before an adverse relocation actually is made, the rights of the original claimant or his grantee stand as if there had been no failure to comply with the statutes.[136]

§ 753. Affidavit of Labor Not Essential.

The fact that the owner of a mining claim failed to record an affidavit of the annual expenditure for labor and improvements as provided by a state statute, does not render the claim subject to relocation.[137]

§ 754. Effect of Payment.

A mining claim is not subject to relocation in whole, or in part, on the ground that the applicant for patent has not performed the annual assessment work during the pendency of the application, where he has paid the government for the land embraced in such application.[138]

§ 755. Relocation of Excess.

A relocation of a mining claim can not be made on an existing location upon the ground that it is excessive, as such a location is void only as to the excess. Until the locator has been advised of such excess

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[136] Belk vs. Meagher, *supra* (50); Jackson vs. Roby, 109 U. S. 442; Yosemite Co. vs. Emerson, 208 U. S. 25, aff'g. 149 Cal. 50, 85 Pac. 122; O'Connell vs. Pinnacle Co., *supra* ( ); Worthen vs. Sidway, *supra* (26); Peachy vs. Frisco Co., *supra* (133); Anthony vs. Jillson, 83 Cal. 300, 23 Pac. 418; Harris vs. Kellogg, 117 Cal. 489, 49 Pac. 708; Hirschler vs. McKendricks, 16 Mont. 213, 40 Pac. 290. The question is "has the required expenditure been made as the law commands?" Shank vs. Holmes, 15 Ariz. 229, 137 Pac. 871, and the burden of showing the forfeiture is upon the relocator. Copper Co. vs. Kidder, 20 Ariz. 224, 179 Pac. 541; see Hammer vs. Garfield Co., 130 U. S. 290; Cunningham vs. Pirrung, 9 Ariz. 288, 80 Pac. 329; Lancaster vs. Coale, 27 Colo. A. 495, 150 Pac. 821. A mining claim is not subject to relocation where the owner either had performed the annual assessment work during the year, or where having failed to perform the same during the year the work had been resumed and was in process of performance at the time of the attempted relocation. McKirahan vs. Gold King Co., 39 S. Dak. 535, 165 N. W. 543; Winters vs. Burkland, *supra* (95). The statute does not authorize a person to trespass upon or to relocate a claim previously located by another, however derelict such locator may be in making the requisite expenditure, provided he has resumed work and actually is engaged in performing the same. North Noonday Co. vs. Orient Co., 1 Fed. 522; Jupiter Co. vs. Bodie Con. Co., 11 Fed. 666; Honaker vs. Martin, 11 Mont. 95, 27 Pac. 397, aff'd. ____ U. S. ____. A relocation of a mining claim made because of the failure to perform the assessment work, but afterwards abandoned, can not aid a subsequent relocation made after the original claimant had made the requisite statutory expenditure. Justice Co. vs. Barclay, 82 Fed. 561; Anderson vs. Anvil Co., 3 Alaska 505; see Bishop vs. Baisley, 28 Or. 119, 41 Pac. 936. A locator who has not performed the annual labor or made the required improvements within the statutory period must show that he has resumed work before an alleged adverse relocation was made, and the proviso of the statute calls for an affirmative showing on his part, but the burden can be met by proof either of the annual labor done within the proper time, or that the work was resumed prior to the alleged relocation. McKnight vs. El Paso Brick Co., 16 N. M. 743, 120 Pac. 694, rev'd. 233 U. S. 250 upon another point. A relocator can not hold the claim except upon proof that the original locator had forfeited or abandoned the claim. Zerres vs. Vanina, *supra* (21).

[137] Book vs. Justice Co., 58 Fed. 118; McCulloch vs. Murphy, 125 Fed. 147; Sturtevant vs. Vogel, 167 Fed. 453; Daggett vs. Yreka Co., *supra* (59); Bismark Co. vs. North Sunbeam Co., *supra* (85); Murray Hill Co. vs. Havenor, 24 Utah 73, 66 Pac. 762; *but see* Harris vs. Kellogg, *supra* (136). In Idaho the failure to file the affidavit of labor is considered *prima facie* evidence of the requisite labor not having been done. Ida. C. C., § 3211. See S. P. R. Co., 50 L. D. 577.

[138] Aurora Hill Co. vs. Eighty-five Co., 34 Fed. 517; see Shank vs. Holmes, *supra* (136). The annual assessment work is not required to be made after the entry in the land office on the theory that the government parts with the property upon such entry, though the title remains in it until the patent in fact is issued, as the right to the patent arises immediately upon payment of the price, and a mere delay in the administration of affairs will not defeat nor diminish the right of the applicant for patent. Benson Co. vs. Alta Co., 145 U. S. 431; Neilson vs. Champagne Co., 111 Fed. 657; Cranes Gulch Co. vs. Scherrer, 134 Cal. 353, 66 Pac. 487.

and has had a reasonable time to make his selection, his possession extends to the entire location and it was so far segregated from the public domain as to exempt it entirely from relocation.[139]

§ 756. Relocation of Incomplete or Fraudulently Abandoned Locations.

A valid relocation of a mining claim can not be made by stealth as against a person in actual possession thereof and working ground under an incomplete location,[140] nor be made to entirely cover a valid and subsisting location,[141] nor be made under a fraudulent abandonment.[142]

§ 757. No Revival of Rights.

No rights can be revived either by relocation or by the resumption of labor within reserved or withdrawn areas,[143] or within the territory of Alaska.[144]

§ 758. Location Acts.

A locator must take measures to inform the world that he has appropriated a certain portion of the public mineral lands and state the extent and boundaries thereof.[145] This involves doing whatever may be required by the federal mining act, local statute and district rule.[146]

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[139] Jones vs. Wild Goose Co., *supra* (24); Adams vs. Yukon Co., *supra* (36).

[140] Pharis vs. Muldoon, 75 Cal. 287, 17 Pac. 70; Springer vs. S. P. Co., *supra* (61); see Honaker vs. Martin, *supra* (136). See, also, Fee vs. Durham, 121 Fed. 470; Willitt vs. Baker, 133 Fed. 946; and, see also, Belk vs. Meagher, *supra* (59); Anderson vs. Anvil Co., *supra* (136); Belcher Co. vs. Deferrari, 62 Cal. 160; Hirschler vs. McKendricks, *supra* (136); Bishop vs. Baisley, *supra* (136).

[141] Brown vs. Gurney, *supra* (103); Farrell vs. Lockhart, *supra* (2); Porter vs. Tonopah Co., *supra* (55); Malone vs. Jackson, 137 Fed. 787; Swanson vs. Kettler, *supra* (2); Berquist vs. W. Virginia Co., *supra* (60). The failure to perform the necessary assessment work does not subject the claim to adverse relocation until after the expiration of the assessment year. Mesmer vs. Geith, 22 Fed. (2d) 690. The rule is well established that the rights which a valid location of a claim secures to the locator and his grantees and successors are clearly defined by law and are wholly unaffected by any subsequent conflicting location. Del Monte Co. vs. Last Chance Co., *supra* (2); Street vs. Delta Co., *supra* (80).

[142] McCann vs. McMillan, *supra* (115); Clack vs. Brethour, *supra* (118).

[143] Interstate Oil Corp., 50 L. D. 262, *but see* Wilbur vs. Krushnic, 280 U. S. 306, aff'g. 58 App. D. C. 332, 30 Fed. (2d) 742, holding that after the passage of the Leasing Act, 30 U. S. C. A. § 193, the owner of the claim had the right to maintain his claim and to perfect it under the same conditions as before. His annual assessment work might be in default, but his estate in his claim would not be lost or terminated merely by reason thereof.

[144] The act of March 2, 1907, 5 U. S. Comp. St., p. 5051, § 6024, expressly declares that, upon the failure of the locator or owner of a mining claim in Alaska to make the annual expenditure "such claim shall become forfeited and open to location by others as if no location had ever been made." Thatcher vs. Brown, 190 Fed. 708; Ebner Co. vs. Alaska Co., 210 Fed. 599. This is contrary to the provisions of the general mining law. 5 U. S. Comp. St., p. 5525, § 4620, which expressly gives the right to resume work upon the claim after failure to complete it, provided no other location has been made in the meantime, *but see* Chichagoff Co. vs. Alaska Handy Co., 45 Fed. (2d) 553, dist'g. Thatcher vs. Brown.

[145] Duncan vs. Eagle Rock Co., 48 Colo. 569, 111 Pac. 588; see Zeiger vs. Dowdy, 13 Ariz. 351, 114 Pac. 565; Miehlich vs. Tintic Co., 60 Utah 569, 211 Pac. 687. Location is the initial step taken by the locator to indicate the place and extent of the surface which he desires to acquire. Del Monte Co. vs. Last Chance Co., *supra* (2). See, Butte & S. Co. vs. Clark-Montana Co., *supra* (124). Among the cases illustrating the indulgent consideration shown locations made in good faith may be mentioned Book vs. Justice Co., *supra* (137); Walton vs. Wild Goose Co., *supra* (33); Duryea vs. Boucher, 67 Cal. 141, 7 Pac. 421; Doe vs. Tyler, *supra* (98); Kern Oil Co. vs. Crawford, *supra* (26); Stock vs. Plunkett, *supra* (67); Green vs. Gavin, *supra* (26); Sydney vs. Richards, 40 Cal. A. 685, 181 Pac. 394; West Granite Co. vs. Granite Co., 7 Mont. 356, 17 Pac. 547. Locations are made upon the surface, and in lode locations the top or apex of a vein or lode must be within the boundary of the claim to enable the locator to perfect his location, but any portion of the apex or course or strike of the vein or lode found within the limits of the location is a sufficient discovery to entitle the claimant to obtain title. Gwillim vs. Donnellan, *supra* (59); Hanson vs. Craig, *supra* (27). See, also, Shreve vs. Copper Bell Co., 11 Mont. 333, 28 Pac. 315. See, Star Co., *supra* (104), holding that a person who locates a mining claim in good faith is protected in his possession of the surface marked out, although

§ 759. Local Law and Regulations.

The local law or regulations may require more improvements or greater expenditures than that made indispensable by the paramount law, yet neither can make a less requirement control, as this would be in conflict with the federal mining statute.[147] So, a local requirement that a discovery shaft be sunk or its equivalent, as an open cut or tunnel shall be made to run as a condition for the location of a mining claim or the continued right of possession of the same,[148] or that a locator shall set center and end stakes, or monuments of a particular character in a particular place or manner,[149] or the notice be posted at a particular place or that the record of a mining claim shall be a true copy of the notice posted or be made within a specified time[150] and

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subsequent developments may show that the location of the apex of the vein was erroneous. See, also, Harper vs. Hill, 159 Cal. 250, 113 Pac. 162.

This is evidenced by discovery, posting of notice containing the name of the claim, the name of the locator, the date of the location, perfecting the right of discovery, the marking of the location upon the ground so that its boundaries can be readily traced, and the recording of the location notice, sometimes called the "location certificate" and sometimes the "declaratory statement." Creede Co. vs. Uinta Co., *supra* (2); Waskey vs. Hammer, 223 U. S. 85; aff'g. 170 Fed. 31; Cole vs. Ralph, *supra* (1); Hall vs. McKinnon, *supra* (37); Smith vs. Union Oil Co., *supra* (4); Strepey vs. Stark, *supra* (84); Swanson vs. Koeninger, 25 Ida. 369, 137 Pac. 893.

A notice not followed by marking the boundaries initiates no right to the claim. Maleck vs. Tinsley, 73 Ark. 610, 85 S. W. 81.

For possession of mining ground without location, see § 1101, note 6.

[146] Belk vs. Meagher, *supra* (59); Butte City Co. vs. Baker, 196 U. S. 119; aff'g. 28 Mont. 222, 72 Pac. 617; Union Oil Co. vs. Smith, *supra* (4); Dwinnell vs. Dyer, 145 Cal. 12, 78 Pac. 247, 7 L. R. A. N. S. 763; Hickey vs. Anaconda Co., 33 Mont. 46, 81 Pac. 811; see Charlton vs. Kelly, 156 Fed. 433; Eaton vs. Norris, 131 Cal. 561, 63 Pac. 856; Stock vs. Plunkett, *supra* (67); McKay vs. McDougall, 25 Mont. 258, 64 Pac. 669; Street vs. Delta Co., *supra* (80); Gleason vs. Martin White Co., 13 Nev. 442.

It is settled law that where a local statute provides for the posting of a notice of location of a mining claim, sinking of a discovery shaft, marking the boundaries on the ground and requires a statement of the number of feet claimed along the course of the vein or lode from the point of discovery and further provides for the recording in the proper office wherein the claim is situated within a certain number of days after posting the notice of location, such requirements must be substantially complied with. Thompson vs. Barton Gulch Co., *supra* (16). See, Butte City vs. Baker, *supra*; Clason vs. Matko, *supra* (3); Ledoux vs. Forester, *supra* (16); Dutch Flat Co. vs. Mooney, 12 Cal. 534; Myers vs. Spooner, 55 Cal. 257; Newport Co. vs. Bead Lake Co., 110 Wash. 120; 188 Pac. 27. See Stock vs. Plunkett, *supra*.

Differently stated, the location of a valid mining claim should be made in conformity with any valid state legislation that may exist in the particular state within which the mineral land is situate, as well as with any valid existing local rules and regulations of miners. Creede Co. vs. Uinta Co., *supra* (2); Northmore vs. Simmons, 97 Fed. 386; Kern Oil Co. vs. Crawford, *supra* (26); Saxton vs. Perry, 47 Colo. 273, 107 Pac. 281; Sissons vs. Sommers, *supra* (97); Copper Globe Co. vs. Allman, *supra* (22); De Witt vs. Sides, *supra* (67).

[147] Northmore vs. Simmons, *supra* (146); Doctor Jack Pot Co. vs. Work Co., 194 Fed. 625; Wheeler, 7 C. L. O. 130; see Hoyt vs. Russell, 117 U. S. 401; Butte City Co. vs. Baker, *supra* (146); Werner vs. McNulty, 7 Mont. 36, 14 Pac. 683.

[148] Northmore vs. Simmons, *supra* (146). There is no provision for a discovery shaft in the federal mining law. McMillen vs. Ferrum, 32 Colo. 43, 74 Pac. 461. A discovery and discovery shaft may be anywhere along the course of a vein or lode within the end lines of a location, may be nearer one end than the other, may be nearer one side line than the other, and is not required to be within any given distance from either of the side lines. Taylor vs. Parenteau, *supra* (21). See, generally, Tonopah Ralston Co. vs. Mt. Oddie Co., 49 Nev. 420, 248 Pac. 833.

[149] Wright vs. Lyons, 45 Or. 173, 77 Pac. 81; see Northmore vs. Simmons, *supra* (126); Beals vs. Cone, *supra* (123); McCowan vs. McClay, *supra* (70). If a local statute provides that a location notice shall be posted at the point of discovery a posting of such notice within seventy-five feet of such point is not a sufficient compliance with the law. Batt vs. Stedman, 36 Cal. A. 608, 173 Pac. 99; see Butte Co. vs. Radmilovich, 39 Mont. 157, 101 Pac. 1078; *but see* Green vs. Gavin, *supra* (26); McCleary vs. Broaddus, 14 Cal. A. 60, 111 Pac. 125. The discovery point of a lode location to make it valid must be upon free territory. Round Mt. Co. vs. Round Mt. Co., *supra* (111), and within the strip of land located. Deer Creek Co. vs. Paris, 45 L. D. 272; *but see* Reiner vs. Schroeder, *supra* (4); *compare* McGinnis vs. Egbert, 8 Colo. 54, 5 Pac. 652; Michael vs. Mills, 22 Colo. 439, 45 Pac. 429.

[150] See Morrison's Mining Rights (15th ed.), 36. Failure to record notice of location does not necessarily invalidate nor work a forfeiture of the location. Stock vs. Plunkett, *supra* (67); Dripps vs. Allison's Co., *supra* (26), and cases therein cited.

contain certain *data*[151] as conditions precedent to the establishment of title to the location,[152] or giving the locator a certain prescribed time for marking the boundaries of his location[153] are not in conflict with the federal statute.[154]

§ 760. Order of Performance.

In practice, discovery usually precedes location. The mining act treats it as the initial step, but in the absence of an intervening right it is no objection that the usual and statutory order is reversed.[155] In such case the location becomes effective from the date of discovery, but in the presence of an intervening right it must remain of no effect.[156]

§ 761. Discoverer.

A relocator is not the discoverer of such mineral, but the appropriator thereof.[157]

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[151] Erhardt vs. Boaro, *supra* [60]; Iron Co. vs. Elgin Co., *supra* [10]; U. S. vs. Ringeling, 8 Mont. 359, 20 Pac. 643; see Butte City vs. Baker, *supra* [146]. In Winters vs. Burkland, *supra* [36], a local statute requiring the locator to file with his location notice an affidavit of the performance of discovery work or location work was upheld, and a relocation without it held null and void. See, also, Van Buren vs. McKinley, 8 Ida. 93, 66 Pac. 936; and Butte & S. Co. vs. Clark-Montana Co., 233 Fed. 548, aff'd. 248 Fed. 609, aff'd. 249 U. S. 12, overruling Hickey vs. Anaconda Co., *supra* [146], and cognate Montana cases.

[152] Deeney vs. Mineral Creek Co., 11 N. M. 291, 67 Pac. 724; see Faxon vs. Barnard, 4 Fed. 702; Lockhart vs. Willis, *supra* [60]; Mallett vs. Uncle Sam Co., 1 Nev. 188.

[153] Mutchmor vs. McCarty, 149 Cal. 603, 87 Pac. 85; Helena Co. vs. Baggaley, 34 Mont. 464, 87 Pac. 455; Dolan vs. Passmore, 34 Mont. 277, 85 Pac. 134; Sharkey vs. Candiani, 48 Or. 112, 85 Pac. 219; 7 L. R. A. N. S. 791; Slothower vs. Hunter, 15 Wyo. 189, 88 Pac. 36; Bonanza Co. vs. Golden Head Co., 29 Utah 159, 80 Pac. 736. Where a statute provides that when a mining location is made, wholly or in part, upon abandoned ground, the notice shall so state, a failure to comply with that requirement will defeat the title. Clason vs. Matko, *supra* [73]; Newport Co. vs. Bead Lake Co., *supra* [146]. See Cunningham vs. Pirrung, 9 Ariz. 288, 80 Pac 329; Copper Queen Co. vs. Stratton, *supra* [81].

[154] Erhardt vs. Boaro, *supra* [60]; Sanders vs. Noble, 22 Mont. 125, 55 Pac. 1037; Marshall vs. Harney Peak Co., 1 S. Dak. 360, 47 N. W. 290; see Omar vs. Soper, *supra* [59]; Gleeson vs. Martin White Co., *supra* [146]. See, also, *supra*, note 146, and *infra*, note 167.

[155] Creede Co. vs. Uinta Co., *supra* [2]; Cole vs. Ralph, *supra* [1]. Discovery is the indispensable fact in a mining location and the marking and recording of the claim dependent upon it. The order of time is not essential to the acquisition from the United States of the exclusive right of possession of the discovered mineral or the obtaining of a patent therfor. Discovery may follow after location and give validity to the claim as of the time of discovery, provided the rights of third persons have not intervened. Union Oil Co. vs. Smith, *supra* [4]; *but see* Butte & S. Co. vs. Clark-Montana Co., *supra* [124]; see Con. Mutual Oil Co. vs. U. S., *supra* [4]. In Alaska the order of performance is regulated by special congressional enactment. Sutherland vs. Purdy, 234 Fed. 600.

[156] Creede Co. vs. Uinta Co., *supra* [2]; Union Oil Co. vs. Smith, *supra* [4]; Cole vs. Ralph, *supra* [1]; Doe vs. Waterloo Co., *supra* [124]; U. S. vs. Hurst, 2 Fed. (2d) 76; Thompson vs. Spray, *supra* [33]. See Tuolumne Co. vs. Maier, *supra* [64]; Brewster vs. Shoemaker, 28 Colo. 176, 63 Pac. 309. It is well established law that in the absence of any intervening rights the order in which the statutory requirements concerning the making of locations are complied with is immaterial: that the marking of the boundaries of a claim may precede the discovery, or the discovery may precede the marking, and if both are complete before the rights of others intervene, the earlier act will inure to the benefit of the location as of the date of the later, and a complete possessory title to the premises will vest in him as of the later date. Erhardt vs. Boaro, *supra* [60]; Con. Mutual Oil Co. vs. U. S., *supra* [4]; Union Co. vs. Smith, *supra* [4]; Weed vs. Snook, *supra* [65].

A. locates with no discovery. He may hold the location against B., who has made no discovery. Crossman vs. Pendery, 8 Fed. 694; Field vs. Gray, 1 Ariz. 404, 25 Pac. 794; see McInerny vs. Allebrand, 107 Cal. A. 457, 290 Pac. 530; Cosmos Co. vs. Gray Eagle Co., 112 Fed. 4, aff'g. 104 Fed. 20, aff'd. 190 U. S. 301.

[157] Zerres vs. Vanina, *supra* [21]; see Sierra Nevada Oil Co. vs. Home Oil Co., 98 Fed. 673; Hayes vs. Lavagnino, 17 Utah 185, 53 Pac. 1029. It is sufficient if the appropriator knows at the time of making his location that there had been a discovery of mineral within the location. Hagan vs. Dutton, *supra* [2], *but see* McMillen vs. Ferrum Co., *supra* [148], see also § 614, note 81.

§ 762. Question of Fact.

It is a question of fact whether or not a discovery sufficient to complete the location has been made.[158]

§ 763. Marking of Boundaries Indispensable.

The provision of the federal mining law as to the marking of a location upon the ground so that its boundaries can be readily traced is an imperative and indispensable condition precedent to the valid location of a mining claim.[159] The law does not, in express terms, require

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[158] Star Co., *supra* (104); Hagan vs. Dutton, *supra* (2); see Waskey vs. Hammer, *supra* (33); Multnomah Co. vs. U. S., 211 Fed. 100. A location of a lode claim must be upon the top or apex of a vein or lode in order to enable the locator to perfect his location and obtain title. It is sufficient, however, if a portion of the apex is found within the limits of the location. Larkin vs. Upton, *supra* (59); Poplar Creek Mine, *supra* (4); Debney vs. Iles, 3 Alaska 451. A location can not be made on the middle part of a vein or lode, or otherwise than at the top of the apex, which will authorize the locator to follow such vein or lode beyond his side lines. Iron Co. vs. Murphy, 3 Fed 372; *but see* Brewster vs. Shoemaker, *supra* (150).

[159] Creede Co. vs. Uinta Co., *supra* (2); Doe vs. Waterloo Co., 55 Fed. 11, aff'd. 70 Fed. 455; Meydenbauer vs. Stevens, 78 Fed. 787; Reilly vs. Blackmore, 2 Ariz. 442, 17 Pac. 72; Worthen vs. Sidway, *supra* (26); Harper vs. Hill, *supra* (145); Madeira vs. Sonoma Co., *supra* (16); Treasury Co. vs. Boss, 32 Colo. 27, 74 Pac. 888; Flynn Co. vs. Murphy, *supra* (17); Sharkey vs. Candiani, *supra* (153); Sanders vs. Noble, *supra* (154); see Patchen vs. Keeley, 19 Nev. 413, 14 Pac. 347. The marking of the boundaries of a mining claim is the main act of location, and the ultimate fact in determining the validity of the location is the placing of such marks on the ground so as to identify the claim. McCleary vs. Broaddus, *supra* (149); see Donahue vs. Meister, 88 Cal. 121, 25 Pac. 1096; Eaton vs. Norris, *supra* (146). For an interesting case of conflicting locations, each located without boundaries, see Neuebaumer vs. Woodman, 89 Cal. 310, 26 Pac. 900.

It is neither expected nor required that the locator of a mineral claim in marking his location upon the ground so that its boundaries can be readily traced shall be exact in running his lines, or in fixing the corner or other posts. Kern Oil Co. vs. Crawford, *supra* (26); Eilers vs. Boatman, 3 Utah 159, 2 Pac. 66, aff'd. 111 U. S. 356. See Courtney vs. Ward, 67 Colo. 105, 187 Pac. 517; Butte Co. vs. Radmilovich, *supra* (19).

The location of a vein or lode as running in a certain direction and not marked upon the surface for years, but simply indicated by a notice, will not prevail as against a location subsequently made by another party on ground different from the first, as indicated, after the latter has been developed by years of labor and large expenditures, without objection by the first locator, where by subsequent exploration the vein or lode of the first locator runs in a different direction from what he supposed and in its true course is covered by the subsequent location. O'Reilly vs. Campbell, 116 U. S. 422; see Biglow vs. Conradt, *supra* (65).

Where a plaintiff in an ejectment suit had after posting and recording his notice of location, returned to the claim for the purpose of marking its boundaries, so that they could be readily traced on the ground, but was unable to do so owing to the existence of a state quarantine against the hoof and mouth disease, defendants in the meantime entering and making a location, it was held that even if defendants had entered in violation of the quarantine, this fact could not be held to invalidate their title, as the existence of the quarantine had no effect upon the operation of the mining laws under which they acquired title; that their entry if so made was "an offense against the health laws of the state and did not amount to an invasion of the property rights of the original locator or his grantee because they had acquired none." De Witt vs. Sides, *supra* (67).

Whether or not the location of a mining claim has been distinctly marked upon the ground so that its boundaries can be readily traced is a question of fact to be determined by the court or jury upon the evidence presented upon that issue. Erhardt vs. Boaro, *supra* (60); Hammer vs. Garfield Co., 130 U. S. 291; Bennett vs. Harkrader, 154 U. S. 441; Book vs. Justice Co., *supra* (137); McCarthy vs. Phelan, 132 Cal. 406, 64 Pac. 570; Gleeson vs. Martin White Co., *supra* (146); see Eilers vs. Boatman, *supra* (62); Snowy Peak Co. vs. Tamarack Co., 17 Ida. 641, 107 Pac. 60. The manner of marking, generally, is not required to be stated in the notice. Farmington Co. vs. Rhymney Co., *supra* (24); Wells vs. Davis, 22 Utah 327, 62 Pac. 3, nor need the name of the claim be marked upon the stakes unless the boundaries can not be readily traced without it, and especially where the location notice giving all the information that marks on corner stakes would give is fastened on the discovery stake. Smith vs. Newell, 86 Fed. 57; Bingham Co. vs. Ute Co., *supra* (115). To reiterate: the ultimate fact in determining the validity of a location is the placing of such marks upon the ground sought to be located as to identify the claim, or marks of such character that the boundaries can be readily traced. Eaton vs. Norris, *supra* (146); see Taylor vs. Middleton, 67 Cal. 656, 8 Pac. 594; Anderson vs. Black, 70 Cal. 230, 11 Pac. 700. These marks need not necessarily be placed upon the ground sought to be located. Del Monte Co. vs. Last Chance Co., *supra* (2); Jim Butler Co. vs. West End Co., 247 U. S. 453, aff'g. 39 Nev. 375, 158 Pac. 876; Bunker Hill Co. vs. Empire State Co., *supra* (77); Grassy Gulch Claim, 30 L. D. 191; Hidee Co., *supra* (107); West Granite Co. vs. Granite Co., *supra* (145); *but see* Montana Co. vs. Clark, *supra* (110).

See Boundaries.
See Overlapping Locations.

the boundaries of a mining claim to be marked, but prescribes only that the location be so marked that its boundaries can be readily traced.[160] The boundaries required to be marked as the boundaries of an association placer claim are the boundaries of the one hundred and sixty acres and not the boundaries of each twenty acres thereof.[161]

§ 764. Federal Provisions.

Although the federal mining law provides that "the location must be distinctly marked upon the ground so that its boundaries can be readily traced,[162] it does not fix the time within which the location must be so marked, but until it is so marked the location is not complete and the law has not been complied with[163]; nor does it define nor prescribe the kind or character of the marks that shall be made upon the surface nor upon what part of the claims they shall be placed,[164]

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[160] Book vs. Justice Co., *supra* (137).

[161] Miller vs. Chrisman, *supra* (62).

[162] Donnelly vs. U. S., 228 U. S. 243; Doe vs. Waterloo Co., *supra* (124); Harper vs. Hill, *supra* (135); Taylor vs. Parenteau, *supra* (21) Flynn Group Co. vs. Murphy, *supra* (17); Street vs. Delta Co., *supra* (89); Lockhart vs. Wills, *supra* (60).

[163] Loesser vs. Gardiner, 1 Alaska 643; Madeira vs. Sonoma Co., *supra* (16); Gobert vs. Butterfield, *supra* (62); DeWitt vs. Sides, *supra* (57); Gleeson vs. Martin White Co., *supra* (140); see, also, Doe vs. Waterloo Co., *supra* (124); disapproving doctrine of Newbill vs. Thurston, 65 Cal. 419, 4 Pac. 409; and see Burke vs. McDonald, *supra* (16); Patterson vs. Tarbell, 26 Or. 29, 37 Pac. 76.

The purpose of the law is to give notice to prospectors who are looking for mineral locations of what has been already appropriated in order that they may govern themselves accordingly. It is also for the purpose to prevent fraud by swinging or floating. In accomplishing these purposes, courts are inclined to be liberal with persons making mining locations, and are not inclined to defeat a claim of a locator who has in good faith attempted to comply with the requirements of the law by technical criticism of the act relied upon to constitute a valid location. Book vs. Justice Co., *supra* (137); Walton vs. Wild Goose Co., *supra* (35); Tonopah Co. vs. Tonopah Co., 125 Fed. 389, 392; 408, 411; Gleeson vs. Martin White Co., *supra*, (140); Gold Creek Co. vs. Perry, *supra* (11); see, also, Willeford vs. Bell, 5 Cal. Unrep., 679, 49 Pac. 8; Pollard vs. Shively, 5 Colo. 317; Swanson vs. Koeninger, *supra* (135); Nelson vs. Smith, *supra* (95).

Where there has been a discovery of mineral and the location notice filed, the location is valid if the boundaries are marked before the rights of third persons intervene; but the locator delays at his peril, as he assumes the risks of intervening rights. Brockbank vs. Albion Co., 29 Utah 370, 81 Pac. 863; see Jupiter Co. vs. Bodie Con. Co., *supra* (130); Erwin vs. Perego, 93 Fed. 608. The boundaries of a mining claim may be marked at any time prior to the acquisition of an intervening right regardless as to whether the time within which the marking was made is reasonable or not. Gobert vs. Butterfield, *supra*. See Patterson vs. Tarbell, *supra*.

If a subsequent locator obtains from the markings and monuments upon the ground actual notice of the extent of a prior location, the fact that the notice is defective in its description is immaterial. Thompson vs. Underwood, 138 Ark. 323, 211 S. W. 164; Blake vs. Cavins, 25 N. M. 594, 185 Pac. 374. See Stock vs. Plunkett, *supra* (67); Ninemire vs. Nelson, *supra* (117).

In Huckaby vs. Northam, 68 Cal. A. 83, 228 Pac. 718, the locator testified "that the center line of the claim followed the course of the mineral ledge, the point of discovery being in the middle of the center line; that he marked the claim on the ground by driving square stakes, four inches in diameter and extending eighteen inches above the surface, at both ends, and the middle or the center line, and at the four corners of the claim, and piling rocks around them, and that he posted notices on the center line stakes, and subsequently on the corner stakes, and caused a copy thereof to be recorded, reading as follows: "Notice is hereby given that the undersigned * * * has * * * this day located a claim fifteen hundred linear feet along the course of this lead, lode or vein of mineral-bearing quartz, and three hundred feet in width on each side of the middle of said lead, lode or vein * * * in the _____ Mining District, and more particularly described as follows, to wit: commencing at a stake in a canon due south fifteen hundred feet to stake marked * * *." The court said: "No reason is shown why the foregoing is not a sufficient compliance with the statute requiring that 'the location must be distinctly marked on the ground so that its boundaries can be readily traced.' U. S. Rev. Stats., § 2324; McKinley Creek Mining Co. vs. Alaska United Mining Co., 183 U. S. 563. In any event, such marking on the ground and notice were sufficient to put a subsequent locator upon inquiry as to the nature and extent of Northam's claim. Stock vs. Plunkett, *supra*.

[164] Meydenbauer vs. Stevens, *supra* (159); see, also, Jupiter Co. vs. Bodie Con. Co., *supra* (130); Book vs. Justice Co., *supra* (137); Charlton vs. Kelly, *supra* (146); Worthen vs. Sidway, *supra* (26); see Kern Oil Co. vs. Crawford, *supra* (26); West Granite Co. vs. Granite Co., *supra* (145); Gleeson vs. Martin White Co., *supra* (140).

nor that the marking shall precede discovery.[165] These omissions, as well as the doing of preliminary work upon or at the discovery, are supplied by local legislation.[166] A noncompliance with such provisions, however, is not necessarily fatal to the title of the location.[167]

§ 765. Local Legislation.

The time and manner of marking the location as prescribed by local legislation or district rule, must, as a general rule, be complied with as essential acts of location.[168] It does not necessarily follow that by such marking the boundaries, as a fact, can be readily traced. Courts are inclined to be liberal as to the manner in which mining locations may be marked upon the ground and be sufficient to comply with the statute[169]; but the sufficiency of the boundary marks to enable the location to be traced depends upon the conformation and condition of the ground located. To illustrate, a location upon a hill covered by dense forests might require more definite marking than one upon a barren mountain where the monuments can readily be seen.[170]

§ 766. Effect of Fixing Time.

It has been held that the time allowed by the state statutes after making discovery and posting the notice of location is intended to give the discoverer time to explore the vein or lode[171] and find out its strike; and thus enable him to lay his claim; and he can, during such statutory period, swing his claim in any direction, so as to extend it along the vein or lode to the exclusion of any other location made in the meantime, within a circular area, the diameter of which is qual to the longest distance claimed from the point of discovery, so far as the conflict extends, and to the extent of any such conflict a subsequent location is invalid.[172]

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[165] Creede Co. vs. Uinta Co., *supra* (2); Walton vs. Wild Goose Co., *supra* (33); Thompson vs. Spray, *supra* (33); Treasury Co. vs. Boss, *supra* (159); Cedar Canyon Co., vs. Yarwood, 27 Wash. 271, 67 Pac. 719; *but see* Butte & S. Co. vs. Clark-Montana Co., *supra* (124). A locator who has properly marked his location in compliance with the provisions of the law and is in the actual possession of his claim and is making *bona fide* efforts leading to a discovery will be protected by the courts against any forcible, fraudulent, surreptitious or clandestine entry by a third party. Con. Mutual Oil Co. vs. U. S., *supra* (4). See, also, Erhardt vs. Boaro, *supra* (60); Union Oil Co. vs. Smith, *supra* (4); Uinta Co. vs. Ajax Co., 141 Fed. 563; New England Co. vs. Congdon, *supra* (62); Sharkey vs. Candiani, *supra* (153).

[166] The mining states, by statute, uniformly provide a reasonable time for marking the location, after discovery. Mares vs. Dillon, 30 Mont. 117, 75 Pac. 963; Gobert vs. Butterfield, *supra* (62); Brockbank vs. Albion Co., *supra* (163); see, also, Ware vs. White, *supra* (81).

[167] Stock vs. Plunkett, *supra* (65). See Clason vs. Matko, *supra* (73); S. P. R. Co., 50 L. D. 579.

In DeWitt vs. Sides, *supra* (65), it is said: "In order to acquire a valid title to a mining claim, under state and federal statutes, it is essential to post a notice of location at the point of discovery, and also to distinctly mark and define the boundaries of the claim on the ground so that they can be readily traced. (Civ. Code, §§ 1426, 1426*a*; U. S. Rev. Stats., § 2324.)" See, also, Butte & S. Co. vs. Clark-Montana Co., 249 U. S. 12, aff'g. 233 Fed. 547, aff'g. 248 Fed. 609.

See *supra*, § 759.

[168] Butte City Co. vs. Baker, *supra* (146); Ledoux vs. Forester, *supra* (16); Dutch Flat Co. vs. Mooney, *supra* (146); Myers vs. Spooner, *supra* (146). See Stock vs. Plunkett, *supra* (67); Book vs. Justice Co., *supra* (137); Walton s. Wild Goose Co., *supra* (33); Tonopah Co. vs. Tonopah Co., *supra* (7); Thompson vs. Barton Gulch Co., *supra* (16).

[169] Book vs. Justice Co., *supra* (137); see Tiggeman vs. Mirzlak, 40 Mont. 23, 105 Pac. 77.

[170] Book vs. Justice Co., *supra* (137).

[171] Sanders vs. Noble, *supra* (151); Bramlett vs. Flick, 23 Mont. 95, 57 Pac. 869; Street vs. Delta Co., *supra* (80); Ferris vs. McNally, 45 Mont. 27, 121 Pac. 889; see Belk vs. Meagher, *supra* (59); Erhardt vs. Boaro, *supra* (60); Doe vs. Waterloo Co., *supra* (124); Wiltsee vs. King Co., 7 Ariz. 95, 60 Pac. 896.

[172] *Id.*

§ 767. Discovery Must Be in Free Territory.

The discovery on which the location of a mining claim is made must exist upon some part of the public mineral domain not already occupied and held under a prior and subsisting mining location.[173] The mere posting of a notice without discovery is of no force or effect so far as rendering invalid another location of the same ground based upon a valid discovery,[174] but the record of such a notice constitutes a cloud upon the title of such other location.[175]

§ 768. When Location Becomes Effective.

The location becomes effective from the date of discovery, but in the presence of an intervening right it must remain of no effect.[176] In a contest of a location the proof must show a discovery and the court will not presume that a discovery was made from proof of a record of the location and the marking of it upon the ground.[177] The recital of discovery in the record is not evidence of discovery.[178]

§ 769. Insufficient Location.

The mere filing of a location notice, marking the ground and doing the annual assessment work for a period of years provided by the terms of the local statute of limitations, without making discovery within the boundaries of the location would initiate no right to a patent.[179] The federal statute simply undertakes to dispense with many of the formalities in the way of proof in the absence of an adverse claim.[180]

§ 770. Speculative Locations.

In Erhardt vs. Boaro,[181] it is said it would be difficult to lay down any rules by which to distinguish a speculative location from one made in good faith with a purpose to make excavations and ascertain the character of the lode or vein, so as to determine whether it

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[173] Gwillim vs. Donnellan, *supra* (50); Emerson vs. Akin, *supra* (104); Tiggeman vs. Mirzlak, *supra* (169).

[174] Round Mt. Co. vs. Round Mt. Co., *supra* (111). Mining claims being based upon discovery of mineral, no rights are conferred by performance of any other steps requisite to location until discovery is made. Brethour vs. Clack, 31 Ariz. 24, 250 Pac. 254.

[175] See, Hopkins vs. Walker, 244 U. S. 491; Robinson vs. Briest, 178 Cal. 237, 173 Pac. 88.

[176] Creede Co. vs. Uinta Co., *supra* (2); Union Oil Co. vs. Smith, *supra* (4); Cole vs. Ralph, *supra* (1).

[177] Smith vs. Newell, *supra* (159); see, Cole vs. Ralph, *supra* (1). The recorded notice of location of a mining claim is not even *prima facie* evidence of title, and could become such only upon proof of performance by the locator of all the acts necessary to a proper mining location. While the notice and recordation are necessary steps to acquire title, it is but one of the sources to which one must look to ascertain the validity of an unpatented mining claim. An examination of a recorded notice would not show it to be a valid subsisting claim. Mutchmor vs. McCarty, 149 Cal. 603, 87 Pac. 85; McInerny vs. Allebrand, *supra* (156); Guerin vs. American Co., *supra* (66).

[178] Cole vs. Ralph, *supra* (1); Childers vs. Laham, 19 N. M. 301, 142 Pac. 924; U. S. vs. Bunker Hill Co., 48 L. D. 598; Independent Co. vs. Levelle, 50 L. D. 6.

[179] *Id.* Cole vs. Ralph, *supra* (1).

[180] Humphreys vs. Idaho Co., *supra* (72).

[181] 113 U. S. 537. "Posting a notice upon public land claiming the same as a mining claim, recording such notice, and doing so-called assessment work, without first making a discovery, is a mere speculative proceeding, conferring no rights as against the government, although as long as the so-called locator remains in possession and with due diligence prosecutes work towards discovery, he may be entitled to protection against 'all forms of forcible, surreptitious, or clandestine entry and intrusion.' Erhardt vs. Boaro, *supra;* McLemore vs. Express Oil Co., *supra* (60); Borgwardt vs. McKittrick, *supra* (66); Tuolumne Co. vs. Maier, *supra* (64); U. S. vs. Midway Northern Oil Co., 232 Fed. 625. It is contended by plaintiff that the evidence shows that Hastings was a professional staker and that the whole proceeding on the part of Hastings and Stafford with respect to this location was purely speculative. This objection to the location was a question for the jury." Rooney vs. Barnette, *supra* (64).

will justify the expenditures required to extract the metal; but a jury from the vicinity of the claim will seldom err in their conclusions on this subject.

§ 771. Provisional Locations.

An entry upon a mining claim before a prior locator is in default can not be made for the purpose of making a provisional location, to be valid or worthless according as the prior locator fails or not to do the annual assessment work.[182] In other words, mineral ground covered by a valid location is, during the life of the location, segregated and not open to location by another; and until a location is terminated by abandonment or forfeiture, no right or claim to the property can be acquired by an adverse entry thereon, with a view to the adverse relocation of the same.[183]

§ 772. Locations in Breach of Trust.

There are many cases decided by the courts holding that a person occupying fiduciary relations with the owner of a mining claim is precluded from locating the same adversely to his principal.[184]

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[182] Belk vs. Meagher, *supra* (59); Gwillim vs. Donnellan, *supra* (59); Clipper Co. vs. Eli Co., *supra* (73); Brown vs. Gurney, *supra* (103); Farrell vs. Lockhart, *supra* (2); Swanson vs. Sears, *supra* (2); Slavonian Co. vs. Perasich, *supra* (115); Northmore vs. Simmons, *supra* (146); Becker vs. Long, *supra* (118); Rooney vs. Barnette, *supra* (64); Miller vs. Chrisman, *supra* (62); Thornton vs. Phelan, *supra* (125).

A mining location can not be laid upon ground covered by an oil and gas prospecting permit. It is void *ab initio*, and being so it does not attach later by reason of the cancellation of the permit. Filtrol Co. vs. Brittan, 51 L. D. 649. See Lehman vs. Sutter, *supra* (2).

[183] Mason vs. Washington Butte Co., *supra* (2); 18 R. C. L. 1136.

[184] Lowry vs. Silver City Co., *supra* (104); Lockhart vs. Leeds, *supra* (129); Lakin vs. Sierra Buttes Co., 25 Fed. 343; Lockhart vs. Rollins, *supra* (130); Largey vs. Bartlett, 18 Mont. 265, 44 Pac. 965; O'Neill vs. Otero, 15 N. M. 707, 113 Pac. 614; Ball vs. Dolan, 18 S. Dak. 558, 101 N. W. 719; Utah Co. vs. Dickert Co., 6 Utah 183, 21 Pac. 1002; Argentine Co. vs. Benedict, 18 Utah 183, 55 Pac. 559. In Lockhart vs. Washington Co., 16 N. M. 237, 117 Pac. 837, the court said: "We have thus a case pleaded, proved and found by the court as follows: A prospector under contract posts a location notice and initiates a location, he is charged with the duty of performing the several acts of location; he enters into a fraudulent conspiracy to refrain from perfecting the location and to cause a forfeiture thereby; he does refrain from doing said acts and, upon forfeiture, delivers possession to the conspirators. This certainly makes out a case and, irrespective of the other allegations in the complaint, entitles the plaintiff to the relief sought."

The remedy of the defrauded party is by suit in equity to have the defendant declared a trustee *ex maleficio* for him. Lockhart vs. Leeds, *supra* (129); O'Neill vs. Otero, *supra*. See Hawley vs. Romney, *supra* (21); Williams vs. Cordingly, *supra* (132). See, also, *supra*, notes 126 to 132.

CHAPTER XL.

LOCATORS.

§ 773. Who May Be Locators.

A location of a mining claim may be made without regard to the age,[1] sex,[2] residence,[3] or citizenship of the locator.[4] A corporation may locate only to the extent permitted to a single individual.[5]

§ 774. Intervening Locator.

An intervening locator is not one who makes a premature location,[6] nor one who has actual knowledge of a defective location.[7]

§ 775. Dummy Locator.

A dummy locator is one whose name is used by a locator to secure for the latter's benefit a greater area of mineral land than is allowed by law to be appropriated by a single person, and any location made in pursuance of such a scheme or device is without legal support and void.[8]

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[1] Thompson vs. Spray, 72 Cal. 528, 14 Pac. 192; *compare* Davis vs. Dennis, 43 Wash. 54, 85 Pac. 1079. A minor, who is a citizen, may be an applicant for permit to prospect for oil and gas under the Leasing Act, 41 Stats. 437; see West vs. U. S., 30 Fed. (2d) 739.

[2] Eureka Office, 4 C. L. O. 179; Women, Sickels Min. L. & D. 494.

A married woman is eligible as a locator of a mining claim. Atchley vs. Varner, 138 Okla. 156, 280 Pac. 621, and cases therein cited.

[3] Book vs. Justice Co., 58 Fed. 119; see Rush vs. French, 1 Ariz., 150, 25 Pac. 832; Moore vs. Hammerstag, 109 Cal. 124, 41 Pac. 806.

[4] Holdt vs. Hazzard, 10 Cal. A. 440, 102 Pac. 549; Owen vs. Heim, 84 Colo. 295, 269 Pac. 899; Wilson vs. Triumph Co., 19 Colo. 72, 56 Pac. 301; Strickley vs. Hill, 22 Utah 266, 62 Pac. 893. On alienage in mining cases, see Melrose Avenue, 23 A. L. R. 1247, note; Davis vs. Dennis, *supra* [1]; see Manuel vs. Wulff, 152 U. S. 507. See *infra*, note 9. That a locator may be a convict on parole, see Vedin vs. McConnell, 22 Fed. (2d) 753.

[5] McKinley vs. Wheeler, 130 U. S. 636; Gird vs. California Oil Co., 66 Fed. 531; Durant vs. Corbin, 94 Fed. 383; Frank Hough Co. vs. Empire State Co., 42 L. D. 99. See, generally, U. S. vs. Trinidad Co., 137 U. S. 168, holding "a corporation to be an association of individuals." North Noonday Co. vs. Orient Co., 1 Fed. 538; Book vs. Justice Co., *supra* [3]; Doe vs. Waterloo Co., 70 Fed. 463, aff'g. 55 Fed. 11; Wilson vs. Triumph Co., *supra* [4].

[6] See Omar vs. Soper, 11 Colo. 380, 18 Pac. 443; Shepard vs. Murphy, 26 Colo. 350; 58 Pac. 588; Bramlett vs. Flick, 23 Mont. 95, 57 Pac. 869.

[7] Stock vs. Plunkett, 181 Cal. 193, 183 Pac. 657. Gold Co. vs. Perry, 94 Wash. 626, 162 Pac. 996, and cases therein cited; see, also, Webb vs. Carlon, 148 Cal. 555, 83 Pac. 998.

[8] Gird vs. California Oil Co., *supra* [5]; Durant vs. Corbin, *supra* [5]; Cook vs. Klonos, 164 Fed. 538, aff'd. 168 Fed. 700; Hall vs. McKinnon, 193 Fed. 581; U. S. vs. California Midway Oil Co., 259 Fed. 343, aff'd. 279 Fed. 516, aff'd. 263 U. S. 682; Mitchell vs. Cline, 84 Cal. 409, 24 Pac. 164. In Mitchell vs. Cline, *supra*, it is said that three of the locators of one claim and five of another were "sham locators," not pretending to have any interest in the claim. "They merely permitted their names to be used as locators to enable their friends to obtain possession of and patent for more mineral land than they were entitled to by law, and they executed conveyances to such friends without any valuable or lawful consideration therefor." This was held to be contrary to the policy and object of the United States law limiting the quantity of placer mineral land which may be located by one person, and is against public policy and void. To the same effect see Nome & Sinook Co. vs. Snyder, 187 Fed. 385; U. S. vs. California Midway Oil Co., *supra*. The fraud being a fraud upon the government, and not upon the person who might wish to locate, it would seem clear that the government alone can complain; and the same is not relevant in a contest between individuals, except in adverse proceedings. Riverside Co. vs. Hardwick, 16 N. M. 479, 120 Pac. 325; *but see* Mitchell vs. Cline, *supra*, a suit in partition; Cook vs. Klonos, 164 Fed. 529, modified in 168 Fed. 700, a suit to quiet title, wherein two of the locators were not parties to the fraud and so entitled to select twenty acres each out of the location. Rooney vs. Barnette, 200 Fed. 700, an action in ejectment; it was held that an association mining location is not invalidated by an agreement made after the location and discovery of mineral,

§ 776. Alien Locator.

There is no express statutory prohibition against an alien locating a mining claim. It now is settled beyond controversy that a location by, or a transfer of an unpatented location to an alien is not absolutely void, but is voidable.[9]

§ 777. Joint Locators.

Where two or more persons are interested in a mining location they are tenants in common [10] and the relation of mutual trust exists.[11]

§ 778. Location by Agent.

The right to or in a mining location will vest in the principal when made by an agent,[12] attorney in fact,[13] partner,[14] or employee,[15] who

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giving one person an interest in excess of twenty acres. In U. S. vs. Munday, 186 Fed. 385, it is said: "In land office practice 'dummies' are either fictitious persons or those who have no interest in the transaction, permit the use of their names for the perpetration of a fraud and sign papers and make affidavits perfunctorily."

In Borgwardt vs. McKittrick Oil Co., 164 Cal. 657, 130 Pac. 417, it is said: "This is no case of dummy locators, lending their names to any person or any corporation for the purpose of permitting it to acquire lands. This is a case of sixteen men, locating in apparent good faith, lands within the limit of the amount allowed to them, and adopting a corporate management as an appropriate means of regulating and handling their joint interests, and each retaining through the agency of the corporation, the exact interest in the land which he acquired under his location. * * * No reason is advanced or can be conceived why such a practice as adopted in the case at bar can be held to be violative of any statute, rule, or policy relating to the disposition of mineral lands, and we know of no ruling to the effect that it is forbidden," followed in McKittrick Oil Co., 44 L. D. 340.

[9] Manuel vs. Wulff, *supra* [4]; McKinley Creek Co. vs. Alaska United Co., 183 U. S. 563; Lone Jack Co. vs. Megginson, 82 Fed. 89; Thornases vs. Melsing, 109 Fed. 710; Shea vs. Nilima, 133 Fed. 215; Holdt vs. Hazard, *supra* [4]. An alien and a citizen may conjointly locate, hold and transfer mining claims. North Noonday Co. vs. Orient Co., *supra* [5]; Aspen Co., 52 Fed. 250, aff'g. 51 Fed. 338; Ferguson vs. Neville, 61 Cal. 356; Burke vs. Providence Co., 6 Ariz. 323, 57 Pac. 641; Owen vs. Heim, *supra* [4]; Stewart Co. vs. Gold Co., 29 Utah 443, 82 Pac. 475.

A mining location is not subject to attack except by the federal government in direct proceedings termed "inquest of office found." Manuel vs. Wulff, *supra* [4]; McKinley Creek Co. vs. Alaska United Co., *supra*; Allyn vs. Schultz, 5 Ariz. 153, 48 Pac. 960; Harris vs. Kellogg, 117 Cal. 484, 49 Pac. 708; Keeler vs. Trueman, 15 Colo. 143, 25 Pac. 311; Wilson vs. Triumph Co., *supra* [1].

The rights of an alien to take and hold patented mining property or to inherit unpatented mining property is determined by the laws of the state within which the property is situate and not by the federal statutes. Billings vs. Aspen Co., *supra*; Lohmann vs. Helmer, 104 Fed. 178. An alien owning unpatented mining property may protect his rights in the same in the course of adverse proceedings before the Land Department or in the courts, although he may not acquire title from the United States through such proceedings or suit. Ginaca vs. Peterson, 262 Fed. 904. No one but the sovereign has any right to complain of a trust in real estate in favor of an alien disqualified to hold title. 2 C. J. 1056; Osterman vs. Baldwin, 6 Wall. 116, 121–122. Such a trust is valid until, at the instance of the government, the alienage is judicially established. Taylor vs. Benham, 5 How. 270; Princeton Co. vs. First National Bank, 7 Mont. 530, 19 Pac. 211; Isaacs vs. DeHon, 11 Fed. (2d) 943.

[10] Garside vs. Norval, 1 Alaska 19; Gore vs. McBrayer, 18 Cal. 583; Morton vs. Solambo Co., 26 Cal. 527; Doyle vs. Burns, 123 La. 488; Van Valkenburg vs. Huff, 1 Nev. 142, 9; Clark vs. Mitchell, 35 Nev. 447, 130 Pac. 764 (Hornsilver Cases).

[11] Turner vs. Sawyer, 150 U. S. 578; Lockhart vs. Leeds, 195 U. S. 427; Stevens vs. Grand Central Co., 133 Fed. 28; Clark vs. Mitchell, *supra* [10], *but see* Hogdson vs. Federal Oil Co., 274 U. S. 15, aff'g. 5 Fed. (2d) 442; followed in Devlin vs. Centre Co., 20 Fed. (2d) 530; Dunfee vs. Terwilliger, 15 Fed. (2d) 523; and see Richardson vs. Western Oil Co., 3 Fed. (2d) 403, where trusts claimed as existing under such rule were not enforced.

[12] U. S. vs. Dominion Oil Co., 264 Fed. 956; Gore vs. McBrayer, *supra* [10]; Moore vs. Hammerstag, *supra* [3]; Van Valkenburg vs. Huff, *supra* [10]. Unless otherwise provided by local law, no writing is necessary to confer authority upon the agent to make such a location. Gore vs. McBrayer, *supra*. "An agent or attorney in fact may locate a mining claim for his principal, and he may do everything necessary to perfect such location including the making of the affidavit" which may be required by local law. Dunlap vs. Pattison, 4 Ida. 473, 42 Pac. 504. Locators may act as agents for others and such an agency is not prohibited. U. S. vs. Dominion Oil Co., 264 Fed. 956.

"In a case where one locates a mining claim in his own name, pursuant to an agreement between two or more to explore the public domain and to discover and locate mining claims for the joint benefit of the contracting parties, the legal title to the interests of the others is held by him in trust for them. An agreement of this

acts with [16] or without [17] express authority, as the principal's authority is presumed,[18] except in Alaska,[19] although the latter may have no previous knowledge of the location [20]; or he may subsequently acquiesce thereto.[21]

§ 779. Who Can Not Be Locators.

All persons employed in the Department of the Interior as officers of the General Land Office, clerks, employees, special agents or mineral surveyors can not legally locate, hold, convey nor patent a mining claim; nor hold stock in, or act as agent, for a land company claiming unpatented mineral land.[22]

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character makes each the agent of the other in prosecuting the joint adventure; and such an agreement will be taken to include the continuance of work until a valid location is made on a legal discovery." 18 R. C. L., p. 1112, § 21. See, also, Moritz vs. Lavelle, 77 Cal. 10, 18 Pac. 803; Mack vs. Mack, 39 Wash. 190, 81 Pac. 707.

[13] Book vs. Justice Co., *supra* [3]; Doe vs. Waterloo Co., *supra* [5]; Ledoux vs. Forester, 94 Fed. 600; Walton vs. Wild Goose Co., 123 Fed. 218; McCulloch vs. Murphy, 125 Fed. 147; U. S. vs. California Midway Oil Co., *supra* [8]; Morton vs. Solambo Co., *supra* [10]; Moore vs. Hammerstag, *supra* [3]; Dunlap vs. Pattison, *supra* [12]; Hirbour vs. Reeding, 3 Mont. 15; Welland vs. Huber, 8 Nev. 203; Whiting vs. Straup, 17 Wyo. 1, 95 Pac. 850; see U. S. vs. California Oil Co., 279 Fed. 516.

[14] Johnstone vs. Robinson, 16 Fed. 903; Shea vs. Nilima, *supra* [9]; Hendrichs vs. Morgan, 167 Fed. 106; U. S. vs. California Midway Oil Co., *supra* [8]; McMahon vs. Meehan, 2 Alaska 278. Cascaden vs. Dunbar, 2 Alaska 408, modified 157 Fed. 62; Murley vs. Ennis, 2 Colo. 360; Meagher vs. Reed, 14 Colo. 335, 24 Pac. 681; Meylette vs. Brennan, 20 Colo. 242, 38 Pac. 75; Doyle vs. Burns, *supra* [10]; Eberle vs. Carmichael, 8 N. M. 169, 42 Pac. 95.

[15] Fuller vs. Harris, 29 Fed. 814; Book vs. Justice Co., *supra* [3]; Gird vs. California Oil Co., *supra* [8]; Durant vs. Corbin, *supra* [5]. See 18 R. C. L., p. 1112, § 21.

[16] Doe vs. Waterloo Co., *supra* [5]; Morton vs. Solambo Co., *supra* [10]. See, also, *supra* notes 13 and 14 and *infra* note 18.

[17] Rush vs. French, *supra* [3]; Moore vs. Hammerstag, *supra* [3]; Murley vs. Ennis, *supra* [14]; Schultz vs. Keeler, 2 Ida. 337, 13 Pac. 481; Whiting vs. Straup, *supra* [13]. See, also, *supra*, notes 13 and 14, and *infra*, note 18.

In Alaska-Dano Co., 52 L. D. 550, it is said: "It is true that a gift to become effective must be accepted, but where the gift is, as here, of an interest in a mining claim, which interest is evidenced by the naming of the donee in the location notice as one of the locators and causing the notice to be recorded, the donee becomes the owner of such interest, and acceptance is presumed, and the title can not revest in the donor in an *ex parte* proceeding that the gift was not accepted.

A colocator's title can not be divested by the mere act of another colocator in taking down the notice and putting up other notices with other names. Gore vs. McBrayer, *supra* [10]; Morton vs. Solambo Co., *supra* [10]; see, also, Stevens vs. Grand Central Co., 133 Fed. 30, and cases therein cited.

[18] Book vs. Justice Co., *supra* [3]; Gore vs. McBrayer, *supra* [10]; Kramer vs. Settle, 1 Ida. 485; Van Valkenburg vs. Huff, *supra* [10]; see Thompson vs. Spray, *supra* [1]. See, also, *supra*, notes 13 and 14.

[19] Cloninger vs. Finlaison, 230 Fed. 101; Sutherland vs. Purdy, 234 Fed. 600; Placer Claims, 41 L. D. 347. A written power of attorney is required in Alaska. 5 U. S. Comp. St., p. 6026, §§ 5055–8; Comp. Laws, Alaska 1913, §§ 129*b*. 129*e*. Regan vs. McKibben, 11 S. Dak. 270, 76 N. W. 945; Whiting vs. Straup, *supra* [13].

[20] Book vs. Justice Co., *supra* [3]; Gore vs. McBrayer, *supra* [12]; Morton vs. Solambo Co., *supra* [10]; Thompson vs. Spray, *supra* [1]; see, also, Walton vs. Wild Goose Co., *supra* [13].

[21] Gore vs. McBrayer, *supra* [10]; Thompson vs. Spray, *supra* [1]; Whiting vs. Straup, *supra* [13]; Rush vs. French, *supra* [1]. See, also, *supra* notes 13, 14, 15 and 18.

[22] Rev. Stats. § 452. Prosser vs. Finn, 208 U. S. 67, aff'g. 41 Wash. 604, 84 Pac. 404; Waskey vs. Hammer, 170 Fed. 31, aff'd. 223 U. S. 85; U. S. vs. Havenor, 209 Fed. 988; Baltzell, 29 L. D. 333; Saunders, 40 L. D. 217; Montana Co. vs. Ringeling, 65 Mont. 249, 211 Pac. 333, holding such officer can not even be interested by purchase. Gibson vs. Hjul, 32 Nev. 360, 108 Pac. 759; Lavagnino vs. Uhlig, 26 Utah 1, 71 Pac. 1046; *but see* Hand vs. Cook, 29 Nev. 518, 92 Pac. 3.

CHAPTER XLI.

LODE CLAIMS.

§ 780. What Constitutes.

A lode claim is that portion of a vein or lode, and of the adjoining surface, which has been acquired by a compliance with the law,[1] both federal and state.[2] Any dispute as to whether a given parcel of land is a vein or lode is a question of fact to be determined by men experienced in mining, and it can not be determined as a matter of law.[3]

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[1] Mt. Diablo Co. vs. Callison, Fed. Cas. 9886: "The statute allows the discoverer of a lode or vein to locate a claim thereon to the extent of fifteen hundred feet. The written notice posted on the stake at the point of discovery of the lode or vein in controversy designated by the locators as 'Hawk Lode' declares that they claim fifteen hundred feet on the lode, vein or deposit. It thus informs all persons, subsequently seeking to excavate and open the lode or vein, that the locators claimed the whole extent along its course which the law permitted them to take. It is indeed indefinite in not stating the number of feet on each side of the discovery point; and must therefore be limited to an equal number on each side, that is, seven hundred and fifty feet on the course of the lode or vein in each direction from that point. To that extent as a notice of discovery and location, it is sufficient. Greater particularity of description of a location of a (lode) claim could seldom be given until subsequent excavation has disclosed the course of the latter." Erhardt vs. Boaro, 113 U. S. 533, rev'g. 8 Fed. 860.

[2] Erhardt vs. Boaro, *supra* [1]; Parley's Park Co. vs. Kerr, 130 U. S. 256; aff'g. 3 Utah 235, 2 Pac. 709; Enterprise Co. vs. Rico-Aspen Co., 167 U. S. 108, aff'g. 56 Fed. 131, rev'g. 53 Fed. 321; Butte City Co. vs. Baker, 196 U. S. 119, aff'g. 28 Mont. 222, 72 Pac. 617; Creede Co. vs. Uinta Co., 196 U. S. 346, aff'g. 119 Fed. 164; Butte & S. Co. vs. Clark-Montana Co., 249 U. S. 12, aff'g. 248 Fed. 609, aff'g. 233 Fed. 547; Northmore vs. Simmons, 97 Fed. 386; Con. Mutual Oil Co. vs. U. S., 245 Fed. 524; White vs. Lee, 78 Cal. 593, 21 Pac. 363; overruled in Kern Co. vs. Crawford, 143 Cal. 298, 76 Pac. 1111; Stock vs. Plunkett, 181 Cal. 193, 183 Pac. 657. See Dripps vs. Allison's Co., 45 Cal. A. 103, 187 Pac. 448; Saxton vs. Perry, 47 Colo. 273, 107 Pac. 281; Ferris vs. McNally, 45 Mont. 25, 121 Pac. 889; Sisson vs. Sommers, 24 Nev. 379, 55 Pac. 829; Copper Globe Co. vs. Allman, 23 Utah 410, 64 Pac. 1019.

The notice posted on a stake placed at the point of discovery, stating the date of location, the extent of the ground claimed, the designation of the lode claimed and the names of the locators is sufficient as notice of discovery and location. Erhardt vs. Boaro, *supra* [1]; Thompson vs. Barton Gulch Co., 63 Mont. 213, 207 Pac. 115. But the location is not completed until compliance with valid state legislation as well as with any valid existing local rules and regulations of miners of the mining district wherein the location may lie. Butte City vs. Baker, *supra*; Creede Co. vs. Uinta Co., *supra*; Northmore vs. Simmons, *supra*; Nevada Sierra Oil Co. vs. Home Oil Co., 98 Fed. 678; Kern Oil Co. vs. Crawford, *supra*; Saxton vs. Perry, *supra*; Mares vs. Dillon, 30 Mont. 132, 75 Pac. 963; Ferris vs. McNally, *supra*; Sisson vs. Sommers, *supra*; Copper Globe Co. vs. Allman, *supra*; *but see* Stock vs. Plunkett, *supra*; Huckaby vs. Northam, 68 Cal. A. 88, 228 Pac. 717. Illustrative of the above is the case of Ambergris Co. vs. Day, 12 Ida. 123, 85 Pac. 109, in which it is said that the requirements of the federal mining law are supplemented by a statute of the state of Idaho which provides that stakes, posts or monuments set to indicate the line of the vein or lode must be taken for the purposes of the location, to correctly mark the line thereof, and providing that such line can not be changed so as to affect subsequent rights or locations. See, also, O'Donnell vs. Glenn, 8 Mont. 251, 19 Pac. 302. The federal law prescribes a limitation to the size of a single location; St. Louis Co. vs. Kemp, 104 U. S. 636; Carson City Co. vs. North Star Co., 73 Fed. 600, but it does not restrict the locator nor the purchaser to a single claim. O'Connell vs. Pinnacle Co., 131 Fed. 109, aff'd. 140 Fed. 854. See U. S. vs. California Midway Oil Co., 259 Fed. 343.

[3] Bluebird Co. vs. Largey, 49 Fed. 292; see Columbia Co. vs. Duchess Co., 13 Wyo. 256, 79 Pac. 385. When the question of the mineral character of the land within a mining location is an issue it is one for the land department. Lane vs. Cameron, 45 Appeal Cases (D. C.) 409.

"It is true that there is lodged in the officers of the land department the authority to determine what public land is mineral land, and as such open to mining location, and that the courts will not interfere to control the exercise of that power, but there is no express authority given these officers to decide under which of the two different methods of acquiring mining claims any given mineral land may be located. Nor is the existence of such authority recognized by the decisions. The inference to be drawn from the decisions is to the contrary. 'Citing Richmond Co. vs. Rose, 114 U. S. 585; Iron Co. vs. Campbell, 135 U. S. 286; Mining Co. vs. Tunnel Co.; Webb vs. American Asphaltum Co., 157 Fed. 203, and distinguishing Clipper Mining Co. vs. Eli Mining Co., 194 U. S. 221.'" Duffield vs. San Francisco Co., 205 Fed. 480, aff'g. 201 Fed. 836; *but see* Henderson vs. Fulton,

§ 781. Discovery of Vein or Lode.

The discovery of a vein or lode within the surface lines of a lode location is a prerequisite of a valid location.[1] It formerly was held that a discovery outside of such limits, no matter what its proximity thereto, was not sufficient to make a valid location.[5] That rule no longer prevails.[6] The law does not require a discovery before location, or that the location shall precede the discovery; it simply provides that both acts shall be completed before the right of possession vests; and

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35 L. D. 652, in which case it was held that certain marble mining claims located as vein or lode claims should have been located only as placer mining claims; and that the entry thereof in patent proceedings was illegal and void; and must be cancelled. Also, see, Palmer, 38 L. D. 294; Harry Lode, 41 L. D. 402.

[4] Gwillim vs. Donnellan, 115 U. S. 47; Sullivan vs. Iron Co., 143 U. S. 438; aff'g. 5 McCrary 274; King vs. Amy Co., 152 U. S. 226; rev'g. 9 Mont. 543, 24 Pac. 200; Lawson vs. U. S. Co., 207 U. S. 13, aff'g. 134 Fed. 769; Donnelly vs. U. S., 228 U. S. 243; Waterloo Co. vs. Doe, 56 Fed. 689, aff'd. 70 Fed. 455; South Butte Co. vs. Thomas, 260 Fed. 817; Bryan vs. McCaig, 10 Colo. 313, 15 Pac. 413; see Dahl vs. Raunheim, 132 U. S. 260; McMillen vs. Ferrum Co., 32 Colo. 43, 74 Pac. 461. In a lode location the discovery must be rock in place. Book vs. Justice Co., 58 Fed. 106; Meydenbauer vs. Stevens, 78 Fed. 787; Fox vs. Myers, 29 Nev. 169, 86 Pac. 793; Hayes vs. Lavagnino, 17 Utah 185, 53 Pac. 1029, not necessarily in fissure, Mt. Diablo Co. vs. Callison, *supra* [1]; see Breece Co., 3 L. D. 11; nor with well-defined walls, Burke vs. McDonald, 2 Ida. 679, 33 Pac. 49; see O'Donnell vs. Glenn, *supra* [2], but it must include the top or apex of the vein or lode, Larkin vs. Upton, 144 U. S. 19; Hanson vs. Craig, 170 Fed. 64; Bunker Hill Co. vs. Shoshone Co., 33 L. D. 142; see Iron Co. vs. Murphy, 3 Fed. 368; Van Zandt vs. Argentine Co., 8 Fed. 725; see, also San Francisco Co. vs. Duffield, 201 Fed. 836, aff'd. 205 Fed. 480. It must occupy defined space and be capable of identification. Foote vs. National Co., 2 Mont. 402; Fox vs. Myers, *supra*. It may be wide or narrow, North Noonday Co. vs. Orient Co., 1 Fed. 522; see Meydenbauer vs. Stevens, *supra*, be a crevice, seam or stringer, Shreve vs. Copper Co., 11 Mont. 333, 28 Pac. 315; McShane vs. Kenkle, 18 Mont. 208, 44 Pac. 979; see North Noonday Co. vs. Orient Co., *supra*; Jupiter Co. vs. Bodie Con. Co., 11 Fed. 666; see, also, Shoshone Co. vs. Rutter, 87 Fed. 801, slightly interrupted, partially closed, Jupiter Co. vs. Bodie Con. Co., *supra*, pinched out in places or expand or swell out and as suddenly contract, forming "kidneys." Meydenbauer vs. Stevens, *supra; but see* Rough Rider Claims, 42 L. D. 584. The lode or vein must bear mineral, see Book vs. Justice Co., *supra*; Meydenbauer vs. Stevens, *supra*; Fox vs. Myers, *supra*; Hayes vs. Lavagnino, *supra*, which may be rich or poor, Book vs. Justice Co., *supra*; Meydenbauer vs. Stevens, *supra*; see Ledoux vs. Forester, 94 Fed. 600; Southern Cross Co. vs. Europa Co., 15 Nev. 383. While uniformity is not required, Meydenbauer vs. Stevens, *supra*; the mineral must not be fragmentary; Terrible Co. vs. Argentine Co., 89 Fed. 583; see Jones vs. Prospect Co., 21 Nev. 339, 31 Pac. 642. It may be unevenly distributed. Jupiter Co. vs. Bodie Con. Co., *supra*; Meydenbauer vs. Stevens, *supra*; Murray vs. White, 42 Mont. 423, 113 Pac. 755. It must not consist of pieces or bunches of quartz not in place, Jupiter vs. Bodie Con. Co., *supra*; Waterloo Co. vs. Doe, *supra*; nor of float rock, Book vs. Justice Co., *supra*; U. S. vs. Ohio Oil Co., 240 Fed. 996; *but see* Erhardt vs. Boaro, *supra* [3]; nor of boulders detached from the earth's crust, Meydenbauer vs. Stevens, *supra*; see Ambergris Co. vs. Day, *supra* [2]. It is not material that the vein matter is loose, or broken or disintegrated. Jones vs. Prospect Co., *supra*.

The land department enunciates the following rules: "To constitute a valid discovery upon a lode mining claim, the following elements are necessary:

1. There must be a vein or lode of quartz or other rock in place. 2. The quartz or other rock in place must carry gold or some other mineral deposit. 3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine. Many factors enter into the third element: the size of the vein, so far as disclosed, the quantity and quality of mineral it contains, its proximity to working mines, and location in an established mining district, the geologic conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not." Jefferson-Montana Co., 41 L. D. 320; East Tintic Co., 43 L. D. 79; see, also, Shoshone Co. vs. Rutter, *supra*.

In Iron Co. vs. Mike & Starr Co., 143 U. S. 394, it is stated "the amount of ore, the facility for reaching and working it, as well as the product per ton, are all to be considered in determining whether the vein is one which justifies exploration and working." U. S. vs. Hurliman, 51 L. D. 258.

See Discovery.

[5] Gwillim vs. Donnellan, *supra* [4]; Waskey vs. Hammer, 223 U. S. 91; aff'g. 170 Fed. 31; Wilhelm vs. Silvester, 101 Cal. 363, 35 Pac. 997; Michael vs. Mills, 22 Colo. 439, 45 Pac. 429; Miller vs. Hamley, 41 Colo. 498, 74 Pac. 980; *but see infra*, note 9.

[6] See Diamond Coal Co. vs. U. S., 233 U. S. 236; U. S. vs. S. P. Co., 251 U. S. 1; U. S. vs. N. P. R. Co., 1 Fed. (2d) 57. See *infra*, note 9.

the order in which the statutory requirements are complied with is immaterial so long as the rights of others do not intervene.[7]

§ 782. Priority of Discovery.

Priority of discovery is an essential fact in determining the right of possession to mining ground, as such discovery gives priority of right against naked location and possession.[8]

§ 783. Sufficiency of Discovery.

Under the former rule it was necessary to discover a mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of a lode location to entitle the locator to make a valid location of such vein or lode.[9]

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[7] Union Oil Co. vs. Smith, 249 U. S. 348; aff'g. 166 Cal. 217, 135 Pac. 966; North Noonday vs. Orient Co., *supra* [4]; Zollers vs. Evans, 5 Fed. 172; Jupiter Co. vs. Bodie Con. Co., *supra* [4]; Walton vs. Wild Goose Co., 123 Fed. 209, 217, 218; Uinta Co. vs. Ajax Co., 111 Fed. 567; Thompson vs. Burke, 2 Alaska 255; Debney vs. Iles 3 Alaska 449; Thompson vs. Spray, 72 Cal. 533, 14 Pac. 182; Miller vs. Chrisman, 140 Cal. 448, 73 Pac. 1083, 74 Pac. 411, aff'd. 197 U. S. 313; New England Oil Co. vs. Congdon, 152 Cal. 214, 92 Pac. 180; La Grande Co. vs. Shaw, 41 or 422, 72 Pac. 795, rev'd. 71 Pac. 919; see Erhardt vs. Boaro, *supra* [5]; Bigbow vs. Conradt, 159 Fed. 871; Bingham Co. vs. Ute Co., 181 Fed. 749; Weed vs. Snook, 144 Cal. 143, 77 Pac. 1023; Crown Point Co. vs. Crismon, 39 Or. 364, 65 Pac. 87; Sharkey vs. Candiani, 48 Or. 121, 85 Pac. 219; 7 L. R. A. N. S. 791. While no location of a mining claim can be made until discovery, yet subsequent discoveries may validate earlier locations and inure to the benefit of the locator or his assigns as against the United States and all parties whose rights were initiated subsequent to such discovery. Uinta Co. vs. Creede Co., 119 Fed. 169, aff'd. 193 U. S. 346. Healey vs. Rupp, 37 Colo. 28, 86 Pac. 1015; see Beals vs. Cone, 27 Colo. 173, 62 Pac. 948. It is not necessary that the fact of discovery shall exist prior to the vesting of the right of exclusive possession which follows from a valid location, and not that the discovery shall be made before any of the other steps in the process of location are taken. Creede Co. vs. Uinta Co., *supra* [2]. See Erhardt vs. Boaro, *supra* [5]; Golden Terra Co. vs. Smith, 2 Dak. 377; *but see* Butte & S. Co. vs. Clark-Montana Co., *supra* [2], holding that the first required step in the location of a mining claim is the discovery of mineral-bearing rock within the claim, and such discovery must precede location. The subsequent acts, such as marking the boundaries, posting notice, and recording, are the declaration of title, and the patent is the final evidence of title. Failure to file adverse proceedings against an application for patent for a lode claim, by possessors of another claim which conflicted with the surface of the former, creates no presumption as to priority of discovery, either under Rev. Stats. § 2322 or otherwise, so that the issuance of a patent does not determine the priority of the right to the lode. Star Co. vs. Federal Co., 265 Fed. 881.

[8] Belk vs. Meagher, 104 U. S. 284, aff'g. 3 Mont. 65; Johanson vs. White, 160 Fed. 901; Cook vs. Klonos, 164 Fed. 536; Horswell vs. Ruiz, 67 Cal. 111, 7 Pac. 197; Garthe vs. Hart, 73 Cal. 541, 15 Pac. 93; Gemmell vs. Swain, 28 Mont. 331, 72 Pac. 662. Where the locator of a mining claim permitted a third person to enter thereon and sink a shaft within the boundaries in which the mineral in place was discovered, and a location made without protest before the first locator made a discovery and location, such second locator has the priority of right. Crossman vs. Pendery, 8 Fed. 694; see Johanson vs. White, *supra*.

The date of the discovery is the true date of location. Redden vs. Harlan, 2 Alaska 402; Healey vs. Rupp, *supra* [5].

[9] North Noonday Co. vs. Orient Co., *supra* [4]; Jupiter Co. vs. Bodie Con. Co., *supra* [4]; Book vs. Justice Co., *supra* [4]; Meydenbauer vs. Stevens, *supra* [4]. No conditions are imposed upon the locator as to the value or extent of the ore discovered, the law simply provides that no location of a lode mining claim shall be made until the discovery of the vein or lode. See Chrisman vs. Miller, 197 U. S. 321; Rough Rider Claims, 11 L. D. 242; see, also, U. S. vs. Iron Co., 128 U. S. 673; U. S. vs. Lavenson, 206 Fed. 763; Burke vs. McDonald, 3 Ida. 296, 29 Pac. 98. It is the finding of the mineral rock in place as distinguished from float rock that constitutes a discovery and warrants the prospector in locating a lode mining claim. Book vs. Justice Co., *supra*; Shoshone Co. vs. Rutter, *supra* [4]; Nevada Sierra Oil Co. vs. Home Oil Co., *supra* [2]; Lange vs. Robinson, 148 Fed. 801; McShane vs. Kenkle, *supra* [4]; Murray vs. White, *supra* [4], *but see* Erhardt vs. Boaro, *supra* [5].

In Cole vs. Ralph, 252 U. S. 286, rev'g. 249 Fed. 81, it is held that "to sustain a lode location the discovery must be of a vein or lode of rock in place bearing valuable mineral." In Cameron vs. U. S. 252 U. S. 450, aff'g. 250 Fed. 943, the court said: "No location of a (lode) mining claim shall be made until discovery of the vein or lode within the limits of the claim located, the discovery should be such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine." See, also, Deffeback vs. Hawke, 115 U. S. 394; Davis vs. Weibbold, 138 U. S. 520; U. S. vs. Plowman, 216 U. S. 372; Multnomah Co. vs. U. S., 211 Fed. 100; U. S vs. N. P. R. Co.,

§ 784. Location on Apex.

The top or apex of a vein or lode must be within the boundaries of a lode claim in order to enable the locator to perfect his location and obtain title, but the apex is not necessarily a point. It may be a line of great length; and if a portion is found within the limits of a location it is a sufficient discovery to enable the locator to obtain title.[10]

§ 785. Length and Width of Location.

A lode location can not extend more than fifteen hundred feet along the linear course of the vein or lode[11] nor more than three hundred feet on each side of the middle of the vein or lode at the surface,[12] which may be reduced by local rule or law to any width not less than twenty-five feet on each side of the middle of the vein or lode at the surface.[13]

§ 786. Measurements Determined by Vein or Lode.

The purpose of the federal mining law is to limit the dimensions of the location, not to prescribe its shape, and the point of measurement selected is the vein or lode, and if the measurements be made along and from the middle of the vein or lode, which departs laterally from its course at a right angle, it is obvious that the law is satisfied.[14]

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supra (6); Castle vs Womble, 19 L. D. 455; distinguished in Oregon Basin Co., 50 L. D. 253. See Oregon Basin Co. vs. Work, 6 Fed. (2d) 676, aff'd. 273 U. S. 660. Batt vs. Stedman, 36 Cal. A. 608, 173 Pac. 99; Sydney vs. Richards, 40 Cal. A. 686, 181 Pac. 394. The case of Cole vs. Ralph, *supra*, and last preceding cases modify the broad rule laid down in Book vs. Justice Co., *supra*. Now the criterion for a valid lode location is determined by the fact as to whether, at the vital time, the land is known to contain minerals in quality and quantity reasonably inspiring the average man to believe that expenditure in developing is justified, in that it is reasonably probable that such minerals will be found to return reasonable profits on the investment. But a mere willingness on the part of a locator unless evidenced by actual exploitation is a mere mental state that could not satisfactorily be proved. U. S. vs. Ohio Oil Co., 240 Fed. 996. For rights of the locator before discovery see Union Oil Co. vs. Smith, *supra* (7), which was an action wherein both parties litigant were in the position of prospectors or explorers upon the public domain, locators without discovery within certain oil placer locations. See, also, U. S. vs. McCutchen, 238 Fed. 579; McLaughlin vs. Thompson, 2 Colo. A. 135, 29 Pac. 816. That "belief" has been substituted for knowledge in oil and gas cases and that disclosures in the vicinity are a controlling element in determining the validity of mineral discovery is set forth in Diamond Coal Co. vs. U. S., *supra* (6); U. S. vs. Southern Pacific Co., *supra* (6); *but see* Oregon Basin Case, *supra*; Metson vs. O'Connell, 52 L. D. 313.

See *supra*, note 4.

[10] Poplar Creek Mine, 16 L. D. 1; see Larkin vs. Upton, *supra* (4); Debney vs. Iles, *supra* (7). The underground rights are based upon the fact that the apex of the vein or lode is within the surface lines of the location. Tyler Co. vs. Last Chance Co., 71 Fed. 851. See Jim Butler Co. vs. West End Co., 247 U. S. 450, aff'g. 39 Nev. 373, 158 Pac. 876. Where a mining claim has been duly located on the apex of a vein and the vein has in part been disclosed, and so far as thus known its course or strike is parallel to the side line, it may be inferred or presumed that the strike of the undisclosed portion substantially is the same as that which has been exposed. But this is an inference of fact and not a presumption of law. It does not follow from the location of the claim or the directions of the boundary lines thereof, but from the actual course of the apex of the portion of the vein as disclosed. Bourne vs. Federal Co., 243 Fed. 469.

[11] Gwillim vs. Donnellan, *supra* (4).

[12] See Harper vs. Hill, 159 Cal. 250, 113 Pac. 166. A locator must assume that some place on the earth's surface represented the vein or lode, and from such point he can not exceed the statutory limit. Empire Co. vs. Tombstone Co., 131 Fed. 341. See Erhardt vs. Boaro, *supra* (1). A lode location can not be extended in a zigzag form whereby the distance between the side lines of the location is made to exceed the maximum width of six hundred feet permitted in the location of a vein or lode claim. Jack Pot Claim, 34 L. D. 470; Belligerent Claims, 35 L. D. 22, dist'g. Homestake Co., 29 L. D. 689.

[13] Lakin vs. Dolly, 53 Fed. 337; Silver Bow Co. vs. Clark, 5 Mont. 409, 5 Pac. 570 and 594. See 1 Lindl. Mines (3d ed.), p. 546, § 250.

[14] Breece Co., *supra* (4). The mining statutes evidently contemplated but one vein as the discovery vein, and they provide that no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface. That the discovery vein is the primary vein for the purpose of locating the claim, and is the point of departure for the determination of the lines of the claim is indicated not

§ 787. Form of Location.

The federal mining law contemplates that a lode location shall have its sides equidistant and not more than three hundred feet from the center of the vein or lode on the surface, and not exceeding fifteen hundred feet in length, with the end lines parallel to each other.[15] However, the lode location is not required to be in any particular form. The side lines may be irregular, but the end lines must be parallel.[16] The lines of a location as made by the locator are the only lines that will be recognized, as the courts have no power to establish new lines or to make new locations.[17] The presumption is that the vein or lode runs lengthwise and not crosswise of the claim located.[18]

§ 788. Surface Rights.

The lode locator has the exclusive right of possession and enjoyment of all the surface included within the surface lines of his unpatented location.[19] This right of possession is as complete as if patent had

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only by the language of the statute, but by the decisions of the courts, the rulings of the land department and the opinions of text writers. Walrath vs. Champion Co., 171 U. S. 306; Northport Co. vs. Lone Pine Co., 278 Fed. 719. Where the extent along the vein or lode is given in the location notice the width of the claim is to be determined by the boundaries marked upon the surface. McCarthy vs. Phelan, 132 Cal. 406, 64 Pac. 570; McElligott vs. Krogh, 151 Cal. 126, 90 Pac. 823. See Phillpotts vs. Blasdell, 8 Nev. 61. Where a lode is discovered in a discovery shaft and does not crop out on the surface, it will be assumed that the shaft marks the middle of the vein, in the absence of a contrary showing. Hope Co., 5 C. L. O. 116; Johnson, 7 C. L. O. 35.

[15] Meydenbauer vs. Stevens, *supra* (4). The statute was enacted upon the theory that veins and lodes of mineral-bearing rock in their general course could readily be ascertained, and by locating a claim in the form of a parallelogram fifteen hundred feet in length and six hundred feet in width there would be no difficulty in including the vein or lode within the surface ground so located. Tyler Co. vs. Sweeney, 54 Fed. 290. See Doe vs. Waterloo Co., 70 Fed. 458, aff'g. 56 Fed. 11. The end lines are not necessarily those which are marked or so called, but they may be projected at the extreme point where the apex leaves the location as marked upon the surface. Quilp Co. vs. Republic Corp., 96 Wash. 439, 165 Pac. 57.

[16] Jim Butler Co. vs. West End Co., *supra* (10). A lode location is not required to be in the form of a parallelogram where the mineral is not deposited in a fissure but in irregularly shaped masses, and in such case the location may be in such form as will include such irregular shaped mass. Breece Co., 11 C. L. O. 132; see Wolfley vs. Lebanon Co., 4 Colo. 112. The principles of law and the construction of the statutes, as applied to locations made in the form of a parallelogram, can not be extended where a lode location is made in the form of an octagon or a curved figure in the shape of a horseshoe. Iron Co. vs. Elgin Co., 118 U. S. 196; Tyler Co. vs. Sweeney, *supra* (15).

[17] Argentine Co. vs. Terrible Co., 122 U. S. 478; King vs. Amy Co., *supra* (4); Del Monte Co. vs. Last Chance Co., 171 U. S. 55; Cosmopolitan Co. vs. Foote, 101 Fed. 518; Fitzgerald vs. Clark, 17 Mont. 130, 42 Pac. 273; see Daggett vs. Yreka Co., 149 Cal. 373, 86 Pac. 968. The original locator and his assigns have an unquestioned right to change the lines of the original location so long as such change does not interfere with the existing rights of others acquired previous to such change. Erhardt vs. Boaro, *supra* (1); Tonopah Co. vs. Tonopah Co., 125 Fed. 395; Thompson vs. Spray, *supra* (7); Batt vs. Stedman, *supra* (9); Frisholm vs. Fitzgerald, 25 Colo. 290, 53 Pac. 1109; Duncan vs. Fulton, 15 Colo. A. 148, 61 Pac. 244; Morrison vs. Regan, 8 Ida. 291, 67 Pac. 955; Sanders vs. Noble, 22 Mont. 110, 55 Pac. 1037; Round Mt. Co. vs. Round Mt. Co., 36 Nev. 543, 138 Pac. 71, rev'g. 35 Nev. 392, 129 Pac. 308; but boundary lines are not subject to perpetual readjustment according to subterranean developments made by mine workings; Iron Co. vs. Elgin Co., *supra* (16).

[18] Enterprise Co. vs. Rico-Aspen Co., 167 U. S. 115, aff'g. 66 Fed. 200; Work Co. vs. Doctor Jack Pot Co., 194 Fed. 620.

[19] Calhoun Co. vs. Ajax Co., 182 U. S. 508, aff'g. 27 Colo. 1, 59 Pac. 607; Bradford vs. Morrison, 212 U. S. 394, aff'g. 10 Ariz. 214, 86 Pac. 6; Doe vs. Waterloo Co., 54 Fed. 935; Original Co. vs. Abbott, 167 Fed. 683; Dwinnell vs. Dyer, 145 Cal. 20, 78 Pac. 247. See U. S. vs. Rizzinelli, 182 Fed. 675; Bullion Beck Co. vs. Eureka Co., 5 Utah 55, 11 Pac. 515. The locators of any mineral veins, lode or ledge are given not only an exclusive right of possession and enjoyment of all the surface included within the lines of their locations, but of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically. A locator, therefore, is not confined to the vein upon which he based his location and upon which the discovery was made and blind veins are not excepted. They are included in the statutory description "all veins," and belong to the surface location. Jim Butler Co. vs. West End Co., *supra* (10); see, also, Flagstaff Co. vs. Tarbet, 98 U. S. 467; Del Monte Co. vs. Last Chance Co., *supra* (17); Calhoun Co. vs. Ajax Co., *supra* (19). The surface lines bind absolutely the surface rights and the end lines as absolutely the portion of the vein or lode which they interseet, and at the same time the corresponding zone of

issued to him, provided, he continues to put each year the required amount of labor or improvements thereon.[20] If he applies for a patent and is met with obstacles not anticipated he may relinquish his attempt to secure such patent and hold his claim by right of possession.[21]

§ 789. Subsurface Rights.

The locator owns everything lying perpendicularly under the surface excepting veins or lodes apexing outside of his surface lines.[22] The owner of the surface and the apex is clothed with the exclusive right of possession and enjoyment of both, including the right to follow the vein or lode to its utmost depth; and he is deemed to be in possession of all parts of the vein or lode to which he is entitled, though it departs beyond his side lines; and it has been held he commits no wrong and is not a trespasser when he follows it outside of his side lines.[23] The dip right is controlled by the form of the surface location [24]; to illustrate: no extralateral right attaches to an irregularly shaped location,[25] unless the location was made prior to the act of 1872.[26] The dip right also is limited where the vein or lode crosses the side lines,[27] or where the end lines of the location converge.[28]

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the underground extralateral rights thereto, and both the surface and mineral rights thus are defined by one set of boundary lines, and the limitations of mineral rights are to all veins or lodes apexing within those limits. Pilot Hill Lodes, 35 L. D. 592; see Walrath vs. Champion Co., *supra* [14]. Where a vein terminates against a granite or monzonite at one end the locator would be entitled to have the end line pass through such point of termination parallel with the vertical plane of the other end line, thus giving him the extralateral right of the pursuit of the vein between the planes bounded by these end lines beneath all other mining claims under which it dips. Alameda Co. vs. Success Co., 29 Ida. 618, 161 Pac. 865.

[20] Branagan vs. Dulaney, 2 L. D. 744; Miller vs. Hamley, *supra* [5].

[21] *Id.* Black Queen Lode vs. Excelsior Lode, 22 L. D. 343; McGowan vs. Alps Co., 23 L. D. 113; Peoria Co. vs. Turner, 20 Colo. A. 482; 79 Pac. 915; Beals vs. Cone, *supra* [7]; see Nome & Sinook Co. vs. Townsite of Nome, 34 L. D. 276; Chilberg vs. Con. Co., 3 Alaska 241.

[22] Baillie vs. Larson, 138 Fed. 178; Vulcano Claim, 30 L. D. 482; see Work Co. vs. Doctor Jack Pot Co., *supra* [15]. A valid lode location carries with it the right to all minerals or veins, whether they be side veins, cross veins or spurs, or whether they lie transversely to the main vein or are collateral thereto, provided that the tops or apexes thereof are found within the surface lines of such location. Branagan vs. Dulaney, 8 Colo. 413, 8 Pac. 669; see Calhoun Co. vs. Ajax Co., *supra* [19]; Rico-Argentine Co. vs. Rico Con. Co., 74 Colo. 444, 223 Pac. 31

[23] Montana Co. vs. Boston Co., 27 Mont. 542, 7 Pac. 1114, modif'd. 71 Pac. 1005; *but see* Del Monte Co. vs. Last Chance Co., *supra* [17]; Barker vs. Condon, 53 Mont. 585, 165 Pac. 912. The general presumption is that one who has possession of the surface has the possession of the subsoil also. Gill vs. Colton, 12 Fed. (2d) 533. He who enters beneath the surface within the lines of another's claim and mines the same *prima facie* is a trespasser. Doe vs. Waterloo Co., *supra* [19]; Bluebird Co. vs. Murray, 9 Mont. 468, 23 Pac. 1022. The burden is upon him to show that he is following the dip of a vein or lode apexing within his location. Lawson vs. U. S. Co., *supra* [4]. In other words, "Hands off of any and everything within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim of which you are the owner." Con. Wyoming Co. vs. Champion Co., 63 Fed. 540; Montana Co. vs. St. Louis Co., 204 U. S. 204; *compare* Twenty-one Co. vs. Original Sixteen Mine, 265 Fed. 549, aff'g. 255 Fed. 658.

[24] Flagstaff Co. vs. Tarbet, *supra* [19]; Argentine Co. vs. Terrible Co., *supra* [17]; King vs. Amy Co., *supra* [4]; Last Chance Co. vs. Tyler Co., 157 U. S. 683, rev'g. 61 Fed. 559.

[25] Iron Co. vs. Elgin Co., *supra* [16]; Montana Co. vs. Clark, 42 Fed. 626.

[26] Argonaut Co. vs. Kennedy Co., 131 Cal. 15, 63 Pac. 148, aff'd. 189 U. S. 1; East Central Eureka Co. vs. Central Eureka Co., 204 U. S. 268, aff'g. 146 Cal. 147, 79 Pac. 834.

[27] Flagstaff Co. vs. Tarbet, *supra* [19]; Iron Co. vs. Elgin Co., *supra* [16]; Argentine Co. vs. Terrible Co., *supra* [17]; Del Monte Co. vs. Last Chance Co., *supra* [17]; Montana Co. vs. Clark, *supra* [23].

[28] The act of July 26, 1866, did not require the end lines be parallel; they might converge or diverge, but the act required that they must be straight. Walrath vs. Champion Co., *supra* [14]. The act of May 10, 1872, requiring the end lines to be parallel does not apply to a location that was made under the act of July 26, 1866, and the patent for which was issued prior to the taking effect of the act of 1872. Iron Co. vs. Elgin Co., *supra* [16]; East Central Eureka Co. vs. Central Eureka Co., *supra* [26]. See Tyler Co. vs. Sweeney, *supra* [15]. The want of parallelism of the end lines can not be made the basis of an objection because their convergence, when extended in the direction of the dip of the vein or lode, would give a contestant less,

§ 790. Effect of Patent for Placer on Lode Claim.

The rule that a lode claim within a placer claim can not exceed fifteen hundred feet in length nor more than twenty-five feet on each side of the lode or vein [29] has no application to a lode claim perfected by another prior to the date of the application for patent for a placer claim, the boundaries of which include the lode claim; and when it is made to appear that there is a lode claim within the boundaries of such placer claim, not owned by the applicant for patent, then the lode claim to its full extent is excepted from the placer patent.[30]

§ 791. Invasion of Placer Claim.

No one may go upon a valid existing placer claim to prospect for and acquire title to a vein or lode discovered and located as a result thereof within the limits of the placer claim, unless the owner of the placer claim waives the trespass, or by his conduct is estopped to complain of it.[31]

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instead of more than the law provides. Carson City Co. vs. North Star Co., *supra* (2); Central Eureka Co. vs. East Central Eureka Co., 146 Cal. 153, 79 Pac. 834, aff'd. 204 U. S. 268; Argonaut Co. vs. Kennedy Co., *supra* (25).

[29] South Star Lode, 20 L. D. 204; North Star Lode, 28 L. D. 41.

[30] Elda Co. vs. Mayflower Co., 26 L. D. 573; Mt. Rosa Co. vs. Palmer, 26 Colo. 63, 56 Pac. 176.

See §§ 797–798.

[31] Clipper Co. vs. Eli Co., *supra* (3); see Atherton vs. Fowler, 96 U. S. 513; Haws vs. Victoria Co., 160 U. S. 303; Cosmos Co. vs. Gray Eagle Co., 112 Fed. 17, aff'g. 104 Fed. 20, aff'd. 190 U. S. 301. An attempted location as a placer claim of calcium phosphate or rock phosphate in place having a dip and strike firmly fixed in the mass of a mountain and occuring between strata of limestone, ehert, and shale, where the line of demarcation between such phosphate rock and the wall rock of limestone or shale is well defined and distinct, and where the distinction between such phosphate rock, having a commercial value, and the wall rock, having no commercial value, is readily determined by visual inspection, is invalid and is not an appropriation or segregation of the ground, but the ground within the limits of such attempted location remains public and unoccupied mineral ground, and any third person may make peaceable entry thereon and locate as a lode claim such deposit of calcium phosphate or rock phosphate. Duffield vs. San Francisco Co., *supra* (3).

See § 805.

See Locations. See Veins, Lodes and Ledges.

CHAPTER XLII.

LODES WITHIN PLACER CLAIMS.

§ 792. Characteristics.

Veins or lodes and placer deposits frequently are found to exist within the same land, and it is no objection to the validity of a placer location that it embraces veins or lodes as well as placer deposits[1]; and they both may be located and held by the placer claimant or by different persons and patented accordingly.[2]

§ 793. Known Veins or Lodes.

The term "known vein" is not to be taken as synonymous with "located vein," and refers to a vein or lode whose existence is known as distinguished from one which has been appropriated by location.[3] A

[1] Iron Co. vs. Campbell, 135 U. S. 286; South Butte Co. vs. Thomas, 260 Fed. 814; *certiorari* denied 253 U. S. 486; Hogan & Idaho Claims, 34 L. D. 42. Placer claimants, by mistakenly posting a notice stating that they had relocated the ground as a lode claim, did not thereby admit the validity of a prior conflicting lode location, where the mistake was properly corrected the next day by the substitution of another notice stating that the ground was located as a placer claim and no one was injured thereby. Cole vs. Ralph, 252 U. S. 286, rev'g. 249 Fed. 81.

[2] Henderson vs. Fulton, 35 L. D. 652; Noyes vs. Clifford, 37 Mont. 138, 94 Pac. 842; Iron Co. vs. Reynolds, 124 U. S. 374, rev'g 116 U. S. 695, rev'g 33 Fed. 354; Aurora Lode vs. Bulger Hill Placer, 23 L. D. 95, 99; Daphne Lode, 32 L. D. 513; Jaw Bone Lode vs. Damon Placer, 34 L. D. 72. Known lodes, though unidentified and indefinite, are excepted and excluded from placer patents, and title to them remains in the United States, and at any time thereafter they may be, by strangers to the patent possessed, located and patented as any other lode upon public lands. Clipper Co. vs. Eli Co., 194 U. S. 230, aff'g. 29 Colo. 377, 68 Pac. 289; Barnard Co. vs. Nolan, 215 Fed. 999; Clark-Montana Co. vs. Ferguson, 218 Fed. 963; McCarthy vs. Speed, 11 S. Dak. 362, 77 N. W. 590, aff'd. 181 U. S. 269.

But one may not go upon a prior valid placer location to prospect for unknown lodes, and get title to lode claims thereafter discovered and located in this manner and within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or by his conduct is estopped to complain of it. Clipper Co. vs. Eli Co., 29 Colo. 377, 68 Pac. 289, aff'd. 194 U. S. 220. Mr. Justice Brewer, in the course of the affirming opinion said: "It is contended that, because of a vein or lode may have its apex within the limits of a placer claim, a stranger has the right to go upon the claim, and, by sinking shafts or otherwise, explore for any such lode or vein, and, on finding one, obtain a title thereto. That, with the consent of the owner of the placer claim, he may enter it and make such exploration, and, if successful, obtain title to the vein or lode, can not be questioned. But can he do so against the will of the placer locator? If one may do it, others may, and so the whole surface of the placer be occupied by strangers seeking to discover veins beneath the surface. Of what value, then, would the placer be to the locator? Placer workings are surface workings, and, if the placer locator can not maintain possession of the surface, he can not continue his workings. And if his surface is open to the entry whoever seeks to explore for veins, his possession can be entirely destroyed." See, also, Moffatt vs. Blue River Co., 33 Colo. 142, 80 Pac. 140, and see Mt. Rosa Co. vs. Palmer, 26 Colo. 63, 56 Pac. 176.

See § 188.

[3] Iron Co. vs. Mike & Starr Co., 143 U. S. 400; Sullivan vs. Iron Co., 143 U. S. 433; South Butte Co. vs. Thomas, *supra* (1); Cleary vs. Skiffich, 28 Colo. 368, 65 Pac. 59; McConaghy vs. Doyle, 32 Colo. 98, 75 Pac. 419; Butte & B. Co. vs. Sloan, 16 Mont. 97, 40 Pac. 217; Horsky vs. Moran, 21 Mont. 349, 53 Pac. 1064. In Noyes vs. Mantle, 127 U. S. 353, aff'g. 5 Mont. 274, 5 Pac. 856, the court said: "The section (Rev. St. § 2333, regulating placer patents) can have no application to lodes or veins within the boundaries of a placer claim which have been previously located under the laws of the United States, and are in the possession of the locators or their assigns"; and the court declares that such locations have already been disposed of by the government, citing Belk vs. Meagher, 104 U. S. 279. Where the existence of a vein or lode within a placer claim is otherwise unknown, its existence is not made known by mere inclusion of the ground within a lode location, Cripple Creek Co. vs. Mt. Rosa Co., 26 L. D. 622, nor will the discovery of a vein or lode two or three hundred feet outside of the boundaries of a placer claim create any presumption of the possession of a vein or lode within those boundaries, nor that a vein or lode existed within them. Dahl vs. Raunheim, 132 U. S. 263, aff'g. 6 Mont. 169, 9 Pac. 892; Dis-

vein or lode is known to exist within the meaning of the law affecting placer claims when it could be discovered or when it is obvious to any one making a reasonable and fair inspection of the premises for the purpose of a location.[4]

§ 794. Theory or Belief Insufficient.

On the question of the known existence of an existing vein or lode within the meaning of the law affecting placer claims, a wide difference is made between mere belief and knowledge, and these terms can not be made synonymous and thereby incorporate new terms into the statute.[5]

§ 795. Application for Placer Patent.

In an application for a placer patent the land department requires evidence as to the character of the land, and if the proof shows the existence of known lodes within a placer claim the applicant is required to survey them and if not claimed and included in his application he is required to exclude them and may then enter and pay for the net area of his placer claim, and the patent conveys to him the net area alone. But, if the proof shows there are no known lodes existing within the placer limits, the applicant enters and pays for the entire area of his placer claim and patent issued covering the whole thereof. The law does not authorize the Land Department to insert in a patent an excep-

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covery Claim vs. Murray, 25 L. D. 460; Washoe Co. vs. Junila, 43 Mont. 187, 115 Pac. 917; see Butte Co. vs. Sloan, *supra*. To constitute a known vein or lode within § 2333 of the Revised Statutes, the lode or vein must clearly be ascertained and be of such extent as to render the land more valuable on that account and justify its exploitation, and it is not enough that there may have been some indications by outcroppings on the surface of the existence of lodes or veins of rock in place. U. S. vs. Iron Co., 128 U. S. 683; Casey vs. Thievicge, 19 Mont. 347, 48 Pac. 394. See Iron Co. vs. Reynolds, *supra* (2); Discovery Claim vs. Murray, *supra*. See *supra* note 2.

[4] Iron Co. vs. Mike & Starr Co., *supra* (3); Montana Co. vs. Migeon, 68 Fed. 815, aff'd. 77 Fed. 249; Mutchmor vs. McCarty, 149 Cal. 611, 87 Pac. 85; Brownfield vs. Bier, 15 Mont. 409, 39 Pac. 461. The theory of the law is that a vein or lode of quartz may exist in placer ground that is unknown; but if a discovery of any such vein or lode has been made within the placer boundaries, and in pursuance thereof a lode claim has been properly located, then the applicant for placer patent will be presumed to know of the existence of such lode or vein. Mantle vs. Noyes, 5 Mont. 289, 5 Pac. 856, aff'd. 127 U. S. 353; Raunheim vs. Dahl, 6 Mont. 169, 9 Pac. 892, aff'd. 132 U. S. 263. It is only veins or lodes, the existence of which is known at the time of the application for a placer patent, that are excepted therefrom in the event they are not applied for and granted upon the additional payment required. South Butte Co. vs. Thomas, *supra* (1); see, also, Iron Co. vs. Reynolds, *supra* (3); Montana Co. vs. Migeon, *supra;* Dahl vs. Raunheim, *supra* (3). Where there is a valid location of a vein or lode and its boundaries are specifically marked upon the surface so as to be readily traced, and notice of location is properly recorded in the usual books of record, the vein or lode then is known to exist, though personal knowledge of the fact may not be possessed by the applicant for patent for a placer mining claim, but the information which the law requires the locator to give to the public is sufficient to acquaint the applicant himself with the existence of the vein or lode. Reynolds vs. Iron Co., *supra* (2); Noyes vs. Mantle, *supra* (3); Pike's Peak Lode, 14 L. D. 47; Wilson Creek Co. vs. Montgomery, 23 L. D. 476. See Cripple Creek Co. vs. Mt. Rosa Co., *supra* (3).

As was said in Iron Co. vs. Mike & Starr Co., *supra* (3), whether the vein was known at the date of the application for patent by the plaintiffs as a clearly ascertained vein, and whether it contained such values as made the ground more valuable on that account and justified exploitation with a purpose to extract and utilize the values therein, were questions for the jury. See Campbell vs. McIntyre, 295 Fed. Butte & B. Co. vs. Sloan *supra* (3); Noyes vs. Clifford, *supra* (2).

See § 188.

[5] Iron Co. vs. Reynolds, *supra* (2); see, also, Sullivan vs. Iron Co., *supra* (3). A mere speculative belief of the existence of minerals based not on any discoveries in a placer tract or any tracings of a vein or lode adjacent thereto, but on the bare fact that a number of shafts sunk elsewhere in the district had disclosed horizontal deposits of a particular kind of ore supposed to be parts of a single vein of continuous extension through all the particular territory, is not the knowledge required by the law. Sullivan vs. Iron Co., 143 U. S. 435; Cripple Creek Co. vs. Mt. Rosa Co., *supra* (3); Montana Co. vs. Migeon, *supra* (4).

tion as to the existence of lodes within the placer limits broader than the law implies.[6]

§ 796. Application for Patent by Lode Claimant.

The claimant for a known lode or vein within a placer claim can apply for a patent therefor in the regular way, notwithstanding it exists within the surface covered by a prior patent for the placer claim. The patentee of the placer claim may file an adverse claim in the customary manner.[7]

§ 797. Effect of Patent for Lode on Placer Claim.

Subsequent patents for lode claims within the limits of a patented placer claim are immaterial on the question of the knowledge of the existence of such lodes at the time of the placer application, and the lode patents are not evidence of the known existence of such lodes at the time of the placer patent.[8]

§ 798. Width of Lode Claims Within Placer Claim Limits.

A lode claim within the limits of a placer claim may be of the maximum statutory size as to its length and width when laid prior to the placer location.[9] The limitation of the width of the vein or lode claim to twenty-five feet on each side of the center of the vein or lode

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[6] Clark-Montana Co. vs. Ferguson, *supra* (2). A lode is not known to exist at the time of the placer application for patent where it appears that it was in fact discovered in the bedrock when the placer deposits were removed by extensive work long subsequent to the placer application. Barnard Co. vs. Nolan,, *supra* (1). An applicant for a placer patent, who at the time is in possession of a vein or lode within the boundaries of the placer location, must state such fact in his application, and on payment of the sum required for a lode claim and twenty-five feet of surface on each side of the vein or lode, and on payment of the required sum for the placer claim, a patent will issue covering both placer and lode claims. Reynolds vs. Iron Co., *supra* (2); Iron Co. vs. Reynolds, *supra* (3); Noyes vs. Mantle, *supra* (5); Aurora Lode vs. Bulger Placer, *supra* (1); see Jaw Bone Lode vs. Damon Placer, *supra* (2). The applicant for a placer claim takes the surface land and the placer mine, and such lodes or veins of mineral matter within it as are unknown, but to such as were known to exist he obtains no right whatsoever by the patent unless expressly and specifically applied for. Iron Co. vs. Reynolds, *supra* (2); Sullivan vs. Iron Co., *supra* (3); Clipper Co. vs. Eli Co., *supra* (2); O'Keefe vs. Cannon, 52 Fed. 898; South Star Lode, 20 L. D. 204; Clary vs. Hazlitt, 67 Cal. 286, 7 Pac. 701; Casey vs. Theiviege, *supra* (3). A vein or lode known to exist within the boundaries of a placer claim at the date of the application for patent, and not included in such application, may be located by an adverse claimant after the issuance of the patent. Mutchmor vs. McCarty, *supra* (4). But a third person has no right to enter upon a valid placer claim for the purpose of prospecting or searching for veins or lodes, and any such entry is a trespass which can not be relied upon to sustain a claim of right to any vein or lode. Clipper Co. vs. Eli Co., *supra* (2); *but see* Reynolds vs. Iron Co., *supra*, a case in which adjoining lode claimants followed a vein upon its dip beneath the surface outside of their extra lateral right and within the confines of the placer claim. The court held that by such invasion a known lode existed; that as such it was not the property of the placer mine owner and that he was without remedy as against the lode claimants.

[7] Robinson vs. Roydor, 1 L. D. 564; Olathe Mine, 4 L. D. 494. See Shonobar Lode, 3 L. D. 388. Discovery Placer vs. Murray, *supra* (3); Cripple Creek Co. vs. Mt. Rosa Co., *supra* (3). Where an applicant for a patent within a placer location shows by *exparte* affidavits that such lode claim was known to exist prior to the issuance of the patent for the placer claim, the application may be suspended and a hearing had with a view to the proper proceedings to set aside the placer patent as to its conflict with the lode location. Rebel Lode, 12 L. D. 683. The issuance of the patent does not prevent subsequent departmental inquiry, on behalf of the lode claimant, and after due notice, to determine whether a known lode or vein existed within said placer claim at the date of the application, or the issuance of patent therefor, if so found to exist. Cape May Co. vs. Wallace, 27 L. D. 676.

[8] Clark-Montana Co. vs. Ferguson, *supra* (2). Whether a lode or vein exists within the boundaries of a placer claim at the time of making application for a patent is a question of fact which the locator has a right to have tried as such. Iron Co. vs. Campbell, 135 U. S. 293; N. P. R. Co. vs. Cannon, 54 Fed. 259; Brownfield vs. Bier, *supra* (4). See Iron Co. vs. Mike & Starr Co., *supra* (3); McConaghy vs. Doyle, *supra* (3). See § 790.

[9] Noyes vs. Mantle, *supra* (5); Pikes Peak Lode, *supra* (4); Elda Co. vs. Mayflower Co., 25 L. D. 573; Cape May Co. vs. Wallace, *supra* (7); Mt. Rosa Co. vs. Palmer, *supra* (2).

applies only (1) where the placer claimant seeks a conjoint patent for placer and lode [10]; (2) where a lode claimant, whose location is within the boundaries of a placer claim, fails to file an adverse claim to the placer application for patent within the statutory period [11]; (3) where the lode location is subsequent in point of time to the placer location.[12]

§ 799. Not Excluded.

It was not until the passage of the "General Mining Act" on May 10, 1872, that known lodes were excluded from placer mining claims. The reservation of such lodes therein did not impair the rights or interests in a placer claim on which payment had been made, and a certificate of purchase issued, before the passage of that act. Applications for patent made subsequent to that act are subject to the conditions there expressed.[13]

§ 800. No Statute of Limitations.

In Barnard Co. vs. Nolan [14] the court said: "If after a placer patent has issued the first attempt to so secure lodes within the placer alleged to be 'known' lodes fails, in a suit (to quiet title) like this determines the lodes were not 'known lodes' which the patent was applied for, the patentee is not thereby confirmed in his title, for the decree is not *res judicata* in respect to the United States and persons not parties; and such persons can relocate the lodes and relitigate the issue again and again, *ad infinitum*. Or suit after suit may succeed and lode after lode be carved out of the patent until the whole is gone and the patentee has but his paper grant, a delusion and a snare, conveying nothing. For if no title to the lode passes by the placer patent, if it wholly remains in the United States, neither laches nor limitation can vest title in the patentee."

§ 801. Contests.

Contests have frequently arisen between placer and subsequent lode locations involving the question of whether or not the placer embraced within its limits "known lodes," which under the provisions of § 2333, Revised Statutes, are excepted from placer patents. In such cases it has been held that a known lode is one known to exist at the time of application for patent, and to contain minerals in such quantities and quality as to justify expenditures for the purpose of extracting them.[15]

§ 802. Insufficiency of Indications.

Mere outcroppings or other indications of a vein within the limits of a placer, or evidence of the existence of a vein which might be sufficient

[10] Pikes Peak Lode, *supra* (4); Mt. Rosa Co. vs. Palmer, *supra* (2); Iron Co. vs. Raynolds, *supra* (2).

[11] Shonbar Lode, *supra* (7); Pikes Peak Lode, *supra* (4); see Daphne Claim, *supra* (2).

[12] Pruett vs. Harvey, 51 Nev. 40, 268 Pac. 41; Noyes vs. Clifford, *supra* (4); see Noyes vs. Mantle, *supra* (3). The twenty-five feet allowed is to be measured from the center of the vein. Shonbar Lode, *supra* (7).

Where the location of a known lode is based on a discovery outside of the placer location, it is valid for the full claim width of six hundred feet or less claimed outside of the placer location, and for fifty feet in width claimed within the placer location upon the known lode, not patented as such to the owner of the latter ground. Costigan Min. Law, p. 268, §§ 75–77.

[13] Cranes Co. vs. Scherrer, 134 Cal. 350, 66 Pac. 487.

[14] 215 Fed. 999.

[15] Iron Co. vs. Mike & Starr Co., *supra* (3); Brownfield vs. Bier, *supra* (4).

to support a lode location as against a conflicting lode claim, or sustain a lode location as against a subsequent placer location in an adverse proceeding are not sufficient to establish the existence of a known vein or lode within the boundaries of a placer prior in point of time, and which has been patented.[16] Float, outcroppings, lodes, and abandoned locations, separately or combined, are not sufficient to constitute a 'known lode' within the exclusion of the placer mining law.[17] Where, prior to the time plaintiff's grantor staked out a placer claim upon public land, defendants had taken steps to locate the same land as a lode claim, and there was some evidence of mineral-bearing rock on the surface, but an entire absence of proof that there was not a vein of metallic ore, such as might be located only as a lode claim, defendant's right of possession was superior to that acquired by plaintiff."[18]

§ 803. Proof Required.

Before it can be held that veins or lodes are excluded from the grant of land included in a placer patent, it is not sufficient to show that the land does in fact contain valuable minerals, but it must be shown that, at the time of the application for patent, more has been discovered than the indications of mineral which would ordinarily sustain a lode location, and that it was at the time "known to the applicant for the placer patent, or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises, for the purpose of obtaining title from the government," that there was rock in place bearing minerals to such extent and value as would justify expenditures for the purpose of extracting them.[20]

§ 804. Burden of Proof.

The burden of proof is upon the lode claimant to establish by clear and convincing testimony that the vein or veins which he claims are exempted from the placer application by operation of law are of the character which will render them known veins.[21]

§ 805. Unlawful Acts.

In Campbell vs. McIntyre,[22] "The court said to the jury that, if they found that the plaintiff had a valid placer location at the time when the defendants entered upon the same and discovered a lode or vein theretofore not known to exist within the boundaries of the placer claim, their acts were unlawful and they could not in that manner initiate any title to the lode or vein; that where a vein or lode is not known to exist within the boundaries of a valid placer claim, no person other than the owner of the placer claim has the right to enter upon the same for the purpose of discovering such vein or lode and locating the same, and one who attempts to do so without the owner's consent, or without his knowledge, is a trespasser and can acquire no

[16] McConaghy vs. Doyle, *supra* (3).
[17] Barnard Co. vs. Nolan, *supra* (2); see Iron Co. vs. Mike & Starr Co., *supra* (3); Mason vs. Washington-Butte Co., 214 Fed. 37.
[18] Bevis vs. Markland, 130 Fed. 226.
[19] Iron Co. vs. Mike & Starr Co., *supra* (3).
[20] Mason vs. Washington-Butte Co., *supra* (17).
[21] Montana Co. vs. Migeon, *supra* (1); McConaghy vs. Doyle, *supra* (3); Kift vs. Mason, 42 Mont. 232, 112 Pac. 392.
[22] 295 Fed. 46. See Clipper Co. vs. Eli Co., *supra* (2).

rights to such lode claim; but that if the jury found that the defendants located upon a known lode claim within the boundaries of the placer claim, and that their entry and discovery were made peaceably and in good faith they had the right to make such discovery and location. In so instructing the jury the court followed principles of law that are well settled."

§ 806. Adverse Claim Suits.

In a suit of an adverse claim to a placer mining location plaintiff in order to establish a *prima facie* case, is bound to show, in addition to the other legal requirements, that the ground was not covered by a prior location, or, if so, that such location was invalid, that the claimant had forfeited his rights by failure to comply with the law, or that the claim had been abandoned.[23]

[23] Moffatt vs. Blue River Co., *supra* (2).
See § 791.

CHAPTER XLIII.

MILL SITES.

§ 807. Character of Mill Sites.

Only nonmineral land not adjacent to a vein or lode but which may be in contact with the side lines of a lode claim can be appropriated for mining and milling purposes[1] under the federal mining law.[2] State statutes or local rules and regulations of miners granting mill sites inconsistent with that law are invalid.[3] The mill site must not be laid upon reserved or appropriated territory[4] nor exceed five acres in extent.[5]

§ 808. Character Unchangeable.

The character of the land embraced within a mill site must be determined as of the date the right attached thereto, as changed conditions in the character of the ground can not affect the right of the mill site claimant.[6]

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[1] Rev. Stat., § 2337, Yankee Mill Site 37 L. D. 674, overruling Brick Pomeroy Mill Site, 34 L. D. 323. The term "mining and milling purposes" means more than a colorable use. Hard Cash Claims, 34 L. D. 325. It is not necessary that the land claimed by a mine owner be actually a mill site, but the use or occupation of it by him for mining or milling purposes is essential. Lennig, 5 L. D. 180; Eclipse Mill Site, 22 L. D. 496. But the right of the owner of the mill or reduction works depends upon the existence upon the land of either one of said structures. Hecla Co., 12 L. D. 75; Brodie Co., 29 L. D. 143.

In Kerschner vs. Trinidad Co., 27 N. M. 326, 201 Pac. 1055, the court said: "It will be seen that in asserting a claim to a mill site in connection with a lode claim, it must be used and occupied for mining and milling purposes. And in case of an owner of a mill not connected with a mine, the presence on the ground of the mill satisfies the requirements of the statute as to use and occupation. The statute does not seem to contemplate the right to locate a mill site without actually using and occupying the ground. This is the position of the Land Department of the government. This is not so with regard to mining locations. After a mining location has been perfected, no further possession need be maintained except to make the required annual expenditure. The nature of the right is inherently different in the two cases. We are not aware that this distinction has been pointed out in other cases, but we conclude that the right to a mill site may be transferred by delivery and acceptance of possession and no deed is required."

In Cleary vs. Skiffich, 28 Colo. 362, 65 Pac. 59, the court said: "A mill site claimant would certainly have a reasonable time after taking the necessary steps to commence the erection of a reduction works thereon. If not commenced within a reasonable time, then his rights would attach, as against other claimants, from the time he did begin construction of such works in good faith, and prosecuted them with reasonable diligence."

[2] Mongrain vs. N. P. R. Co. 18 L. D. 105; Reed vs. Bowron, 26 L. D. 66; Mabel Lode, 26 L. D. 675; Burns vs. Clark, 133 Cal. 638, 66 Pac. 12; Burns vs. Schonfeld, 1 Cal. A. 124, 81 Pac. 713. The mill site law is *sui generis* applicable to nonmineral land, yet resorted to only for purposes ancillary to the exploitation of mineral land. While in some cases it might promote its objects to permit its use in securing surface rights in land of mineralized subsurface, congress has not yet so provided. Emerald Oil Co., 48 L. D. 243. If the land contains no valuable mineral deposits it falls into the nonmineral class however rich in minerals are the adjoining lands. U. S. vs. Kostelak, 207 Fed. 453. So a mill site may be in contact with the side line or the end line of a lode mining claim; Yankee Mill Site, *supra* [1]; Montana-Illinois Co., 42 L. D., 434; see Dillon, 40 L. D. 84, or lie between such claims, Hales & Symons, 51 L. D. 123.

[3] Cleary vs. Skiffich, *supra* [1]; see Reed vs. Bouron, *supra* [2]; and see Adams vs. Quijeda, 25 L. D. 24.

[4] Key Stone Mill Site, 15 L. D. 259; Mongrain vs. N. P. R. Co., *supra* [2]; Emerald Oil Co., *supra* [2]; Hamburg vs. Stephenson, 17 Nev. 449, 30 Pac. 1088. As to a mill site within a forest reserve see Alaska Co., 43 L. D. 257; Nichol, 44 L. D. 197; Crowley, 46 L. D. 178; Walker, 47 L. D. 224. A location of a mill site over the ground covered by a subsisting location is void. It can not ripen into a valid claim, even if the senior location becomes forfeited. Kershner vs. Trinidad Co., *supra* [1].

[5] 5 U. S. Comp. St., p. 5691, § 4645; S. P. Mines vs. Valcalda, 79 Fed. 890; aff'd. 86 Fed. 90; Hoggin, 2 L. D. 755; Yankee Mill Site, *supra* [2]

[6] U. S. vs. Kostelak, *supra* [2]; Peru Mill Site, 10 L. D. 196; Gale vs. Best, 78 Cal. 235, 20 Pac. 550; Cleary vs. Skiffich, *supra* [1].

§ 809. Character of Occupation.

The occupation for mining or milling purposes must be more than the mere naked possession [7] and must be evidenced by outward and visible signs of the good faith of the claimant; and if the claimant is not actually using the land he must show such an occupation by improvements as evidences an intention to use the land in good faith for mining and milling purposes.[8] It is not sufficient that the claimant is the owner of a specified mining claim, nor that he is the owner of and operating numerous mines.[9]

§ 810. Cessation of Right.

Where the owner of a mill site ceases, by reason of abandonment or forfeiture, to be the proprietor of the vein or lode, the right of the associated mill site and to any improvements thereon is ended.[10]

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[7] Cyprus Mill Site, 6 L. D. 706; Two Sisters Mill Site, 7 L. D. 557; see Eclipse Mill Site, *supra* (1).

[8] The land must be used in good faith in connection with the ostensible purpose for which it was located. Hartman vs. Smith, 8 Mont. 19, 14 Pac. 648. That is to say, the mill site claim must be used or occupied for milling purposes, and some steps in or directly connected with the process of mining or some feature of milling must be performed upon, or some recognized agency of operating mining or milling must occupy the mill site. Crowley, *supra* (4); Alaska Copper Co., 32 L. D. 128; S. P. Mines vs. Valcalda, *supra* (5); Alaska Mildred Co., 42 L. D. 255; Hartman vs. Smith, *supra*; Kerschner vs. Trinidad Co., *supra* (1). For instance, the mill site may be used in connection with a quartz mill, reduction works, Le Neve Mill Site, 9 L. D. 460; Hecla Co., *supra* (1), pumping works constructed and maintained for the purpose of operating a lode claim, Sierra Grande Co. vs. Crawford, 11 L. D. 338, a tank built for the storage of water sufficient to operate a mine, Gold Springs Mill Site, 13 L. D. 175; Satisfaction Mill Site, 14 L. D. 173, a dam and a pipe used for driving a water wheel to compress air for the engine and drills used for mining upon adjacent lode claims, Le Neve Mill site, *supra*, a blacksmith shop and tool house for the storage of tools, machinery necessary in running a tunnel, and as a storage place of supplies needed in development work, houses for workmen. Alaska Mildred Co., *supra*. A cabin used for storing tools, and as an ore house for the ore taken from the mine. Hartman vs. Smith, *supra*.

The following are instances of what are not considered as uses for mining and milling purposes, viz., a mill site used solely for the purpose of supplying water pipes to other mining claims, or for the use of the timber upon the mill site, Two Sisters Mill Site, *supra*; the construction of a ditch for conveying water for the use of a lode claim, Lennig, *supra* (5); the appropriation of land for the purpose of conveying water to and for a road and in transporting ore from actively operated mining claims, Hales vs. Symons, 51 L. D. 123; dumping waste and ore from a tunnel in immediate connection with the mill site; the construction of a dam for the utilizing of a water power in connection with such tunnels, Peru Mill Site, *supra* (6); see, Two Sisters Mill Site, *supra* (7); Iron King Mill Site, 9 L. D. 201; a dam for the impounding of tailings, Hecla Co., *supra* (1); a frame house to be used as a store house having no connection with mining operations, Mint Mill Site, 12 L. D. 624; see Peru Mill Site, *supra*; Two Sisters Mill Site, *supra*; Iron King Mill Site, *supra*; coke ovens for the use of a third party, a smelting company, Syndicate Mill Site, 11 L. D. 561; a boarding house, store, sawmill and wharf, Alaska Copper Co., *supra* (4). A rock crusher or pulverizer, not shown to be connected with or forming an essential part of the instrumentalities used in any process of reduction is not a "reduction works." Pacific Co., 51 L. D. 459.

[9] Hecla Co., *supra* (1).

[10] Watterson vs. Cruse, 179 Cal. 379, 176 Pac. 870; see Valcalda vs. S. P. Mines, *supra* (5).

In Watterson vs. Cruse, *supra*, the court said: "Mr. Lindley states the rule thus: 'Such improvements or betterments as have been placed upon the property by the original locator, if they fall within the class designated as fixtures, become a part of the realty, and the subsequent appropriation of the land carries with it, necessarily, whatever may be affixed to it. Prior to the determination of his estate by the perfection of a location, it can not be doubted that the prior locator may sever and remove all machinery, buildings and other improvements which, by the manner of their attachment to the soil, have become a part of the freehold. But his right of entry for that purpose ceases when his estate is terminated.' 2 Lindley on Mines (3d ed.), sec. 409. We are satisfied that is a correct statement of the law."

§ 811. Location of Mill Sites.

The federal mining law is silent as to the manner of locating mill sites,[10a] and in the ordinary sense, a mill site is not a mining claim,[11] although, in the case of a patent for a town site, it was held to be within the term any mining claim or possession held under existing laws.[12] Other than in the matter of discovery, a mill site location may be made in the same manner as a placer mining[13] claim upon non-mineral[14] land. It has been said that the location must be made "in the manner required by local statutes"[15]; but there is no provision in the mining law permitting a state to so legislate.[16] The claimant connects himself with the government by the erection of a mill[17] when the land is used or occupied by the proprietor of a vein or lode, for mining or milling purposes, or by the owner of a quartz mill or reduction works, but not owning a mine in connection therewith.[18]

§ 812. No Annual Expenditures Required.

No annual expenditure is required upon a mill site[19]; nor is there any specific time within which a mill site shall commence to be used as such[20]; but intention to use is not sufficient.[21]

§ 813. Number of Mill Sites.

A separate mill site is not, necessarily, complemental to each lode location,[22] nor does the mining law contemplate that a mill site may be patented for each of a group of contiguous lode claims held and worked

[10a] Hargrove vs. Robertson, 15 L. D. 499.
See Cal. C. C. § 1426j.

[11] St. Louis Co. vs. Kemp, 104 U. S. 636; Hales & Symons, *supra* [8]; Burns vs. Clark, *supra* [2]. A mill site is an adjunct of a mine. Helena Co. vs. Dailey, *supra* [3]. See, also, Watterson vs. Cruse, *supra* [10]; *but see* Cleary vs. Skiffich, *supra* [1]. In Rico Townsite, 1 L. D. 557, it is said: "It is true that the statute is silent as to the location of mill sites; but it is not unreasonable to suppose such location must be made substantially as that of a mining claim." See, also, Hargrove vs. Robertson, *supra* [10a].
In Cleary vs. Skiffich, *supra* [1], it is held that "a mill site is a mining location."

[12] Hartman vs. Smith, *supra* [8]; *compare* Cleary vs. Skiffich, *supra* [1].

[13] Burns vs. Clark, *supra* [2]; Kershner vs. Trinidad Co., *supra* [1]. See Cal. Civ. Code, § 1426*j*.

[14] Howard, 15 L. D. 504; Yankee Mill Site, *supra* [2]; Montana-Illinois Co., *supra* [2]; *but see* Hartman vs. Smith, *supra* [8], and *compare* Cleary vs. Skiffich, *supra* [1]. The erection and maintenance of the mill itself is notice of the claim upon which it stands and operates as a location of the land. See Cyprus Mill Site, *supra* [7]; Two Sisters Mill Site, *supra* [7]; Kershner vs. Trinidad Co., *supra* [1]. See, generally, Hard Cash Claims, *supra* [1]. No location of a mill site, however valid, would hold as against an abandonment or forfeiture of a lode claim associated with a mill site, for, naturally, the loss of the lode claim automatically would cause the loss of the mill site. Watterson vs. Cruse, *supra* [10]. In any event, for safety, a demarcation of the mil site should be made. See 5 U. S. Com. St., p. 5691, § 4645; Newark Co. vs. Meinke, 3 C. L. O. 68.

[15] See Kirshner vs. Trinidad Co., *supra* [1]; Costigan Min. Law, 225.

[16] *Compare* 5 U. S. Comp. St., p. 5525, § 4620 with *Id.*, p. 5691, § 4645. See Cleary vs. Skiffich, *supra* [1].

[17] Kirshner vs. Trinidad Co., *supra* [1].

[18] 5 U. S. Comp. St., p. 5691, § 4645. It has been held that it is sufficient possession of a mill site if its corners are marked with painted posts and the claimant has built thereon a house and stable, constructed a graded wagon road leading from the mill site to his mines and run a tunnel to increase the flow of water. Such possession is sufficient to enable him to maintain an action in ejectment against an intruder. Valcalda vs. S. P. Mines, *supra* [5]; *but see* Alaska Copper Co., *supra* [8]. Any use in good faith for any mining purpose in connection with a lode claim would be within the meaning of the statute. It is not intended that it shall be used for such work as is done upon the mine itself because of the requirement of the non-mineral character of the land. Hartman vs. Smith, *supra* [8]; see, also, Burns vs. Clark, *supra* [2]; and see Garrard vs. S. P. Mines, 82 Fed. 578, aff'd. 94 Fed. 983.

[19] Alaska Copper Co., *supra* [8].

[20] Valcalda vs. S. P. Mines, *supra* [5]; Alaska Copper Co., *supra* [8].

[21] Hudson Co., 14 L. D. 544.

[22] Alaska Copper Co., *supra* [8]. In this case the land department said: "Whilst no fixed rule can well be established, it seems plain that ordinarily one mill site affords abundant facility for the promotion of mining operations upon a single body of lode claims." See, also, Hard Cash Claims, *supra* [1].

in common.[23] It has been held that more than one mill site may be embraced in an application for a patent, provided all of such tracts combined keep within the restriction of five acres of nonmineral land.[24]

§ 814. Patent Proceedings.

A mill site may be applied for separately, or in conjunction with a lode claim or claims by a lode claimant or it may be the subject of an independent application made by the lode claimant,[25] or by the owner of a quartz mill or reduction works.[26]

In an application for a conjoint patent for a lode claim and mill site the statutory expenditure of five hundred dollars upon the lode claim is sufficient.[27] The owner of a quartz mill or reduction works must have a mill or reduction works upon the premises as a condition precedent to patent.[28] In each instance the proof must show the nonmineral character of the ground and its reasonable use for mining or milling or smelting purposes.[29]

§ 815. Adverse Claim.

A mill site is a proper subject for adverse proceedings,[30] and the courts will entertain adverse suits involving mill site conflicts with mining locations.[31]

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[23] Hard Cash Claims, *supra* [1]; see Alaska Copper Co., *supra* [8]; Helena Co. vs. Dailey, 36 L. D. 147. Satisfactory and sufficient reasons should exist for the inclusion of more than one mill site in an application for patent for a group of locations. Alaska Copper Co., *supra* [8]; Brick Pomeroy Mill Site, *supra* [2]; Hard Cash Claims, *supra* [1].

[24] Hoggin, *supra* [5]; Alaska Copper Co., *supra* [8]; Brick Pomeroy Mill Site, *supra* [2], holding that where more than one mill site is applied for, reason for the necessity must be shown.

[25] Min. Regs. par. 61; Eclipse Mill Site, *supra* [1]; Ebner Co. vs. Hallum, 47 L. D. 32. The use or occupation of the land for mining or milling purposes is the only requisite for a patent therefor. See 5 U. S. Comp. St., p. 5691, § 4645; Lennig, *supra* [5]; Cyprus Mill Site, *supra* [7]; Two Sisters Mill Site, *supra* [7]; Le Neve Mill Site, *supra* [8]; Gold Springs Mill Site, *supra* [8]; Brodie Co., *supra* [1]; Hard Cash Claims, *supra* [1].

Where a mill site and a lode claim are embraced in an application for patent a copy of the plat and notice of intention must be conspicuously posted upon both properties. Min. Regs., par. 63; Silver Star Mill Site, 25 L. D. 165; Peacock Mill Site, 27 L. D. 373.

[26] Min. Regs. par. 64. The preliminary requirements as to survey and notice applicable to lode claims are enumerated in § 2337 of the Rev. St.; Phoenix Co., 40 L. D. 314. See, also, Peacock Mill Site, *supra* [25].

See preceding note.

[27] Lessig, 1 C. L. O. 1; Alta Mill Site, 8 L. D. 195.

[28] Alta Mill Site, *supra* [27]. The application for a mill site which does not embrace an application for any mine noncontiguous thereto, nor claim that the applicant is "the owner of a quartz mill or reduction works, not owning a mine in connection therewith" is without merit. Hamburg Co. vs. Stephenson, *supra* [4]. It is subject to the same requirements as to survey and notice as are applicable to lode claims. Snyder vs. Waller, 25 L. D. 7; Hamburg Co. vs. Stephenson, *supra* [4], and the application for patent must be accompanied by a nonmineral affidavit. Alta Mill Site, 8 L. D. 196.

[29] Valcalda vs. S. P. Mines, *supra* [5]; Cyprus Mill Site, *supra* [7]; Two Sisters Mill Site, *supra* [7]; Le Neve Mill Site, *supra* [8]; Mint Mill Site, *supra* [8]; Hard Cash Claims, *supra* [1]; Alaska Copper Co., *supra* [8]; Hamburg vs. Stephenson, 17 Nev. 449, 30 Pac. 1088.

Proof of nonmineral character of mill site must appear by affidavit of two disinterested persons. Min. Regs., par. 65, and also of its use and occupation as a mille site.

[30] Durgan vs. Redding, 103 Fed. 914; Warren Mill Site vs. Copper Prince Lode, 1 L. D. 555; Bay State Co. vs. Trevillon, 10 L. D. 194; Ebner Co. vs. Hallum, *supra* [25]; Cleary vs. Skiffich, *supra* [1]; Shafer vs. Constans, 3 Mont. 369; *but see* Snyder vs. Waller, *supra* [19]; Ryan vs. Granite Hill Co., 29 L. D. 522; Helena Co. vs. Dailey, *supra* [23], dist'g. in Ebner Co. vs. Hallum, *supra* [25]. Contradictory views are expressed upon this subject in 3 Lindl. Mines (3d ed.), p. 1774, § 724; and Morrison's Mining Rights (15th ed.), p. 609.

[31] Ebner Co. vs. Hallum, *supra* [25]; see Durgan vs. Redding, *supra* [30]; Helena Co. vs. Daily, *supra* [23], (explained); Shafer vs. Constans, 3 Mont. 369.

In Cleary vs. Skiffich, *supra* [1], it is said where a lode claim was discovered outside the lines of a mill site location, but the boundaries of the lode claim were projected so as to include a portion of the mill site, such action was not a tresspass; and hence the contention that, as the title to a mining claim can not be initiated by a

§ 816. Conflicting Rights.

A person claiming an adverse right in a mill site must, in order to protect his interests in patent proceedings, give the required notice and institute proceedings in a court of competent jurisdiction within the statutory period. Such proceedings properly instituted constitute a bar to further action by the land department until the adverse claim has been determined.[32]

§ 817. Agricultural Claimant.

The location of a mill site and the building of a mill thereon may create such equities as to exclude the land from subsequent homestead appropriation.[33]

§ 818. Town Site Claimant.

A person seeking to have a mill site excluded from the entry of a town site must first establish a title to such mill site. To do this he must show that it is nonmineral in character; and the burden of proof to show this fact is upon the party alleging it.[34]

§ 819. Mill Site Within a National Forest.

A valid location of a mill site may be made within the boundaries of a national forest.[35]

§ 820. Mill Site Within Railroad Grant.

An application for patent for nonmineral land as a mill site will be rejected where such land is within the limits of a railroad grant.[36]

§ 821. Abandonment of Mill Site.

Lapse of time does not of itself constitute an abandonment of a mill site, but is only a circumstance that may be considered in determining the question of abandonment, which is one of intent.[37]

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trespass, the mill site was not subject to location by the lode claimants, was untenable. But the lode claimant must not only show that the lands in question contain minerals, but that they contain minerals of a quantity and quality that can be extracted at a profit in order to entitle him to hold the lands as mineral lands.

[32] Ebner Co. vs. Hallum, *supra* (25).

See preceding note.

[34] Adams vs. Simmons, 16 L. D. 182.

[34] Rico Town Site, *supra* (11).

[35] Alaska Co., 43 L. D. 257; Nichol, 44 L. D. 197. See, generally, U. S. vs. Langmade, 52 L. D. 700.

[36] Mongrain vs. N. P. R. Co., *supra* (2); see Keystone Mill Site vs. Nevada, *supra* (4).

[37] Valcalda vs. S. P. Mines, *supra* (10).

See § 812.

CHAPTER XLIV.

MINERS' LIENS.

§ 822. Introductory.

The statutes of the different mining states affecting miners' liens are so divergent that decisions thereon in one jurisdiction are not by any means safe guides in another.[1] As a general rule, however, it uniformly is held that such statutes are remedial and entitled to a liberal construction.[2] It is usual to include in the statute a provision for a reasonable attorney's fee to be allowed the claimant. And this has been sustained as valid.[3]

§ 823. Purpose of Miners' Liens.

A miner's lien is a creature of local statute, which should be consulted and substantially followed.[4] Its purpose is to secure the unpaid wages of those doing manual labor in or upon a mining claim, mill or reduction works,[5] and, also, the debt due to the materialman, that is,

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[1] Some of the peculiarities of the different lien laws will appear in the cases cited. For example a local law may require a verified claim of lien to be recorded. Yet in Boivard vs. American Co., 29 Fed. (2d) 361, it is held that a lien is given laborers by the Constitution; and that such a lien can not be made by the legislature to depend on compliance with such statutory conditions. In that case an oil well is declared to be a "thing" such as the law contemplates and that the liens of material men for repairs attach to the land containing the well of the lessee for whom the work was done. And the failure to file verified claims of lien does not affect the validity or priority of the lien claims.

The cases cited *infra*, note 14, hold that a watchman is not entitled to a lien for his wages, as he is not within the theory of the law contributing his labor to any construction. Yet in Idaho Co. vs. Davis, 123 Fed. 396, it is held that the laws of Idaho give a lien to a watchman or caretaker.

The following cases are illustrations of some of the rulings of the courts of interest if not of value to the miner:

In Andrews vs. Ladd, 188 Fed. 313, Noble vs. Gustafson, 204 Fed. 71, and Pioneer Co. vs. Delamotte Co. 185 Fed. 755, work upon a placer mine within Alaska, sluicing and taking out gold is held to give or create no lien. In Reese vs. Bald Mt. Co., 133 Cal. 285, 65 Pac. 578; Jurgenson vs. Diller, 114 Cal. 491, 46 Pac. 616, it is held that a laborer in a mine extracting ore was not entitled to charge or enforce a lien for his work as against the mine unless employed by the owner himself—since his work was subtractive and not constructive; in that it did not appear to be within the terms of the statute, *i. e.*, done "in the construction, alteration or repair of a building or improvement" and only in such case did the doctrine of § 1192 of the Code of Civil Procedure requiring a posting of notice to protect the owner apply. This well emphasizes the statement in the text that such liens "are creatures of local law."

This statute later was amended (in 1907) so that an owner must post notice to protect his interest against any and all laborers.

[2] See Grainger vs. Johnson, 286 Fed. 833, *certiorari* denied 262 U. S. 749. In California laborers' liens are protected by § 15, Art. XX of the Constitution. Hammond Co. vs. Barth Corp., 202 Cal. 606, 262 Pac. 29; Trout vs. Siegel, 202 Cal. 706, 262 Pac. 320.

[3] Hobart vs. Jones, 51 Nev. 315, 274 Pac. 921; Morley vs. McCaskey, 134 Okla. 50, 54, 270 Pac. 1107, 272 Pac. 850.

[4] Church vs. Smithea, 4 Colo. A. 175, 35 Pac. 267; see Davis vs. Alford, 94 U. S. 545. A miner's lien upon real property has been declared to be in the nature of a mortgage of the property, though it is imposed by statute in favor of a whole class of persons. It has also been likened to an attachment and to a *lis pendens*. Springston vs. Wheeler, 3 Ind. T. 388. See Summers on Oil and Gas, p. 656, § 216 *et seq.*

[5] See Cascaden vs. Wimbish, 161 Fed. 241; Pioneer Co. vs. Delamotte Co., *supra* [1]; Andrews vs. Ladd, *supra* [1]; Noble vs. Gustafson, *supra* [1]; Palmer vs. Uncas, 70 Cal. 614, 11 Pac. 666; Tredinnick vs. Red Cloud Co., 72 Cal. 78, 13 Pac. 152; Chappius vs. Blankman, 128 Cal. 362, 60 Pac. 925; Higgins vs. Carlotta Co., 148 Cal. 700, 84 Pac. 758; Consolidated Co. vs. Bosworth, 40 Cal. A. 89, 180 Pac. 60; see, generally, Olson-Mahoney Co. vs. Dunne Co., 30 Cal. A. 332, 159 Pac. 178; Colorado Co. vs. Stearns Co., 60 Colo. 412, 153 Pac. 765; Thompson vs. Wise Boy Co., 9 Ida. 363, 74 Pac. 958; Stearns-Rogers Co. vs. Aztec Co., 14 N. M. 300, 93 Pac. 706; *but see* Williams vs. Hawley, 144 Cal. 97, 77 Pac. 762; *compare* Idaho Co. vs. Davis, *supra* [1]; Barnard vs. McKenzie, 4 Colo. 251; Lindemann vs. Belden Co., 16 Colo.

the person who furnishes materials actually used in the improvement, alteration or repair of such property.[6]

§ 824. Contract Essential.

The work must be done or the materials must be furnished under a contract, expressed or implied, with one in lawful possession of the property as the owner, agent, receiver, lessee,[7] or one working the claim under an option or working bond.[8]

§ 825. Protection of Owner.

When property is being worked by one other than the owner the latter protects the property from possible lien by posting notice thereon to the effect that the property is being so worked and that he will not be responsible for any debt or charge created thereby.[9] A local statute may further require that such notice be verified and recorded within a certain time after its posting.[10]

A. 342, 65 Pac. 403; Morrison vs. New Haven Co., 143 N. C. 251, 55 S. E. 611. A pit sunk within a mining claim is a structure. Helm vs. Chapman, 66 Cal. 291, 5 Pac. 352; Williams vs. Mountaineer Co., 102 Cal. 134, 34 Pac. 702 and 36 Pac. 388. An oil well has been held to be a structure within the meaning of that term as used in mechanics' lien laws. Haskell vs. Gallagher, 20 Ind. A. 224, 50 N. E. 485; Kanawha Co. vs. Wenner, 71 W. Va. 477, 76 S. E. 893. The machinery in a dredge boat, used in placer mining, being unpaid for, subjected the entire consolidated claim to a lien upon it as a whole. Colorado Co. vs. Stearns-Rogers Co., *supra*.

A coal mine is held to be an improvement on land in Central Tr. Co. vs. Sheffield Co., 42 Fed. 106, 9 L. R. A. 67, and coal cars are "material furnished" creating a lien. Oil tanks and fixtures are "erections and improvements" within the line law, so held in American Tank Co. vs. Cont. & Com. Bank, 3 Fed. (2d) 122. The lien attaches to an oil and gas well and the interest of an assignor of the lease who reserves a share of the net profits of the well is held subject to it. Hollingsworth vs. White, 289 Fed. 401. The lien binds the mine and mill but not a detached and distant power plant operated with it. Salt Lake Co. vs. Chainman Co., 137 Fed. 632. No lien is allowed in Colorado for hauling ores. Barnard vs. McKenzie, *supra* (5).

Land necessary for the protection of a well is subject to the lien for digging the same. Keane vs. Thos. B. Watson Co., 149 Wash. 424, 271 Pac. 73.

Merchandise supplied for use as part of a drilling equipment was not the basis of a materialman's lien on an oil or gas well leasehold. Given vs. Campbell, 127 Kan. 378, 273 Pac. 442.

[6] Silvester vs. Coe Co., 80 Cal. 510, 22 Pac. 217. Fuel is held to be material used. Silvester vs. Coe, *supra*. So lumber depreciated by being made into forms for moulding or running concrete, is "used" to the extent that it is lessened in value, *supra* (5); Olson-Mahoney Co. vs. Dunne Co., *supra* (5); Ensele vs. Jolley, 188 Cal. 297, 204 Pac. 1085; Grants Pass Co. vs. Enterprise Co., 58 Or. 174, 113 Pac. 859. Electric power is held to be material supplied giving a lien in Grants Pass Co. vs. Enterprise Co., *supra*. A power line can be subject to the laborer's or materialman's claim. Western Co. vs. Colley, 79 Cal. A. 776, 251 Pac. 331.

[7] Higgins vs. Carlotta Co., *supra* (5). See P. W. Wood vs. Blalack, 86 Cal. A. 576, 261 Pac. 737.

[8] Hines vs Miller, 122 Cal. 517, 55 Pac. 401; Ah Louis vs. Harwood, 140 Cal. 500, 74 Pac. 41.

[9] Hamilton vs. Delhi Co., 118 Cal. 148, 50 Pac. 378; Gould vs. Wise, 18 Nev. 253; Lamb vs. Goldfield Co., 37 Nev. 9, 138 Pac. 902; see, also, McClung vs. Paradise Co., 164 Cal. 517, 129 Pac. 774; Reynolds vs. Norman, 57 Colo. 339, 141 Pac. 466.

In Silvester vs. Coe Co., *supra* (6), it is said: "It is claimed by the appellant that it was relieved from liability by the posting of a notice that it would not be responsible for materials furnished the contractors, but conceding that such a notice, properly posted, would prevent the attachment of the lien, the court below found upon sufficient evidence that the plaintiffs had no actual knowledge that such a notice had been posted, and that it was not posted in a conspicuous place, as required by the statute, which meets this point." See Spalding vs. Martin, 241 Fed. 372; Didier vs. Webster Corp., 49 Nev. 5, 234 Pac. 520.

[10] See Ariz. Laws, 1915, p. 144; Cal. C. C. P., § 1192.

A recorded notice of nonliability which was acknowledged before a notary public instead of being verified as the law requires was held to be noneffective. Leoni vs. Quinn, 189 Cal. 622, 209 Pac. 551; Pasqualetti vs. Hilson, 43 Cal. A. 718, 185 Pac. 693; Western Works vs. California Co., 60 Cal. A. 756, 214 Pac. 491; Hammond Co. vs. Gordon, 84 Cal. App. 705, 258 Pac. 612; Johnson vs. Smith, 97 Cal. A. 756, 276 Pac. 146.

§ 826. Lien Protected.

The issuance of a mining patent does not impair any lien which may have attached in any way whatsoever to any mining claim or property thereto attached prior to the issuance of a patent.[11]

§ 827. Subordinate to Mortgage.

Claims for materials, supplies or labor furnished to a mining claim before the appointment of a receiver are subordinate to a prior mortgage.[12]

§ 828. Subordinate to Deed of Trust.

In Beard vs. Lancaster Co.,[13] it is held that the lien of a deed of trust is prior and superior to the liens of persons who have done the work and furnished labor in performance of contracts made by them with a lessee in connection with the drilling of an oil well on the leased property, where the trust deed was recorded prior to the execution of the lease, and prior to the transactions between the mechanic's lien claimants and the lessee; and the fact that the beneficiary under the trust deed, by its vice president, indorsed on the lease a consent to the execution and delivery of the lease did not constitute a waiver of the priority of its lien as against persons furnishing labor or materials to the lessee.

§ 829. Not Entitled to Lien.

It is a general rule that a right to a lien upon mining property is given only to those who do work[14] or furnish materials[15] for the working, preservation or development of the property. Hence, where the services rendered do not enter into any improvement upon, working or development of the property, either presently or prospectively, or the material furnished is not actually used in, say, the construction of the property, a lien can not be asserted upon the property for such services or materials.

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[11] Butte Co. vs. Frank, 25 Mont. 344, 65 Pac. 1. The lien is expressly preserved by § 2332 Rev. Stat. U. S., § 4631, 5 U. S. Com. St., p. 5665.

[12] Fidelity Co. vs. Shenandoah Co., 42 Fed. 372. For preference of trust deed over mechanics' liens see Fidelity Ass'n vs. Shaefer, 59 Cal. A. 40, 210 Pac. 47. As to receiver's certificates, see International Co. vs. Decker Bros., 152 Fed. 78; Nowell vs. International Co., 169 Fed. 497.

[13] 72 Cal. A. 148, 236 Pac. 970. A mortgage recorded after the work is done will not be given preference over a lien for the work. Ah Louis vs. Harwood, *supra* [8]. § 1186, Cal. C. C.; Grants Pass Co. vs. Enterprise Co., *supra* [9], and see Crowther vs. Fidelity Co., 85 Fed. 41. The lien of one furnishing supplies attaches as of the time they are furnished. Mott vs. Wissler Co., 135 Fed. 697. Liens for labor and materials are prior only to other liens attaching subsequent to commencement of the work. Morley vs. McCaskey, *supra* [3]; Jordan vs. Myers, 126 Cal. 565, 58 Pac. 1061. A mortgagee or holder of a trust deed as security need not give the notice or post notice as required of the owner to protect his rights, if his claim is of record. Stearns-Rogers Co. vs. Aztec Co., *supra* [9].

[14] Lindemann vs. Belden Co., *supra* [5]. A geologist and mining expert, Id., or a watchman engaged in caring for a mine while it is lying idle, are not entitled to a lien. Williams vs. Hawley, *supra* [5]. See Bell Co. vs. Price, ___ Tex. C. A. ___, 251 S. W. 55 A. In Jurgenson vs. Diller, *supra* [1], it is said that a laborer is not entitled to a lien for work done for a person whom he knew not to be the owner, and not to be working the mine as representative of the owner. See, also, Reese vs. Bald Mt. Co., *supra* [1]. Both these cases involved subtractive mining which was not "the construction, alteration or repair of a building or other improvement."

[15] Silvester vs. Coe Co., *supra* [6]; Bewick vs. Muir, 83 Cal. 368, 373, 23 Pac. 389, 390; Reed vs. Norton, 90 Cal. 598, 26 Pac. 767; *Id.* 27 Pac. 426; Hamilton vs. Delhi Co., *supra* [9]; Wilson vs. Nugent, 125 Cal. 280, 57 Pac. 1008; Stimson vs. Los Angeles Co., 141 Cal. 30, 74 Pac. 357; Bennett vs. Beadle, 142 Cal. 239, 75 Pac. 843; see Western Co. vs. Colley, *supra* [3]; Missoula Co. vs. O'Donnell, 24 Mont. 65, 60 Pac. 594 and 991.

CHAPTER XLV.

MINING LEASES.

§ 830. Characteristics.

The legal understanding of a lease is a contract for the possession and profits of land for a determinative period, with a recompense in rent.[1] There is a distinction, upon questions of interpretation, between a mining lease and an oil and gas lease or an agricultural lease;[2] the reason being that leases, like all other instruments relating to a particular business, must always be construed with due regard to the known characteristics of the business;[3] but there is no difference between them as respects the interest or estate conveyed;[4] and, as to the owner and his grantees, their dominion is, upon general principles, as absolute over the solid as over the fluid minerals.[5]

§ 831. Peculiarities.

Each mining lease has its own peculiar details.[6] It is a contract for labor and not a lease, if it provides that the lessor shall have a certain part of the mineral extracted as a return for working the property for a fixed time.[7] It is sometimes coupled with an option to purchase the property leased, in which case they are separate instruments and the

[1] U. S. vs. Gratiot, 14 Pet. 526; Raynolds vs. Hanna, 55 Fed. 783, 59 Fed. 723; Del Valle vs. Rossy, 29 Fed. (2d) 353. In estimating the language which constitutes a lease, the form of words used is of no consequence. It is not necessary that the term "lease" should be used. Whatever is equivalent will be equally available. If the words assume the form of a license, covenant, or agreement, and the other requisites of a lease are present, they will be sufficient. Pelton vs. Minah Co., 11 Mont. 281, 28 Pac. 310; Gulf Co. vs. Hayne, 138 La. 555, 70 So. 512. In Conner vs. Garrett, 65 Cal. A. 664, 224 Pac. 786, it is said that whether the instrument is called a lease, a license, or a contract of employment the result is the same. See, also, Northern Light Co. vs. Blue Goose Co., 25 Cal. A. 292, 143 Pac. 540; Wheeler vs. West, 71 Cal. 126, 11 Pac. 871; Hudepohl vs. Liberty Hill Co., 80 Cal. 553, 22 Pac. 339; Michalek vs. New Almaden Co., 42 Cal. A. 741, 184 Pac. 56; Kirk vs. Mathier, 140 Mo. 23, 41 S. W. 252; Morton vs. Droster, __ Mo. A. __, 185 S. W. 733, holding a so-called lease a mere option.

[2] Burgan vs. South Penn. Co., 243 Pa. St. 128, 89 Atl. 823; see Gulf Co. vs. Hayne, *supra* [1].

[3] McKnight vs. Manufacturing Co., 146 Pa. St. 200; see, also, Rechard vs. Cowley, 202 Ala. 337; 80 So. 419; Bryson vs. Crown Point Co., 185 Ind., 156, 112 N. E. 1.

[4] Prager's Estate, 74 Pa. Super. Ct. 595. In Percy Co. vs. Newman Co., 300 Fed. 142, it is said: "What does a mining lease vest in the lessee? Providence Co. vs. Nicholson, 178 Fed. 29, held that a mining lease conveys nothing but a right to search for and extract the minerals, and that the lessee acquired no other rights, and that the title in all other respects remained in the lessor. See, also, Butler vs. McGorrisk, 114 Fed. 300. In Ewert vs. Robinson, 289 Fed. 740, Judge Kenyon's review of the authorities construing leases shows that in the western states, at least, in the absence of an expressed covenant, the ordinary oil or mining lease conveys no title to the mineral in place. Furthermore, in U. S. vs. Biwabik Co., 247 U. S. 116 rev'g. 242 Fed. 9, and distinguishing Von Baumbach vs. Sargent Co., 242 U. S. 503, the court held that a mining lease was not to be construed as a conveyance of ore in place, in spite of the fact that the latter could be measured with substantial accuracy. In other words, it grants merely an incorporeal hereditament or easement, and not an estate in fee. In Reinecke vs. Spalding, 30 Fed. (2d) 369, it was held that the right to mine under a lease which lease might have been cancelled at any time was not a sale of the ore. However, it has been held by the California courts that an oil lease grants a vested interest where the entire consideration has been paid and there are no conditions in the lease requiring development of the property. Jameson vs. Chanslor-Canfield Co., 176 Cal. 1, 167 Pac. 369; Taylor vs. Hamilton, 194 Cal. 768, 230 Pac. 656; Hall vs. Augur, 82 Cal. A. 600, 256 Pac. 232.

See *infra*, note 7.

[5] Hague vs. Wheeler, 157 Pa. St. 341, 27 Atl. 714.

[6] Settle vs. Winters, 2 Ida. 215, 10 Pac. 216; see Gulf Co. vs. Hayne, *supra* [1].

See § 842.

[7] Hudephohl vs. Liberty Hill Co., *supra* [1]; Michalek vs. New Almaden Co., *supra* [1]; see Vietti vs. Nesbitt, 22 Nev. 390, 41 Pac. 151; *but see* Waskey vs. Cham-

option may outlive the lease.[8] Time always is of the essence of the lease,[9] whether there is an express stipulation therein or not.[10]

§ 832. Title Conveyed.

Mining leases do not constitute a sale of any part of the land, and the ore or mineral derived from the usual operation of open mines or quarries constitutes the rents and profits of the land and belongs to the tenant for life or years; but this rule does not apply to unopened mines in the absence of a contract for opening them.[11]

§ 833. Covenants.

Where there is any doubt or uncertainty as to the meaning of covenants in a mining lease they are construed strongly against the lessor and in favor of the lessee.[12]

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bers, 224 U. S. 564, holding that a lease is an interest in the land; see, also, Webb vs. O'Brien, 263 U. S. 313, rev'g. 279 Fed. 117; Mathews Co. vs. New Empire Co., 122 Fed. 972; U. S. Gypsum Co. vs. Mackey Co., 252 Fed. 399; Kift vs. Mason, 42 Mont. 232, 112 Pac. 392; Snider vs. Yarborough, 43 Mont. 203, 115 Pac. 411. A mining lease for a definite period contained an option for the purchase of the mining property, but it did not contain any express provision for forfeiture. Under such a lease it is doubted whether a forfeiture could be enforced. Grant Co. vs. Marks, 92 Or. 443, 181 Pac. 345. In Huckaby vs. Northam, 68 Cal. A. 89, 228 Pac. 719, it is held that "where an option to purchase a mining claim expressly made time of its essence and provided that upon the failure of the optionee to make the payments therein provided, the option agreement should terminate and be at an end and all rights were to be forfeited, the failure of the assignee of the optionee to make the required payments forfeited all its rights under the option." A person holding an option to purchase a mining claim coupled with the right of possession under certain conditions stands in the position of a lessee and not that of a purchaser. Nicholson vs. Smith, 31 Ida. 545, 174 Pac. 1008; Virginia Co. vs. Haeder, 32 Ida. 240, 181 Pac. 141.

[8] Montrozona Co. vs. Thatcher, 19 Colo. A 371, 75 Pac. 595; Settle vs. Winters, *supra* [6]; Merk vs. Bowery Co., 31 Mont. 298, 78 Pac. 519; see Halla vs. Rogers, 176 Fed. 709; Westerman vs. Dinsmore, 68 W. Va. 594, 71 S. E. 250; *but see* Jackson vs. Twin States Oil Co., 95 Okla. 96, 218 Pac. 324; and see Aggers vs. Shaffer, 256 Fed. 648. A conjoint lease and option expressly provided that "time is of the essence of this agreement." The time for making the stipulated payments was subsequently extended by a written agreement between the parties. But, the extension, based upon a valuable consideration, enlarging the time within which payments upon the original contract must be made to a definite date, did not operate as a waiver of the provision in the contract making time of the essential essence thereof. Virginia Co. vs. Haeder, *supra* [7].

[9] Waterman vs. Banks, 144 U. S. 394 rev'g. 27 Fed. 827; Kelsey vs. Crowther, 162 U. S. 401; Gaines vs. Chew, 167 Fed. 635; Taylor vs. Hamilton, *supra* [4].

See Options, notes 3 and 4.

[10] Skookum Oil Co. vs. Thomas, 162 Cal. 539, 123 Pac. 363; Champion Co. vs. Champion Mines, 164 Cal. 213, 128 Pac. 315; Taylor vs. Hamilton, *supra* [4], and see, also, Taylor vs. Longworth, 14 Pet. 174, cited in Brown vs. Covillaud, 6 Cal. 571, Sec. 57 A. L. R. 340, note.

See Options.

[11] See Campbell vs. Lynch, 88 W. Va. 209, 106 S. E. 869. Where a lease provides for the payment of a stipulated royalty per ton for the ore mined the lessee is not a purchaser of the ore in place. U. S. vs. Biwabik Co., *supra* [4]. Where the lessee is granted the absolute and exclusive right to extract and have the ore in the land and to remove it during terms, such as twenty-five and fifty years, so long as to be practically equivalent to unlimited time, the lease in reality is a sale of the ore, and the royalties reserved in the lease are in fact the purchase price thereof. Von Baumbach vs Sargent Land Co., *supra* [4], dist'g. in U. S. vs. Biwabik, *supra* [4]. Where it clearly appears by a clause in a lease providing "for the term and period of ten years from date hereof with the right of renewal for a further term of ten years at the end of such term for which it may be renewed" this, upon proper notice of election to renew gives the lessee the right of renewal in perpetuity. Becker vs. Submarine Oil Co., 55 Cal. A. 698, 204 Pac. 245; Burns vs. New York, 213 N. Y. 516, 108 N. E. 77; Blackmore vs. Boardman, 28 Mo. 420 But where the lease is uncertain in this particular it will be construed as importing but one renewal. Diffenderfer vs. Board, 120 Mo. 447, 25 S. W. 542.

[12] Niles Co. vs. Chemung Co., 234 Fed. 294; see McKeever vs. Westmoreland Co., 219 Pa. St. 234, 68 Atl. 670; Tustin vs. Philadelphia Co., 250 Pa. St. 425, 95 Atl. 595.

See *infra*, note 29.

The contrary is the rule in oil and gas leases. Halbermel vs. Mong, 31 Fed. (2d) 822.

A provision in a mining lease was that the lessee mine ore only from the three hundred foot level. The court held that everything below the two hundred foot level and above the three hundred foot level is called the three hundred foot level and that stoping ore from the bottom of a sixty foot winze sunk from the bottom of the two hundred foot level was not a violation of the lease. Chambers vs. Lowry, 21 Mont. 478, 54 Pac. 816.

See § 842 and see *infra*, note 20.

§ 834. Covenant to Work the Property.

A covenant to work the property continuously means continuously to the end of the term.[13] But a mere covenant to work the property is not tantamount to a covenant to work continuously.[14]

§ 835. Suspension of Work.

Where it is provided in the lease that the obligation to work the property, or to pay the royalty, is suspended during strikes and other unavoidable casualties over which the lessee has no control, three things must occur in order to entitle the lessee to the benefit of such provision, viz: (1) The casualty must be unavoidable; (2) it must be one over which the lessee has no control; (3) it must be such as to cause the lessee to close down the mine.[15]

§ 836. Implied Covenant.

Where a lease provides for a royalty, there is an implied covenant on the part of the lessee for diligent search and operation; and the lessee is bound to proceed with his mining operations with reasonable diligence.[16]

§ 837. Extension of Lease.

Acts of the lessor that hinder and delay the lessee in his mining operations serve to extend the time for the extraction of mineral beyond that which is fixed in the lease.[17]

§ 838. Removal of Machinery.

Where it is stipulated in the lease what machinery and other improvements, placed by the lessee upon the leased premises, may be removed, such stipulation is controlling.[18] Mining machinery, apparatus and appurtenances are not regarded as fixtures that pass with the soil,

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[13] Zelleken vs. Lynch, 80 Kan. 746, 104 Pac. 563; see Lehigh Co. vs. Searle & Stark, 248 Pa. St. 385, 94 Atl. 74. Where it is stipulated in a lease that the lessee shall work the property steadily and continuously during the term as the weather and seasons of the year will permit he is bound to continue the work as steadily and continuously as such conditions may allow during the entire term of the lease. The terms of the lease can not be varied by evidence of miners' customs or usages to the contrary, unless the terms of the lease are obscure or uncertain. Northern Light Co. vs. Blue Goose Co., *supra* (1).

[14] Caley vs. Portland Co., 12 Colo. A. 397, 56 Pac. 350, *but see* Zelleken vs. Lynch, *supra* (13).

[15] Bennett vs. Howard, 175 Ky. 797, 195 S. W. 117; see, also, Hitchman Co. vs. Mitchell, 202 Fed. 512, revs'd. 14 Fed. (2d) 685; revs'd. 245 U. S. 229; Matoaka Co. vs. Clinch Valley Co., 121 Va. 522, 93 S. E. 799.

[16] Payne vs. Neuval, 155 Cal. 46, 99 Pac. 476. McIntosh vs. Robb, 4 Cal. A. 484, 88 Pac. 517; Sledge vs. Stolz, 41 Cal. A. 221, 182 Pac. 340. See, also, Sharp vs. Behr, 117 Fed. 872 and cases therein cited. Unreasonable delay in commencing work subjects the lease to forfeiture. Acme Oil Co. vs. Williams, 140 Cal. 681, 74 Pac. 296; Hall vs. Augur, *supra* (4); Mills vs. Hartz, 77 Kan. 218, 94 Pac. 142.

If a reasonable and fair interpretation of the terms of a lease shows that it was made to depend on something essential to its object and purpose, the law implies the condition to attain that end. Petroleum Co. vs. Coal Co., 89 Tenn. 391, 18 S. W. 65; Hall vs. Augur, *supra*.

[17] Halla vs. Rogers, *supra* (8). The owner of oil lands executed a mortgage to secure certain indebtedness and subsequently executed a lease for the development of the land for oil. The foreclosure of the mortgage and a sale under the decree of foreclosure put an end to the leasehold interest. Mercantile Trust Co. vs. Sunset Road Co., 176 Cal. 461, 168 Pac. 1037.

[18] Bache vs. Central Co., 127 Ark. 397, 192 S. W. 225; s. c. Shaleen vs. Central Co., 192 S. W. 225. Parties to a mining lease are at liberty to contract in any manner they see fit, as to ownership of improvements and machinery placed on the premises during term of lease. American Fork Co., 291 Fed. 746.

See Conditional Sales.

although actually affixed thereto, and may be removed by the lessee in the absence of an express stipulation in the lease to the contrary.[19]

§ 839. Abandonment of Lease.

Mining leases are subject to abandondement;[20] but an abandonment can not be brought about by action or inaction on the part of the lessee alone. There must be some act or attitude on the part of the lessor indicating his acquiescence in the abandonment.[21]

§ 840. Forfeiture of Lease.

Where the right of forfeiture is confined to the failure of the lessee respecting the covenants and conditions which are expressed in the lease, and does not arise upon the nonobservance of an implied covenant or condition, the lessor can not claim the right to forfeit the lease because of the failure of the lessee to perform an implied covenant.[22] A forfeiture and reentry by the lessor between rental priods releases the lessee from liability for all rents not fully accrued.[23] The acceptance of rent after covenants broken may estop the lessor from claiming forfeiture of the lease or reclaiming possession.[24] The forfeiture does not deprive the lessee of the right, within a reasonable time,[25] to remove the fixtures belonging to him.[26]

§ 841. Location and Lease.

There is nothing in the federal mining laws which render fraudulent a lease of a mining location made on the same day as the location, in pursuance of an understanding relative thereto.[27]

§ 842. Oil and Gas Leases.

Few subjects of contract contribute to the courts an equal proportion of written agreements for interpretation. The fact is so patent that courts generally, in gas and oil states, have come to place such contracts in a class of their own, and to look critically into such instru-

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[19] *Id.*; McClendon vs. Busch-Everett Co., 138 La. 722, 70 So. 781; Hart vs. Appalachian Co., 139 Tenn. 204, 201 S. W. 515; see *contra* Puzzle Co. vs. Morse, 24 Colo. A. 74, 131 Pac. 791.

See Fixtures.

[20] Wilmore Co. vs. Brown, 147 Fed. 931, and cases therein cited.

[21] Ellis vs. Swan, 38 R. I. 534, 96 Atl. 840; see, also, Pursel vs. Reading Co., 232 Fed. 806; Bearcat Co. vs. Grasselli Co., 247 Fed. 287; Mauney vs. Millar, 134 Ark. 15, 203 S. W. 10; Payne vs. Neuval, *supra* [16].

[22] DeGrasse vs. Verona Co., 185 Mich. 514, 152 N. W. 242; see Chandler vs. Hart, 161 Cal. 405, 119 Pac. 516; Core vs. New York Co., 52 W. Va. 276, 43 S. E. 128.

In Jameson vs. Chanslor-Canfield Oil Co., *supra* [4], it is said that where in a lease it is provided that failure on the part of the lessees to perform any of the conditions embodied therein for a period of thirty days shall render the lease null and void if the lessees shall elect, a forfeiture of the leasehold interest for breach of conditions can be declared only by the joint or concurrent action of the lessors; citing § 1431 of the Civil Code. This rule finds support in Calvert vs. Bradley, 16 How. 580; Union Gas Co. vs. Gillem, 212 Ky. 293, 279 S. W. 626; Howard vs. Manning, 79 Okla. 165, 192 Pac. 358; Krost vs. Moyer, 166 Minn. 153, 207 N. W. 311; Cochran vs. Gulf Ref. Co., 139 La. 1010, 72 So. 718. Decisions to the contrary are Field vs. Squires, 9 Fed. Cas. 4776; Empire Co. vs. Saunders, 22 Fed. (2d) 733; Bayside Co. vs. Dabney, 90 Cal. A. 122, 265 Pac. 566; Kelly vs. Parker, 221 Ill. A. 273; Thiessen vs. Weber, 128 Kan. 556, 278 Pac. 770; Blake vs. Everett, 1 Allen (Mass.) 248; Pearson vs. Richards, 106 Or. 78, 211 Pac. 167; Dickenson vs. Hoomes, 8 Grat. (Va.) 353; Sullivan vs. Sherry, 111 Wis. 476, 87 N. W. 471.

[23] Youngs Co. vs. Courtney, 219 Fed. 871.

[24] East Sioux Co. vs. Wisconsin Co., 39 S. Dak. 301, 64 N. W. 77. Forfeitures of leases are not favored in law or equity, and will not be enforced unless the right thereto is clear and conclusive. Niles Co. vs. Chemung Co., *supra* [12].

[25] Perry vs. Aeme Co., 44 Ind. A. 207, 80 N. E. 174, on rehearing 88 N. E. 174.

[26] Conrad vs. Saginaw Co., 54 Mich. 249, 20 N. W. 39.

[27] Mason vs. U. S., 260 U. S. 545, rev'g 273 Fed. 135.

ments for the real intention of the parties, because it so frequently happens that they can not, on account of incongruous provisions, be enforced according to the strict letter of the contract.[28]

§ 843. Special Jurisprudence.

There is a special jurisprudence of the subject, one distinguishing feature of which is that language of doubtful import will be construed more favorably to the lessor, or at least that courts will incline away from a construction that would compel him, on receiving some small periodical payment, to remain inactive while his oil is drained away through wells sunk on neighboring lands.[29] Another similar tendency is, where practicable, to avoid an interpretation that would make against the development of the resources of the property involved.[30]

§ 844. Inchoate Title.

Where an oil and gas lease grants only the right to do certain things upon the land described therein and to take certain mineral substances therefrom, no title passes from the lessor until the same is severed from the realty. In respect to such agreements it is said: "The title is inchoate and for the purposes of exploration only, until oil is found. If it is not found, no estate vests in the lessee and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract."[31]

§ 845. Subletting.

Where there is no agreement in the lease against subletting, the lessee has the right to sublease portions of the land for the purpose specified in the lease.[32]

§ 846. Federal Leases of Potash Lands.

The act of July 17, 1914,[33] affects lands withdrawn or classified as phosphate, nitrate, potash, oil, gas or asphaltic minerals or which are valuable for those deposits. This act allows nonmineral entry of such lands with a reservation to the United States of the deposits on account

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[28] Ohio Oil Co. vs. Detamore, 165 Ind. 243, 73 N. E. 908.

[29] Bettman vs. Harness, 42 W. Va. 433, 26 S. E. 271; see Acme Co. vs. Williams, *supra* (16); Hall vs. Augur, *supra* (4); Taylor vs. Hamilton, *supra* (4), and see North Confidence Co. vs. Morrice, 56 Cal. A. 150, 204 Pac. 851. Oil leases are strictly construed as against the lessees. Habermel vs. Mong, *supra* (12).

[30] Parish Fork Co. vs. Bridgewater Co., 51 W. Va. 583, 42 S. E. 655. It is well settled that the principal purpose of an oil and gas lease is to procure the exploration of the land for oil and gas, to be followed by the development of it if circumstances warrant. Dill vs. Fraze, 169 Ind. 53, 79 N. E. 971. The grantee can not omit to drill and develop and hold the grant for speculative purposes purely. Hall vs. Augur, *supra* (4).

The rights of the parties to ordinary oil leases is well stated in Brookshire Oil Co. vs. Casmalia Oil Co., 156 Cal. 211, 103 Pac. 927.

[31] Brookshire Co. vs. Casmalia Co., *supra* (30), and cases therein cited; Hall vs. Augur, *supra* (4). See, also, Emerson vs. Little Six Co., 3 Fed. (2d) 265, *certiorari* denied 268 U. S. 700; Watts vs. England, 168 Ark. 213, 269 S. W. 585; Standard Oil Co. vs. Oil Co., 170 Ark. 729, 281 S. W. 360; Clark vs. Dennis, 172 Ark. 1096, 291 S. W. 807; Coever vs. Crescent Co, 315 Mo. 276, 286 S. W. 3; Caruthers vs. Leonard, ___ Tex. C. A. ___, 254 S. W. 779.

See § 954.

[32] Chandler vs. Hart, *supra* (22); Smith vs. United Crude Oil Co., 179 Cal. 573, 178 Pac. 141; c. c. 50 Cal. A. 466, 195 Pac. 434.

See Oil and Gas Lands.

[33] U. S. Code, p. 962, § 121.

of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same.

§ 847. Entry by Prospector.

Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the same upon the approval of the Secretary of the Interior of a bond to protect the nonmineral claimant.

§ 848. Potash Leases.

The act of October 2, 1917,[34] makes chlorides, sulphates, carbonates, borates, silicates or nitrates of potassium, except lands in and adjacent to Searles Lake, San Bernardino County, California, subject to disposition only under prospecting permits and leases issued by the Secretary of the Interior, except valid claims existent at date of the act and thereafter duly maintained in compliance with the laws under which initiated, which claims may be perfected under such laws. This act was repealed by the act of February 7, 1927, *infra*.[35]

§ 849. Act of February 7, 1927.

Under the act of February 7, 1927,[35] entitled "An act to promote the mining of potash on the public domain" the Secretary of the Interior may issue exclusive prospecting permits for a period not to exceed two years for the land described therein for potassium in any of the forms named in said act, viz: chlorides, sulphates, carbonates, borates, silicates or nitrates of potassium.

§ 850. Additional Provisions.

It is further provided that prospecting permits or leases may be issued under the provisions of this act on deposits of potassium in public lands, also containing deposits of coal or other minerals; and that such deposits be reserved to the United States for disposal under appropriate laws; provided, that if the interests of the government and of the lessee will be subserved thereby, potassium leases may include covenants providing for the development by the lessee of chlorides, sulphates, carbonates, borates, silicates or nitrates of sodium, magnesium, aluminum, or calcium, associated with the potassium deposits

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[34] 40 Stats. 297 U. S. Code, p. 963, § 142.

The mining laws have been repealed in part by the later leasing acts; and the land department has held that it has authority to grant prospecing permits for different minerals specified in such acts to run consecutively upon the same area and that a potassium permit may issue carrying a preference right to a lease upon discovery for not to exceed one-fourth of the area covered by the permit, upon lands embraced within a subsisting oil and gas prospecting permit, provided the permittee waives his rights to a patent. See 51 L. D. 180. There is no legal impediment, and it is in furtherance of the leasing acts to annex the same conditions to the grant of a potassium permit, where the lands at the date of the application therefor were known to have a prospective value for oil and gas.

Although a potassium prospecting permit coupled with a right to a patent for lands valuable for potassium is not technically a mining location, yet the estate that passes under the patents in both cases is absolute and unrestricted.

However, the department may exercise its discretion where the lands have a *prima facie* value for oil and gas and reject the application for a potassium permit where the right to select a one-fourth part for patent is not surrendered. It should be borne in mind that an application for permit is a mere request that a license be granted and confers no interest in the land or mineral deposit applied for. Enlow vs. Shaw, 50 L. D. 339. See Smoot, 52 L. D. 44.

[35] 44 Stats. 1057.

leased, on terms and conditions not inconsistent with the sodium provision of the act of February 25, 1920.[36]

§ 851. Exception of Fissure Veins.

Where valuable deposits of mineral now subject to disposition under the general mining laws are found in fissure veins on any of the lands subject to permit or lease under this act, the valuable minerals so found shall continue subject to disposition under said general mining laws notwithstanding the presence of potash therein.

§ 852. Applicability of the Leasing Act.

The general provisions of §§ 1 and 26 to 38, inclusive, of the act of February 25, 1920,[37] are made applicable to permits and leases under this act, the first and thirty-seventh sections thereof being amended to include deposits of potassium.[38]

§ 853. Searles Lake.

The prospecting provisions of this act do not apply to lands and deposits in or adjacent to Searles Lake, in San Bernardino County, California.

§ 854. Area.

Leases are authorized by the terms of the act for an area not exceeding twenty-five hundred and sixty acres, but will be granted only for such area as may be shown to the satisfaction of the Secretary of the Interior to contain deposits of potassium in such form and quantities as to constitute a deposit of commercial value.

§ 855. Description.

The land must be taken in compact form by legal subdivisions of the public land surveys, or if the land be not surveyed by survey executed at the cost of the permittee in accordance with regulations prescribed by the Secretary of the Interior.

§ 856. Lease by Permittee.

The permittee has a preference right within two years to lease any or all of the lands included in his permit, upon showing to the satisfaction of the Secretary of the Interior that he has discovered a valuable deposit of potash thereon, and that such land is chiefly valuable therefor. Any lands not leased by the permittee will be subjected to be leased by others under the terms set forth in the potash regulations.[39]

§ 857. Term of Lease.

Leases shall be for a period of twenty years with preference right in the lessee to renew for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the expiration of such periods.

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[36] 41 Stats. 437.
[37] 41 Stats. 437.
[38] 44 Stats. 1057.
[39] 52 L. D. 84. For form of permit, notice of application and form of lease see *Id.*

§ 858. Repeal.

The act of October 2, 1917,[40] is repealed by this act; but this repeal does not affect pending applications for permits or leases filed prior to January 1, 1926, or valid claims existent at the date of the passage of this act (February 7, 1927),[41] and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

§ 859. Leasing Act.

By the act of February 25, 1920,[42] the federal mining law was, in effect, repealed by excluding from mineral location and entry so much of the public domain, including national forests, of lands containing deposits of coal, phosphate, sodium, oil, oil shale or gas and made the operation of such lands subject to prospecting permits and leases issued only by the Secretary of the Interior, except valid claims existent at date of said act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

§ 860. Exceptions.

Lands acquired under the act known as the Appalachian Forest Act, in national parks and in lands withdrawn or reserved for military or naval uses or purposes, and the lands in San Bernardino County, California, are excluded from the provisions of said act.

§ 861. Administration.

Permits and leases are issued under the rules and regulations of the Secretary of the Interior.[43]

§ 862. Limitations.

The act of removal of limitation of April 30, 1926, which amended § 27 of the "Leasing Act," removed the limitations of one permit or lease on a geologic structure, as well as three in a state, but it did not enlarge the reward for discovery or the area of the minimum royalty lease.[44]

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[40] 40 Stats. 297.
[41] 44 Stats. 1057.
[42] 41 Stats. 437. For amendment of §§ 23 and 24 of this act in regard to leasing sodium deposits on public lands, see Stats. 1929, p. 1019.
[43] 41 Stats. 437.
[44] 44 Stats. 373.
See Elbe Co., 52 L. D. 187 In Kinney Oil Co. vs. Kieffer, 277 U. S. 488, revs'g. 9 Fed. (2d) 260, and modifying 1 Fed. (2d) 705, the court said: "The acts of 1914, *supra*, and 1920, *supra*, are to be read together—each as the complement of the other. So read they disclose an intention to divide oil and gas lands into two estates for the purposes of disposal—one including the underlying oil and gas deposits and the other the surface—and to make the latter servient to the former, which naturally would be suggested by their physical relation and relative values. The act of 1914, in providing for the disposal of the surface, directs that there be a reservation of the oil and gas deposits, together with the right to prospect for, mine and remove the same, meaning, of course, the right to use so much of the surface as may be necessary for such operations. And the act of 1920, in providing for the leasing of the oil and gas deposits, provides (§ 29) for a reservation of the surface in so far as said surface is not necessary for the use of the lessee in extracting and removing the deposits. In effect therefore a servitude is laid on the surface estate for the benefit of the mineral estate to the end, as the acts otherwise show, that the United States may realize, through the separate leasing, a proper return from the extraction and removal of the minerals. * * *
"Where one person has a homestead patent and another an oil and gas lease covering the same land and both drafted in keeping with these acts, the lessee has the right to extract and remove the oil and gas, and the appurtenant right to use the

§ 863. Wind River.

The act of August 21, 1916,[45] authorizes the Secretary of the Interior to lease for production of oil and gas ceded lands of the Shoshone or Wind River Indian Reservation in Wyoming. This act is administered through the Commissioner of Indian Affairs.

§ 864. Certain Indian Reservations.

Section 26 of the act of June 30, 1919,[46] authorized the Secretary of the Interior to lease for the purpose of mining metalliferous mineral lands in Indian reservations in certain states. This act is administered through the Commissioner of Indian Affairs.

§ 865. Sulphur Lands in Louisiana.

By the act of April 17, 1926,[47], the Secretary of the Interior is authorized to grant prospecting permits and leases for sulphur lands in Louisiana which may also contain coal or other minerals on condition that such other deposits shall be reserved to the United States for disposal under applicable laws.

§ 866. Similarity of Acts.

The similarity of this act to the "Leasing Act" is such that, practically, the same rules and regulations govern the procedure in applications for permits and leases under the first named act.

§ 867. Area.

A sulphur permit may, however, be allowed for a maximum of six hundred and forty acres only.

§ 868. Limitation.

No person, association, or corporation may take or hold more than three sulphur permits or leases in any one state during the life of such permits or leases.

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surface so far as may be necessary to that end; these rights are excepted and reserved from the estate granted by the homestead patent; their exercise involves no taking of anything granted thereby; the owner of the surface is not entitled to compensation for the minerals taken or the use of the surface pursuant to the lease, and, though he may rightfully demand compensation for the damages caused by the mining operations to his crops and agricultural improvements, he can not include improvements placed on the land after the mining operations are under way, for purposes plainly incompatible with the right of the lessee to proceed, with due care, until the oil and gas are exhausted. It well may be that, if the operations are negligently conducted and damage is done thereby to the surface estate, there will be liability therefor. But such liability will ensue, not from admissible mining operations and use of surface, but from the inadmissible negligence causing the damage."

For a collection of numerous cases affecting the various sections of the Leasing Act, see Federal Permits and Leases, Report XX of the State Mineralogist (1924), p. 218, *et seq.*

For Federal Oil and Gas Regulations, see *Id.*, p. 251, *et seq.*

[45] 39 Stats. 519.

[46] 41 Stats. 3.

[47] 44 Stats. 301. Regulations, 51 L. D. 647, § 5 of said act provides: "The general provisions of § 1 and §§ 26 to 38, inclusive, of the Act of February 25, 1920, entitled 'An act to promote mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain,' are made applicable to permits and leases under this act, the first and thirty-seventh sections thereof being amended to include deposits of sulphur, and section 27 being amended so as to prohibit any person, association, or corporation from taking or holding more than three sulphur permits or leases in any one state during the life of such permits or leases."

§ 869. Royalty.

The royalty in sulphur leases granted consequent upon a permit is five per centum of the quantity or gross value of the output of sulphur at the point of shipment to market.

§ 870. Discovery by Oil Permittee.

An oil permittee who shall make a discovery of sulphur in lands covered by his permit shall have the same privilege of obtaining a sulphur lease as is given to a sulphur permittee.

§ 871. Leases on Private Land Grants.

The act of June 8, 1926,[48] authorizes the Secretary of the Interior to lease to the grantee, or those claiming through or under him, gold, silver, and quicksilver deposits, or mines or minerals of the same, on lands in private land claims patented pursuant to decrees of the Court of Private Land Claims with reservation of such minerals or mines.

§ 872. Lease of Known Mineral Lands by State.

Subject to the provisions of subsections (a), (b), and (c) of § 1 of the act of January 25, 1927,[49] land, mineral in character within numbered school sections in place, unless land has been granted to and/or selected by and certified or approved to the state as indemnity or in lieu of any land so granted in numbered sections are subject to lease by the state as the state legislature may direct.

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[48] 44 Stats. 710. This act reads as follows: "That hereafter all gold, silver or quicksilver deposits, or mines or minerals of the same on lands embraced within any land claim confirmed or hereafter confirmed by decree of the Court of Private Land Claims, and which did not convey the mineral rights to the grantee by the terms of the grant, and to which such grantee has not become otherwise entitled in law or equity, may be leased by the Secretary of the Interior to the grantee or to those claiming through or under him, for a period of twenty years, with the preferential right in the lessee to renew the same for successive periods of ten years, upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the time of the expiration of such periods.

"That for the privilege of mining or extracting the gold, silver, or quicksilver deposits in the land covered by such lease the lessee shall pay to the United States a royalty, which shall not be less than five per centum nor more than twelve and one-half per centum of the net value of the output of gold, silver, or quicksilver at the mine, due and payable at the end of each month succeeding that of the extraction of the minerals from the mine. * * *"

For form of lease see 52 L. D. 21.

[49] 44 Stats. 1026.

The beneficiaries of this act are the states of Arizona, California, Colorado, Idaho, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. The grant also extends to the unsurveyed school sections reserved, granted, and confirmed to the state of Florida by act of September 22, 1922, 42 Stats. 1017, but all lands in Alaska are excluded.

Subsection (a) of § 1 of said act provides: "That the grant of numbered mineral sections under this act shall be of the same effect as prior grants for the numbered nonmineral sections, and titles to such mineral sections shall vest in the states at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections."

Subsection (b) of § 1 of said act provides: "That the additional grant made by this act is upon the express condition that all sales, grants, deeds, or patents for any of the lands so granted shall be subject to and contain a reservation to the state of all the coal, and other minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to lease by the state, as the state legislature may direct, the proceeds of rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools; provided, that any lands or minerals disposed of contrary to the provisions of this act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property or some part thereof is located."

Subsection (c) of § 1 of said act provides: "That any lands included within the limits of existing reservations of or by the United States, or specifically reserved

§ 873. State Leases.

Numerous states, including many which are not designated as the "mining states," have enacted special legislation affecting minerals within state lands. Space precludes their reproduction here except as to California. A collection of such statutes may be found in 1 Lindl. Mines (3d ed.), p. 38, § 18 *et seq.*, and Morrison's Oil and Gas Rights, p. 517 *et seq.*

§ 874. California Statutory Leases.

The development of coal, oil, oil shales, phosphates, sodium and other mineral deposits in lands belonging to that state, including tidal and submerged lands are by the act of May 25, 1921,[50] reserved to the state and are reserved from sale except upon a rental and royalty basis.

§ 875. Similar to Federal Legislation.

The California act was fashioned after an act adopted by congress on February 25, 1920, known as the Leasing Act,[51] and the two acts are very similar in every important feature.[52]

§ 876. Administration.

Permits and leases are issued under the rules and regulations prescribed by the State Surveyor General.[53]

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for water-power purposes, or included in any pending suit or proceedings in the courts of the United States, or subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such application, claim, or right is relinquished or cancelled, and all lands in the Territory of Alaska are excluded from the provisions of this act."

See Instructions, 52 L. D. 51.

[50] Stats. and Amdts, 1921, p. 404 amended in 1923, Stats. 1923, p. 593. This statute expressly mentions river-beds, lake-beds, overflowed tide and submerged lands as subject to the issuance of prospecting permits (§ 4) and also reserves one-sixteenth only of the mineral rights in state land sold by the state. (§ 10.) See Joyner vs. Kingsbury, 97 Cal. A. 17, 275 Pac. 255, holding that lands within an incorporated city may not be leased under this act, amended Stats. 1923, p. 593. This act amends § 17 of the act of May 25 and adds § 17*a* relating to the entering upon tide, overflowed or submerged land by littoral or riparian owners of such land, the drilling, deepening and operation of producing wells thereon, the granting of leases thereto and providing for the rents and royalties to be paid by such littoral or riparian owners.

One of the purposes in enacting this statute was to give to the citizens an opportunity to intercept the large volumes of oil gravitating seaward to inextricable depths, and to reduce to useful purposes oil, gas and mineral deposits reposing beneath the ocean's bed. The commercial value of these subterranean products is enormous. Boone vs. Kingsbury, 206 Cal. 148, 791, 273 Pac. 797, 274 Pac. 61.

The foregoing act was amended in 1929, Stats. 1929, p. 14; it withdrew the right to prospect or lease of tide lands, whether filled or unfilled, submerged lands, overflowed lands or the beds of navigable rivers or lakes, but preserving rights to valid, uncancelled and unforfeited prospecting permits granted upon an application filed in full accordance and compliance with the provisions of this act on or prior to January 17, 1929, and preserving the rights of a littoral owner as to his preferential rights.

The act of April 9, 1929, Stats. 1929, p. 145, provides for the leasing by the state of certain tide and submerged lands, and provides the terms, conditions, purposes and restrictions of, and preference rights to, leases thereof. See Kelley vs. Kingsbury, *supra*; Kennedy vs. Kingsbury, *supra*.

The "Mineral Leasing Act" of 1921, providing for the granting of permits to residents of California to enter and prospect upon tidal and submerged lands and to lease the same on a royalty basis is a valid exercise of the sovereign power of the state and not in any way impinging upon the state or federal constitutions, and not in conflict with any act of congress or the State of California.

Kelley vs. Kingsbury, ___ Cal. ___, 290 Pac. 885; Kennedy vs. Kingsbury, ___ Cal. ___ 290 Pac. 886; Carr vs. Kingsbury, ___ Cal. A. ___, 295 Pac. 586.

See Keller vs. King, ___ Cal. A. ___, 295 Pac. 351.

[51] 41 Stats. 449.

[52] Boone vs. Kingsbury, *supra* [(50)]. In this case the constitutionality of the state act was upheld.

[53] Boone vs. Kingsbury, *supra* [50].

§ 877. Extracting Minerals from Waters.

By the provisions of the act of April 14, 1911,[54] minerals contained in the waters of any stream or lake within California shall not be extracted from said waters except upon charges, terms and conditions prescribed by law in any manner other than by lease from or express permission of the state as prescribed by law; and no such lease or permission shall be granted for a longer period than twenty-five years.

§ 878. Water Containing Minerals.

The act of April 27, 1911,[55] relates to lakes and streams, the waters of which contain minerals in commercial quantities; withdraws California state lands within the meander lines thereof from sale; prescribes conditions for taking such minerals from said waters and lands, and provides for the leasing of lands uncovered by the recession of the waters of such lakes and streams.

§ 878a. Leases of County Lands for Mining Operations.

The respective boards of county supervisors may lease, within certain exceptions, any land owned by the county containing fluid and other minerals. Sealed proposals to lease must be submitted pursuant to resolution. At the time therein stated the lease will be awarded to the highest responsible bidder in the judgment of the board, or all bids may be rejected and the property withdrawn.[56]

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[54] Stats. and Amdts. 1911, p. 904.
[55] 42 *Id.*, p. 1154.
See Stats. 1929, p. 945.
[56] Cal. Pol. Code, § 4041*m*.
See Mining Leases.

CHAPTER XLVI.

MINING LICENSES.

§ 879. Privilege or Permit.

A license, as it affects real property, is a privilege or permit, oral or written, with or without consideration,[1] to do a particular act or series of acts upon the land of another without possessing any estate therein,[2] and which otherwise would be unlawful.[3]

§ 880. Intention Controls.

It is the intention of the parties, as expressed in the instrument, and not its form, that determines whether it is a license or a lease. A quit claim deed may, in effect, be a license,[4] or a grant bargain and sale deed may contain covenants to that effect.[5]

§ 881. How Construed.

If the contract gives exclusive possession it is a lease; if it merely confers the privilege of occupation, under the owner, it is a license.[6]

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[1] Stoner vs. Zucker, 148 Cal. 516, 83 Pac. 808; dist'd. in Roberts vs. Colyear, 179 Cal. 673, 180 Pac. 937.

[2] Wynn vs. Garland, 19 Ark. 23; Shaw vs. Caldwell, 16 Cal. A. 1, 115 Pac. 941; Eastman vs. Piper, 68 Cal. A. 560, 229 Pac. 1002; Emerson vs. Bergin, 76 Cal. 197, 18 Pac. 264; Fuhr vs. Dean, 28 Mo. 116; see Wheeler vs. West, 71 Cal. 126, 11 Pac. 873. The one essential of a license is that it be assented to by the licensor; and any acts may serve to show such assent. For example, consent to the creation of a license privilege may be evidenced by acquiescence in its exercise. Eastman vs. Piper, *supra*. See *infra*, note 6.

[3] Grubb vs. Bayard, Fed. Cas. 5849; Cook vs. Stearns, 11 Mass. 534; Clark vs. Wall, 32 Mont. 219, 79 Pac. 1052.

[4] Tennessee Oil Co. vs. Brown, 131 Fed. 696; Baker vs. Clark, 128 Cal. 181, 60 Pac. 677; Paul vs. Cragnaz, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983; see, also, Coolbaugh vs. Lehigh Co., 213 Pa. St. 28, 62 Atl. 94.

[5] Shaw vs. Caldwell, *supra* (2).

[6] In Woodside vs. Ciceroni, 93 Fed. 1, it is said that a grant of the right to enter on land, for mining purposes only, and to prospect and mine the same, not being exclusive, the grantor and his subsequent grantees, also, had the right to prospect and mine on the same land. Hence no presumption could arise of abandonment of the rights first granted, from the fact that similar rights were exercised by the grantor and his subsequent grantees.

"It has already been pointed out that there is a great distinction between a lease of mines and a license to work mines. The former is a distinct conveyance of an actual interest or estate in lands, while the latter confers a mere incorporal right to be exercised in the lands of others. It is a *profit a prendre*, and, unlike an easement, may be held apart from the possession of this land. * * * In order to ascertain whether an instrument must be construed as a lease or as a license, it is only necessary to determine whether the grantee has acquired by it any estate in the land, in respect of which he might bring an action of ejectment. If the land is still to be considered in the possession of the grantor, the instrument will amount to a license, and though the grantee of the license will certainly be entitled to search and dig for mines according to the terms of his grant, and to appropriate the produce to his own use, on payment of the stipulated rent or proportion, yet he will acquire no property in the minerals till they are severed from the land, and have thus become liable to be recovered in an action of trover. It must be remembered that, in order to constitute an actual lease of mines, it is not necessary for the grantee to acquire any right or interest in the surface; for minerals have been shown to be capable of forming a distinct inheritance in the lands of which they are a part, and consequently an actual estate may be both created in and restricted to any specified kinds of minerals. But a license is created only where the grantee has acquired no right of property to *any part* of the soil or minerals, till they are separated from the general inheritance." Bainbridge, Law of Mines (4th ed.) pp. 510 and 511; Doe d. Hanley vs. Wood, 2 B. & Ald. 724; Southerland vs. Heathcote, 1 Ch. 475; 17 Eng. Rul. Cas. 796, note; Summers Oil & Gas, p. 170, note 47.

There is a broad distinction between a lease of a mine, under which the lessee enters into possession and takes an estate in the property, and a license to work the same mine. In the latter case the licensee has no permanent interest, property

§ 882. Revocability.

A mere license is revocable at will and is unassignable[7] although it has been said it is based upon a consideration.[8]

§ 883. When Irrevocable.

When coupled with an interest a license is irrevocable and assignable.[9]

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or estate in the land itself, but only in the proceeds, and in such proceeds not as realty, but as personal property; and his possession, like that of an individual under a contract with the owner of land to cut timber or harvest a crop of potatoes thereon for a share of the proceeds, is the possession of the owner. Quoted to the same effect in Shaw vs. Caldwell, *supra* (2); De Haro vs. U. S., 72 U. S. 627; Swendig vs. Washington Co., 281 Fed. 903; Michalek vs. New Almaden Co., 42 Cal. A. 741, 184 Pac. 58; Conner vs. Garrett, 65 Cal. A. 661, 224 Pac. 786; Clark vs. Wall, *supra* (3); Rose's U. S. Notes, which announce the same doctrine. Whether an instrument is a license or a lease will depend upon the manifest intent of the parties, gleaned from a consideration of its entire contents. Paul vs. Cragnaz, *supra* (4).

For distinction between a license and an easement see Eastman vs. Piper, *supra* (2).

[7] Wheeler vs. West, *supra* (2); Eastman vs. Piper, *supra* (2); East Jersey Co. vs. Wright, 32 N. J. Eq. 248. A license is founded upon personal confidences, Roberts vs. Colyear, *supra* (1), a mere personal privilege extending to the person to whom it is given, and is therefore not assignable and an attempt to assign terminates the privilege. Shaw vs. Caldwell, *supra* (2); Eastman vs. Piper, *supra* (2); Hill vs. Cutting, 113 Mass. 107; Harris vs. Gillingham, 6 N. H. 11. In Grubb vs. Bayard, *supra*, the court said: "A right or privilege to dig and carry away ore from the land of another is an incorporeal hereditament—a right to be acquired on the land of another. It is a license irrevocable when granted on sufficient consideration. It may be demised for years or granted in fee. It is assignable"; *but see* Mumford vs. Whitney, 15 Wend. 380; Ganssen vs. Morton, 10 Barn. & C. 731. A mere license, which is nothing more than a personal privilege, is revocable at the pleasure of the licensor, and the fact that the license was created by a written instrument, or even conferred by deed, does not affect the rule of revocability at the option of the licensor. A license may be revoked by a sale and conveyance of the land without reserving the privilege to the licensee or by a lease or mortgage of the same, for a mere license can not work a breach of the warranty of title. Shaw vs. Caldwell, *supra* (2). A verbal agreement to the effect that one may enter into certain mining property and mine and extract ore therefrom during the will and pleasure of the mine owner is merely a license revocable at any time the latter may desire, and gives the licensee no interest or right in the realty, but merely a property right in the ore actually extracted, as personalty. Clark vs. Wall, *supra* (3). See Caledonian Co. vs. Rocky Cliff Co., 16 N. M. 517, 120 Pac. 716; *but see* Outlaw vs. Gray, 163 N. C. 325, 79 S. E. 676.

A mere license is not a covenant running with the land nor does it work a breach of the warranty of title. Shaw vs. Caldwell, *supra*.

[8] Huff vs. McCauley, 53 Pa. St. 206; Dark vs. Johnston, 55 Pa. St. 164; see Entwhistle vs. Henke, 211 Ill. 273, 71 N. E. 990; Muskett vs. Hill, 5 Bing. (N. C.) 694. In Huff vs. McCauley, *supra*, it was held that a contract that one may take coal for his works from the land of another is a right of *profit a prendre*, is incorporeal, and incapable of creation except by grant or prescription. Grubb vs. Grubb, 74 Pa. St. 25. See Luman vs. Davis, 108 Kan. 801, 196 Pac. 1078; Cahoon vs. Bayard, 123 N. Y. 298, 25 N. E. 376; Algonquin Co. vs. Northern Co., 162 Pa. St. 114, 29 Atl. 402.

[9] Grubb vs. Bayard, *supra* (3); Stoner vs. Zucker, *supra* (1); Clendenin vs. White, 62 Cal. A. 664, 217 Pac. 761; Cary vs. McCarthy, 10 Colo. A. 200, 50 Pac. 744; Clark vs. Wall, *supra* (2).

A license may be given by parol. Wheeler vs. West, *supra* (2); Scott vs. Henry, 196 Cal. 666, 239 Pac. 314; Cairns vs. Haddock, 60 Cal. A. 83, 212 Pac. 222, and when executed is irrevocable, Smith vs. Green, 109 Cal. 228, 1022; Irrigated Valleys Co. vs. Altman, 57 Cal. A. 426, 207 Pac. 401, and cases therein cited.

An option to purchase mining property with the privilege, under designated conditions, of prospecting and mining thereon may be technically characterized as a license coupled with an interest, with option to purchase, and the licensee having gone into possession, performed labor, and made expenditures in pursuance thereof, thereby rendered the license irrevocable. Hall vs. Abraham, 44 Or. 477, 75 Pac. 882; *but see* McCullagh vs. Rains, 75 Kan. 458, 89 Pac. 1041. In Dinsmore vs. Renfroe, 66 Cal. A. 215, 225 Pac. 886, the defendants built a road under a license from one of the coowners of the land, which license was not revoked until defendants had spent hundreds of dollars in reliance thereon. The license became irrevocable because of this expenditure by the defendants. Ricioli vs. Lynch, 65 Cal. A. 58, 223 Pac. 88. See, also, Stoner vs. Zucker, *supra*; Miller & Lux vs. Kern County, 154 Cal. 785, 99 Pac. 170; Shaw vs. Caldwell, *supra* (2); Hoffman vs. Metcalf, 113 Iowa 240, 84 N. W. 1054; Gravelly Ford Co. vs. Pope & Talbot Co., 192 Cal. 4, 218 Pac. 405; Wilkes vs. Brady, 84 Cal. A. 365, 258 Pac. 108; Raritan Co. vs. Veghte, 21 N. J. Eq. 475. See, also, comment of Professor Freeman on the last named case in 16 Am. Dec. 501 *et seq.*

The leading case upon this point is Rerick vs. Kern, 14 Serg. & R. 267, 16 Am. Dec. 497. Passive acquiescence does not, by itself, create an irrevocable license nor produce an estoppel. Fraser vs. City, 81 Or. 92, 158 Pac. 515, and cases therein cited.

§ 884. Injunction.

Where the license has been revoked, the licensee refuses to surrender possession is committing waste and destroying the substance of the licensor's estate the latter is entitled to an injunction [10] and damages.[11]

§ 885. Adverse Possession.

Adverse possession (in California) for five years after a license becomes irrevocable is sufficient to establish title by prescription.[12]

§ 886. Removal of Property.

In general there is no dispute in the cases that the licensee is entitled to remove his property and that he is entitled to a reasonable time within which to do so.[13]

§ 887. Cotenant as Licensor.

A license to dig ore in a mine given by one cotenant extends only to his own interest therein.[14]

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[10] Clark vs. Wall, *supra*.[3]
[11] Roberts vs. Colyear, *supra*.[1]
[12] Myers vs. Berven, 166 Cal. 484, 137 Pac. 260; Scott vs. Henry, *supra* [9]; Irrigated Valleys Co. vs. Altman, *supra* [9]; Cairns vs. Haddock, *supra* [9]; Ricioli vs. Lynch, *supra*.[9]
[13] Desloge vs. Pearce, 38 Mo. 588, 44 L. R. A. 568.
[14] Omaha Co. vs. Tabor, 13 Colo. 41, 21 Pac. 925; Tipping vs. Robbins, 71 Wis. 507, 37 N. W. 427. See Paul vs. Cragnaz, *supra* [4]; Job vs. Potton, L. R. 20 Eq. 84.

CHAPTER XLVII.

MINING PARTNERSHIPS.

§ 888. How Created.

A mining partnership is created when the owners of a mining claim or shares therein, or lessees of a mining claim unite in the actual working of such a claim for the purpose of extracting mineral therefrom, sharing the losses and profits arising from such working, although no express agreement to form a partnership is entered into between them.[1]

In several of the states statutory provisions exist relative to mining partnerships, but such provisions are in general merely declaratory of the principles already established by decisions of the courts.

§ 889. Actual Operation.

A mining partnership is not created by an executory contract to buy an interest in a mining property;[2] nor by an agreement to the effect

[1]Loy vs. Alston, 172 Fed. 90; Crystal Co. vs. Gaido, 5 Fed. (2d) 881; Sturm vs. Ulrich, 10 Fed. (2d) 9; Gilbert vs. Fontaine, 22 Fed. (2d) 661; McMahon vs. Meehan, 2 Alaska 278; Ferris vs. Baker, 127 Cal. 520, 59 Pac. 937; Harper vs. Sloan, 177 Cal. 174, 169 Pac. 1043; Holdt vs. Hazzard, 10 Cal. A. 440, 102 Pac. 540; Peterson vs. Beggs, 26 Cal. A. 760, 148 Pac. 541; Walker vs. Bruce, 44 Colo. 109, 97 Pac. 250; Lamont vs. Reynolds, 26 Colo. A. 347, 144 Pac. 1131; Doyle vs. Burns, 123 Iowa 488, 99 N. W. 195; Anaconda Co. vs. Butte & B. Co., 17 Mont. 519, 43 Pac. 924; dist'g. in State vs. District Court, 79 Mont. 1, 254 Pac. 863; Congdon vs. Olds, 18 Mont. 487, 46 Pac. 261; Young vs. Krumme, 109 Okla. 105, 236 Pac. 606; Ellis vs. Lewis, 119 Okla. 201, 249 Pac. 295; Kirchner vs. Smith, 61 W. Va. 434, 58 S. E. 614; see Vietti vs. Nesbitt, 22 Nev. 390, 41 Pac. 151. For instances of what do not constitute a mining partnership, see, Thompson vs. Walsh, 140 Fed. 83; Thompson vs. Crystal Springs Bank, 21 Fed. (2d) 602; Chung Kee vs. Davidson, 102 Cal. 188, 36 Pac. 519; Callahan vs. Danziger, 32 Cal. A. 405, 163 Pac. 65; Holdt vs. Hazzard, *supra*; Michalek vs. New Almaden Co., 42 Cal. A. 736, 184 Pac. 56; Butler vs. Hinckley, 17 Colo. 523, 30 Pac. 250; Hatch vs. Fritz, 48 Colo. 530, 111 Pac. 74; Caley vs. Coggswell, 12 Colo. A. 394, 55 Pac. 939; Mader vs. Norman, 13 Ida. 585, 92 Pac. 572; Groome vs. Fisher, 48 Ida. 771, 284 Pac. 1030, and cases therein cited; Diamond Creek Co. vs. Swope, 204 Mo. 48, 102 S. W. 561; Anaconda Co. vs. Butte & B. Co., *supra*; Horton vs. New Pass Co., 21 Nev. 184, 27 Pac. 376, 1018; Hartney vs. Gosling, 10 Wyo. 346, 68 Pac. 1118. The mere fact that an interest in an oil and gas lease is given to pay for the drilling of a well does not, in itself, constitute a mining partnership. Robinson Pet. Co. vs. Black, 138 Okla. 128, 280 Pac. 595. Where it is the intention of the parties that a partnership is to become effective upon the happening of a certain contingency or is to take effect at a future day, the relation of partners does not exist. Ash vs. Mickelson, 118 Okla. 163, 247 Pac. 680.

In Kimberly vs. Arms, 129 U. S. 512, the language of the court is instructive. Kimberly had advanced the money for Arms' expenses. Arms was to go into the mining fields of Arizona for the purpose of leasing, prospecting and operating in mineral land, and was to perform the things belonging to the trade or business. The Supreme Court said: "The partnership between Arms and Kimberly was not a mining partnership, in the proper sense of that term. It was not a partnership for developing and working mines, but for the purchase and sale of minerals and mining lands, and in that respect was subject to the rules governing ordinary trading or commercial partnerships. It can no more be called a mining partnership than a partnership for the purchase of the products of a farm and the lands upon which those products are raised can be called a partnership to farm the lands." Snider et al. vs. Davidson, 105 Kan. 661, 185 Pac. 724; Rolshouse vs. Wally, 263 Pa. St. 247, 106 Atl. 227.

See *infra*, note 2.

For a collection of numerous cases distinguishing mining partnerships from tenancies in common, agency, agreements and hiring contracts, see Sturm vs. Ulrich, *supra*.

For effect of uniform partnership law of California on mining partnerships see Civil Code, § 2400.

[2]Prince vs. Lamb, 128 Cal. 120, 60 Pac. 689. In Peterson vs. Beggs, *supra* [1], it is said: "There appears to be nothing in the agreement under discussion about working any of the mines mentioned in it. As a consequence, even if that writing evidenced an association of the parties for the purpose of acquiring, developing and dealing in mines, unless it further provided that, when acquired and developed, they

that if A should secure a paying mine through the efforts of B, said A would, in addition to wages, give B an interest in the mine;[3] nor by an agreement that upon the happening of some contingent event the party to the agreement will operate a mine,[4] as the rule is that, to be charged as mining partners the parties must engage in working the mine.[5]

The creation of the partnership is not within the statute of frauds.[6]

§ 890. Actual Working By All Partners Not Necessary.

It is not essential that each of the partners shall perform physical work upon the claim. One partner who supplies money to be used in working the mine is engaged in such work as truly as the one who devotes his own labor to the enterprise.[7]

§ 891. Distinction Between Mining and Ordinary Partnerships.

A mining partnership, to which the parties do not by contract give the ordinary incidents of commercial partnerships, is distinguishable from the ordinary commercial or trading partnership in characteristics which flow from the fact that in mining partnerships there is no *delectus personae* except as to the few peculiarities which depend upon this distinction. The law governing a mining partnership is not different from that applicable to a commercial partnership, and the elements of the latter are common also to the former.[8]

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should then be worked on joint account, no mining partnership was created by it. Doyle vs. Burns, 123 Iowa 488, 99 N. W. 195."

In Harper vs. Sloan, *supra* (1), the court said: "It is true that when the contract was made, title was still in Lewis and McGregor. It is not necessary, however, to the existence of a mining partnership that the property which is to be operated be owned in fee by the partners. Under his contract with McGregor and Lewis, Harper was entitled to the possession of the property, and had the right, on complying with certain conditions, to acquire its ownership. This gave him an interest in the property, and such interest could well form the subject of a mining partnership." See, also, Ashenfelter vs. Williams, 7 Colo. A. 332, 43 Pac. 666, 40 Cor. Jur. 1143.

Receiving payment of a debt in ores mined does not make the debtor a partner. Davis vs. Patrick, 122 U. S. 144, approved, 145 U. S. 623.

[3] Berry vs. Woodburn, 107 Cal. 504, 40 Pac. 802. See Michalek vs. New Almaden Co., *supra* (1); Caley vs. Coggswell, *supra* (1).

[4] Dorsey vs. Newcomer, 121 Cal. 216, 53 Pac. 537.

[5] Peterson vs. Beggs, *supra* (1); see, also, *supra*, note 1.

[6] Whistler vs. McDonald, 167 Fed. 477; Howard vs. Luce, 171 U. S. 584; Shea vs. Nilima, 133 Fed. 209, and cases therein cited; Musick Oil Co. vs. Chandler, 158 Cal. 7, 109 Pac. 614; see Scott vs. Jungquist, 179 Cal. 7, 175 Pac. 412; Kent vs. Costin, 130 Minn. 222, 153 N. W. 874.

[7] Bell vs. Wright, 25 Ariz. 97, 213 Pac. 575; Harper vs. Sloan, *supra* (1); Lyman vs. Schwartz, 13 Colo. A. 318, 57 Pac. 735; Congdon vs. Olds, *supra* (1); Costello vs. Scott, 30 Nev. 43, 43 Pac. 11, 94 Pac. 222.

[8] Thompson vs. Crystal Springs Bank, *supra* (1); Dailey vs. Fitzgerald, 17 N. M. 137, 125 Pac. 625. There may be an ordinary commercial partnership in the working of a mining property, but this will arise only from agreement. See Kahn vs. Central Smelting Co., 102 U. S. 641. The distinction between mining and commercial partnerships is shown in Dailey vs. Fitzgerald, *supra*. See, also, Crystal Co. vs. Gaido, *supra* (1).

"The principal distinction between a mining partnership and an ordinary partnership is that in the former the *delectus personae*, or the right of a partner to say whether a new partner shall be admitted to the partnership, is absent. One of the most important results of this distinction is that a mining partnership, unlike an ordinary partnership, is not dissolved where the interest of a partner passes to another person or persons, as on the death of the partner or the transfer of his interest." Kennedy vs. Beets Oil Co., 105 Okla. 1, 231 Pac. 508; McKay vs. Kelly, 130 Okla. 62, 264 Pac. 814. See, also, Crystal Co. vs. Gaido, *supra* (1). A general partnership may exist if the contract between the parties is to that effect, even if the business of the partnership is solely in mines. Congdon vs. Olds, *supra* (1). The *delectus personae* may be waived by the agreement of the parties; as, for example, by the insertion of the words "heirs and assigns." Gilbert vs. Fontaine, 22 Fed. (2d) 662.

In case of an ordinary mining partnership something more will be required to raise the presumption of liability arising from persons holding themselves out to the world as partners than would be necessary in the case of an ordinary partnership. Thompson vs. Crystal Springs Bank, *supra* (1), and cases therein cited. A leading case upon this subject is Skillman vs. Lachman, 23 Cal. 204.

§ 892. Coowners Not Necessarily Mining Partners.

Coowners of a mining claim are not necessarily mining partners or partners at all. They become such only when they actually engage in working the property. Before actual operations begin and after actual operations cease the parties simply are cotenants unless the ordinary partnership, in fact, has been formed.[9] They may work the claim under such an arrangement as shall not constitute a partnership and the nonparticipating cotenants are not liable for its debts.[10]

§ 893. Limited Powers.

The powers of the members or managers of mining partnerships are limited to the performance of such acts in the name of the partnership as may be necessary to the transaction of its business, or as are usual in like concerns unless there is an express agreement to the contrary known to the party dealing with the members, and, hence, such partners may not borrow money, employ counsel, execute promissory notes, nor draw or accept bills of exchange, no matter how pressing the necessity for the use of the money, unless there is an express agreement to the contrary known to the party contracting with the firm.[11]

§ 894. Majority Controls.

Members of a mining partnership not agreeing, those having the majority have the right to control its management and are liable only for culpable negligence, breach of duty or diversion of the property.[12]

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[9] Harper vs. Sloan, *supra* (1); Peterson vs. Beggs, *supra* (1); Huston vs. Cox, 103 Kan. 73, 172 Pac. 992, 97 Cyc. 759. Where tenants in common cooperate in developing a lease for mineral land each agreeing to pay his part of the expenses and to share in the profits or losses, they constitute a mining partnership. Gillespie vs. Shufflin, 91 Okla. 72, 216 Pac. 132; Barrett vs. Buchanan, 95 Okla. 62, 213 Pac. 734; McKay vs. Kelly, *supra* (8). See, also, Sturm vs. Ulrich, *supra* (1). See, generally, New Domain Co. vs. McKenney, 188 Ky. 193, 221 S. W. 250.

Tenants in common of a mine may form a partnership to work the mine, in which case the mine itself may or may not be put in as a firm asset, or tenants in common of a mine may work it without forming any partnership. Howard vs. Luce, *supra* (6).

[10] Peterson vs. Beggs, *supra* (1); Lamont vs. Reynolds, *supra* (1).

[11] Bently vs. Brossard, 33 Utah 396, 94 Pac. 736; see, also, Skillman vs. Lachman, *supra* (8); Manville vs. Parks, 7 Colo. 128, 2 Pac. 212; Nolan vs. Lovelock, 1 Mont. 224; Congdon vs. Olds, *supra* (1); Childers vs. Neely, 47 W. Va. 70, 34 S. E. 828; Hartney vs. Gosling, *supra* (1); Randall vs. Meredith, 76 Tex. 669, 13 S. W. 576; and see Decker vs. Howell, 42 Cal. 636; Miliken vs. Fredrickson, 73 Colo. 534, 216 Pac. 714; Burgan vs. Lyell, 2 Mich. 102.

A member of a mining partnership has authority to employ a laborer to work in a mine belonging to the partnership. Lyman vs. Schwartz, *supra* (7).

[12] For statutory rule, in California, see Civil Code, § 2520; Idaho, Rev. Stats., § 3309; Civil Code 1901, § 2783; Rev. Codes 1907, § 3370; and Montana, Rev. Codes of 1895, § 3359; Rev. Code 1907, § 5544. Dougherty vs. Creary, 30 Cal. 291; Jones vs. Clark, 42 Cal. 180; Patrick vs. Weston, 22 Colo. 45, 43 Pac. 446; Kennedy vs. Beets Oil Co., *supra* (8); State vs. District Court, *supra* (1); see Bissel vs. Foss, 114 U. S. 252.

"The conduct of the partners holding the major portion of the property in a mining concern is to be most jealously scrutinized when complaint is made, by the minority in interest, of oppression. It might and often would work great inconvenience and damage to the minority in interest in a mining partnership, if the majority were allowed to do as they might deem to their own advantage, regarding the rights and interests of the minority; but notwithstanding the danger of the abuse of power in such cases, what may be necessary and proper for carrying on the business of mining for the joint benefit of all concerned must be determined by those owning and holding in the aggregate the major part of the property; and if the powers which are thus attempted to be exercised are not necessary and proper for the success of the enterprise, those whose interests are imperiled or disastrously affected thereby have the right to resort to the courts for redress and protection." Dougherty vs. Creary, *supra*.

In Hawkins vs. Spokane Co., 2 Ida. 970, 3 Ida. 241, 28 Pac. 433, the court said: "The plaintiff is the owner of a seven-eighths interest in a placer mining claim. The defendant is the owner of one-eighth interest in the same claim. *Held*, that the plaintiff has the right to control the means used and the method adopted in working said mine, and is entitled to an injunction to restrain said defendant from working said claim, except in the manner directed by the plaintiff."

§ 895. Trustees.

The partners are in the relation of trustees for each other.[13]

§ 896. Sale of Partnership Interests.

A partner properly may sell his interest in the partnership property at a greater price than that received by his associates;[14] but a partner buying the interest of a partner must deal fairly with the vendor and disclose facts and conditions within his knowledge bearing upon the value of the property.[15]

§ 897. Debts and Liens.

Each partner jointly is liable for the debts of the firm.[16] While the property worked is not necessarily owned by the partnership, yet, if it be so, it is subject to the lien of each member of the firm for debt due to himself or to the creditors of the partnership.[17]

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[13] Kimberly vs. Arms, *supra* (1); Gore vs. McBrayer, 18 Cal. 582; Con. Divide Co. vs. Bliley, 23 Colo. 160, 46 Pac. 633; Galbraith vs. Devlin, 85 Wash. 482, 148 Pac. 589; Kittilsby vs. Vevelstadt, 103 Wash. 126, 173 Pac. 744; Miller vs. Walser, 42 Nev. 497, 181 Pac. 437. In Bissell vs. Foss, *supra* (8), the question was whether a member of a mining partnership could acquire the shares of an associate without the knowledge of the other associates, and hold them on his own account, and the court held that it was lawful for him to do so.

In Settembre vs. Putnam, 30 Cal. 490, the principle is announced that if two or more persons, as mining partners, claim and develop a mine situate upon land owned by a third person, and the partners verbally authorize one of their number to purchase the land from the owner for the benefit of all, and he buys the same in his own name, he holds the legal title of his partners' proportion in trust for them.

[14] Taylor vs. Castle, 42 Cal. 367; Harris vs. Lloyd, 11 Mont. 390, 28 Pac. 736; Galbraith vs. Develin, *supra* (13); see Freeman vs. Hemingway, 75 Mo. A. 611. As a member of a mining partnership may freely convey his interest without disturbing such partnership, the lesser step of incumbering such interest by a mortgage does not affect the rights of the other partners to their lien nor the rights of the mortgagor to a marshaling of assets which would result in no harm to such partners. Bankruptcy of a single partner in mining partnership does not interfere with ordinary orderly prosecution of the business of such partnership, nor with the rights of the partners between themselves as to the partnership property. Sturm vs. Ulrich, *supra* (1).

[15] Cardoner vs. Day, 253 Fed. 577. See Duryea vs. Burt, 28 Cal. 589, cited in Hauret vs. Pedelaborde, 77 Cal. A. 189, 246 Pac. 134.

[16] Hailey vs. GVB Co., 89 Fed. 449, aff'd. 95 Fed. 35; Stuart vs. Adams, 89 Cal. 367, 26 Pac. 970; see Lesamis vs. Greenberg, 225 Fed. 452.

In Thompson vs. Crystal Springs Bank, *supra* (1), the court said: "In the leading case of Skillman vs. Lachman, 23 Cal. 204, 83 Am. Dec. 96, it is said:

" 'In the case of an ordinary mining partnership, something more will be required to raise the presumption of liability arising from persons holding themselves out to the world as partners than would be necessary in the case of an ordinary partnership. Such persons, in the absence of other circumstances, can not fairly be presumed to have intended to render themselves liable to all the consequences of a commercial partnership.' In Kahn vs. Central Smelting Co., 102 U. S. 641, 26 L. Ed. 266, the Supreme Court of the United States said:

" 'Mining partnerships as distinct associations, with different rights and liabilities attaching to their members from those attachng to members of ordinary trading partnerships, exist in all mining communities; indeed, without them successful mining would be attended with difficulties and embarrassments, much greater than at present.' From 1 Thornton's Law of Oil and Gas, § 355, we quote: 'But, in case of an ordinary mining partnership, something more will be required to raise the presumption of liability arising from persons holding themselves out to the world as partners than would be necessary in the case of an ordinary partnership.' See Childers vs. Neely, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. Rep. 777; Congdon vs. Olds, 18 Mont. 487, 46 P. 261; Peterson vs. Beggs et al., 26 Cal. App. 760, 148 P. 541; Barrett vs. Buchanan et al., 95 Okla. 262, 213 P. 734; Kennedy et al. vs. Beets Oil Co., 105 Okla. 1, 231 P. 508; Huston et al. vs. Cox et al., 103 Kan. 73, 172 P. 992, 27 Cyc. 759."

[17] Sturm vs. Ulrich, *supra* (1); GVB Co. vs. Hailey, 95 Fed. 35, aff'g. 89 Fed. 35; Duryea vs. Burt, *supra* (15); see Brunswick vs. Winters, 3 N. M. 386, 5 Pac. 706; Kennedy vs. Beets Oil Co., *supra* (8). As a member of a mining partnership may freely convey his interest without disturbing such partnership, the lesser step of encumbering such interest by a mortgage does not affect the rights of the other partners to their lien nor the right of the mortgagee to marshaling of assets which would result in harm to such partners. Sturm vs. Ulrich, *supra*. Mr. Lindley says: "As in the case of general partnerships, the liability of a mining partner for the acts of his associates continues, after he sells his interest and retires from the firm, in favor of persons who have had dealings with, and given credit to, the partnership, until they have had actual personal notice of the dissolution.

§ 898. Contribution.

Assessments may be levied of which due notice must be given to each of the partners, but forfeiture does not follow delinquency in the absence of an express agreement to that effect.[18]

§ 899. Accounting.

Where a mining partnership exists under which one of the partners expended money and labor, he is entitled to an accounting in order to settle the relative rights of himself and his copartners. The rule applies although the partnership had been dissolved or abandoned before the commencement of the action for an accounting.[19]

§ 900. Dissolution.

The dissolution of a mining partnership does not result from the death or bankruptcy or the sale of the interest of any part thereof of a partner.[20] There must be an abandonment of the work before the partnership is at an end. If there was an understanding, expressed or implied, to resume at a later date the mere cessation of labor would not result as a dissolution. The burden of proof must be borne by the one claiming that the partnership has terminated.[21] A mining partnership is dissolved as to one who withdraws therefrom by ceasing to

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Dellapiazza vs. Foley, 112 Cal. 380, 44 Pac. 727, 728; Kelley vs. McNamee, 164 Fed. 374; McNamee vs. Williams, 3 Alaska 470. Constructive notice imparted by the recording of an instrument by which the retiring partner disposes of his interest in the partnership will not suffice." Lindl. Mines (3d ed.), p. 1976, § 801. A member of a mining partnership who advances more than his share of the money to operate or develop the property has a lien on his partners' share to the extent of his advancement on final accounting. McKay vs. Kelly, *supra* [8].

[18] Joseph vs. Davenport, 116 Iowa 268, 89 S. W. 1081. Each partner is liable to the others for his share (depending upon his interest) of the expenses and losses incurred in the enterprise and there is a lien for such upon his interest in the property or proceeds therefrom in favor of creditors or of other partners who have made advances. Sturm vs. Ulrich, *supra* [1].

[19] Harper vs. Sloan, *supra* [1]; see, also, Butler vs. Union Trust Co., 178 Cal. 195, 172 Pac. 601; Vail vs. Fish Co., 76 Cal. A. 78, 243 Pac. 869; Hawkins vs. Spokane Co., 3 Ida. 24, 33 Pac. 40; Miller vs. Walser, *supra* [13]. Mining partners in a suit for an accounting should each be charged and credited with the sums received and paid out according to their respective interests, and one partner is entitled to a credit and the other should be charged with one-half of a sum paid by one partner for an interest owned by the partners equally. Kleesettel vs. Orr, 80 Wash. 191, 141 Pac. 355. See, generally, Gilbert vs. Fontains, *supra* [8]. In this case it is said: "It is contended by defendants that, even though a lien existed in favor of plaintiff, yet it can not be foreclosed without a final accounting and a winding up of the affairs of the partnership. It is the general rule that an action at law involving partnership transactions can not be maintained between partners until after an accounting and settlement. This rule, however, is by no means universal, even in ordinary partnerships. Thus, where there is an express stipulation in the partnership articles which is violated by one partner, an action at law will lie. And where the partnership agreement, as in the case at bar, provides for a periodical settlement of expenses, suit may be maintained therefor without seeking a dissolution of the partnership and a final accounting. 30 Cyc., pp. 461, 470; Rowley on Modern Law of Partnership, vol. 2, §§ 743, 750; Bates on Partnership, §§ 911, 916; Miller vs. Freeman, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504; Indiahoma Refining Co. vs. Wood (Tex. Civ. App.), 255 S. W. 212, 216. See, also, Denver vs. Roane, 99 U. S. 355, 25 L. Ed. 476; Brew vs. Cochran (C. C.), 141 F. 459; Owen vs. Meroney, 136 N. C. 475, 48 S. E. 821, 103 Am. St. Rep. 952, 1 Ann. Cas. 834; Patterson vs. Ware, 10 Ala. 444."

See *infra*, note 30a.

[20] Kahn vs. Central Co., *supra* [9]; Sturm vs. Ulrich, *supra* [1]; Gilbert vs. Fontaine, *supra* [8]; Jones vs. Clark, 42 Cal. 180; Higgins vs. Armstrong, 9 Colo. 38, 10 Pac. 332; Boehme vs. Fitzgerald, 43 Mont. 226, 115 Pac. 413; Hartney vs. Gosling, *supra* [1]; see Gladdough's Estate, 1 Alaska 649. In Bissel vs. Foss, *supra* [12], it is said: "There is no relation of trust or confidence between mining partners which is violated by the sale and assignment by one partner of his share in the company assets and business to a stranger, or to one or more of his associates, without the knowledge of the other associates." Harris vs. Lloyd, *supra* [14]. See, *supra*, note 8. The transferee thereof becomes a partner, to the extent of the interest transferred. Sturm vs. Ulrich, *supra*.

[21] Nielson vs. Gross, 17 Cal. A. 74, 118 Pac. 725.

work and thereafter his copartners can not operate the property at his expense.[22] A sale of the whole of the property dissolves the partnership,[23] but the sale[24] or assignment[25] of an interest therein does not have that effect. If no time has been agreed upon for the duration of the partnership, it may be dissolved under equitable restrictions at pleasure.[26]

§ 901. Corporations.

There is nothing in the nature of a corporate organization, as such, which would prevent it from being a member of a mining partnership or in a joint adventure of that character. Its powers in that respect, however, would depend upon its character or organic law.[27]

§ 902. Joint Adventure.

The tendency of the modern decisions is to regard the rights of joint adventurers, as between themselves, as governed practically by the same rules of law that govern the relations of partners.[28]

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[22] Peterson vs. Beggs, *supra* (1); Lamont vs. Reynolds, *supra* (1); Mader vs. Norman, *supra* (1); U. S. Co. vs. Morton, 174 Ky. 366, 192 S. W. 79.

[23] Dellapiazza vs. Foley, *supra* (17).

[24] Bissell vs. Foss, *supra* (12); Loy vs. Alston, *supra* (1); Kelley vs. McNamee, *supra* (17); Sturm vs. Ulrich, *supra* (1); Taylor vs. Castle, *supra* (14); Indiahoma Refining Co. vs. Wood, *supra* (16).

Kelley vs. McNamee, *supra* (17).

[25] Dougherty vs. Creary, *supra* (12); Lawrence vs. Robinson, 4 Colo. 567; Miller vs. Walser, *supra* (13); Childers vs. Neely, *supra* (11). In Martin vs. Burris, 57 Cal. A. 742, 208 Pac. 174, it was said: "Whether the joint enterprise constituted a partnership or a joint adventure, the defendant's breach of the agreement justified the plaintiff's termination thereof, but did not work a forfeiture, except as provided by the contract, of his interest in the assets acquired prior to the notice of termination."

A forfeiture can never take place by implication, but must be effected by express, unambiguous language. Cullen vs. Sprigg, 83 Cal. 56, 23 Pac, 222; Connolley vs. Power, 70 Cal. A. 75, 232 Pac. 744.

[27] Sturm vs. Ulrich, *supra* (1); Keyes vs. Nims, 43 Cal. A. 9, 184 Pac. 695. Ordinarily, in the absence of special authority, a corporation can not enter into partnership with a private person. A corporation may enter into a contract by which it is agreed that the gains and losses of the venture shall be borne equally. Bates vs. Coronado Co., 149 Cal. 162, 41 Pac. 855, but such agreements do not necessarily make the parties partners in legal contemplation. Fee vs. McPhee Co., 31 Cal. A. 315, 160 Pac. 397; see, also, Sturm vs. Ulrich, *supra*; Anaconda Co. vs. Boston & B. Co., *supra* (1); Horton vs. New Pass Co., *supra* (1). See, generally, Julian Corp. vs. Courtney Co., 22 Fed. 363; Mervyn Inv. Co. vs. Biber, 184 Cal. 643, 194 Pac. 1037.

[28] 23 Cyc. 453; Taub, 4 Fed. (2d) 993; Irer vs. Gawn, 99 Cal. A. 17, 277 Pac. 1053; Gamble vs. S. P. Mines, 34 Nev. 351, 126 Pac. 111, 113 Pac. 136; on rehearing, 35 Nev. 319; Menefee vs. Oxman, 42 Cal. A. 81, 183 Pac. 379; Botsford vs. Van Riper, 33 Nev. 156, 110 Pac. 705; Forbes vs. Butler, 66 Utah 373, 242 Pac. 950.

In Elliott vs. Murphy Co., 117 Or. 387, 244 Pac. 91, a joint adventure is defined as an association of two or more persons to carry out a single business enterprise for profit. Although it is held not to be identical with partnership in its nature, yet it is analogous to a partnership, and it is governed by practically the same rules of law; Rowley, 2 Modern Law of Partnership, § 975. At sections 982 and 983, this author also says that, as a general rule, all the profits arising from a joint adventure belong to all of the parties thereto, and all must share in its risks. Moore vs. Willamette Co., 127 Or. 134, 271 Pac. 49.

A joint adventure has been aptly defined as a "special combination of two or more persons, wherein some specific venture of profit is jointly sought without any actual partnership, Bowmaster vs. Carroll, 23 Fed. (2d) 827, or corporate designation." It is purely the creature of our American courts. 33 C. J. 841. A joint adventure has also been termed "commercial enterprise by several persons jointly." Joring vs. Hariss, 292 Fed. 974.

The purchase of property by two or more persons, each of whom contributes a portion of the purchase price, makes them joint owners of the property, but does not, without more, establish between them the relation of joint adventurers. Bowmaster vs. Carroll, *supra*.

A joint adventure may exist where persons embark in an undertaking without entering on the prosecution of the business as partners strictly, but engage in a common enterprise for their mutual benefit; they each have the right to demand and expect from their associates good faith in all that relates to their common interests. Jackson vs. Hooper, 76 N. J. Eq. 185, 74 Atl. 130, cited in Reid vs. Shaffer, 249 Fed. 553; Hey vs. Duncan, 13 Fed. (2d) 795; Dexter vs. Houston, 20 Fed. (2d) 652. The authorities have not laid down any very certain rule from which it can be determined whether the given acts or conduct of two or more persons will or will not constitute them joint adventurers, but have rather contented themselves

§ 903. Consideration.

A contract of joint adventure is sufficiently supported by a consideration growing out of the mutual promises of the parties.[29]

§ 904. Fiduciary Relation.

The relation between joint adventurers is fiduciary in its character and requires good faith between them.[30]

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with a consideration of the particular facts of the case before them. There are, however, certain general principles connected with the relation which have received recognition. The relation, as a legal concept cognizable by the courts, must have its origin in contract. There must be an agreement to enter into an undertaking in the objects or purposes of which the parties to the agreement have a community of interest and a common purpose in its performance. Necessarily the agreement presupposes that each of the parties has an equal right to a voice in the manner of its performance, and an equal right of control over the agencies used in its performance. One or more of the parties may, of course, intrust performance to another or others, but this involves only the law of agency; his rights in the ultimate result and his liabilities for negligent or wrongful performance remain the same." Rosenstrom vs. North Bend, 154 Wash. 57, 280 Pac. 933.

Joint adventure is a limited partnership, not in a statutory sense as to liability, but as to scope and duration. Lee vs. Ellis, 121 Or. 259, 253 Pac. 873. See Vail vs. Fish Co., *supra* [9]. There are other features which differentiate the relation between a partnership and a joint adventure, among which may be mentioned the element of principal and agent which inheres in the partnership relation, each partner embracing the character both of a principal and agent, being the former when he acts for himself in the partnership. Story on Partnership, § 1; Jackson vs. Hooper, *supra*. In a joint adventure, no one of the parties thereto can bind the joint adventure. Keyes vs. Nims, 13 Cal. A. 1, 184 Pac. 695.

Persons who enter into a joint venture for the purchase or operation of mining property upon the understanding that each of the parties shall pay an equal amount of all expenses incident to the venture and share the proceeds of the enterprise in like amount, are partners, and the arrangement constitutes a partnership. Galbraith vs. Devlin, *supra* [11]. But acquiring, developing, and dealing in mining property does not create a mining partnership, unless it is further provided that when such property is acquired and developed it should then be worked on general account. Peterson vs. Beggs, *supra* [1]. Joint adventure cannot exist in developing an oil and gas lease unless the parties agree to share expenses, profits and losses. Brown vs. Wasaff, 126 Okla. 164, 259 Pac. 246; Carson vs. Walker, 127 Okla. 186, 260 Pac. 72. In Campbell vs. Smith, 106 Okla. 26, 232 Pac. 844, it is said that the usual test of a partnership as between the parties to a joint adventure is their intent to become partners, 15 R. C. L. 500. If the parties do not intend to become partners, ordinarily they can not be considered as such. 17 Am. & Eng. Ency. Law. (1st ed.) 832, 833; see, also, 20 R. C. L. 832; Karrick vs. Hannaman, 168 U. S. 328.

It is said by the authorities that one of the distinctions differentiating a partnership from a joint adventure lies in the fact that, a partnership ordinarily is formed for the transaction of a general business of a particular kind, a joint adventure relates to a single transaction, although the latter may comprehend a business to be continued for a period of years. Keyes vs. Nims, *supra*; see, also, Miller vs. Walser, *supra* [13]. In Forbes vs. Butler, *supra*, it is said: "A joint venture is in the nature of a partnership, ordinarily, but not necessarily limited to a single transaction. The law of partnership applies as far as substantial rights are concerned." See, also, O K Boiler Co. vs. Minnetonka Co., 103 Okla. 226, 229 Pac. 1045. It sometimes is a close question whether a transaction constitutes a partnership or a joint adventure. Jackson vs. Hooper, *supra*. A joint adventure, however, is similar to a partnership, and being of a similar nature the right to an accounting of profits in accordance with the agreement therefor and the obligations growing out of such an agreement between the parties are governed by the same rules of law. H. B. Clafin Co. vs. Gross 112 Fed. 386; Butler vs. Union Trust Co., 178 Cal. 197, 172 Pac. 601; Pearson vs. White, 43 Cal. A. 279, 224 Pac. 263; Hoge vs. George, 27 Wyo. 423. See, generally, Martin vs. Burris, 57 Cal. A. 739, 208 Pac. 174, 15 R. C. L. 507. For an elaboration of this subject see 48 A. L. R., pp. 1013, 1049 and 1055 and notes. See, also, 17 Ann. Cases 1022, on mutual rights and liabilities of parties to joint adventure; 33 C. J. 839.

[29] Where the parties agreed to use their joint efforts to acquire mining property in equal interests and to convey the title thereto to a corporation to be formed by them for the purpose of taking over the claims, a joint adventure is established. The acquirement of the claims was the primary purpose of the agreement, and it is founded upon a consideration consisting of the mutual promises of the parties. Botsford vs. Van Riper, *supra* [28]; Miller vs. Walser, *supra* [13]; see, also, Florence vs. Thompson, 92 Okla. 156, 218 Pac. 800; Harm vs. Beatman, 128 Wash. 202, 222 Pac. 478. See, also, Huson vs. Portland Co., 107 Or. 187, 211 Pac. 897.

[30] Hey vs. Duncan, *supra* [28]; Meneffe vs. Oxnam, *supra* [28]; Botsford vs. Van Riper, *supra* [28]; Martin vs. Clem, 138 Okla. 245, 280 Pac. 826. Two parties started out on a joint adventure in the course of which they located a claim in the name of both. One of the parties was to complete the location. Before discovery the latter person, unknown to the other, erased the latter's name from the

§ 905. Actions.

A joint adventurer, as a partner in a partnership may do, may sue in equity for an accounting of the profits flowing from the joint adventure. It is true that one party in a joint adventure may sue the other at law for a breach of the contract or a share of the profits or losses or a contribution for advances made in excess of his share as where the adventure has been closed and a party thereto is entitled to a sum certain as his share of the adventure, but the right thus to sue at law does not preclude a suit in equity for an accounting.[30a]

As a defense against an action on a contract for a joint adventure defendant may prove its rescission or abandonment.[31]

§ 906. Withdrawal from Agreement.

A party to a joint adventure, before the contract is executed, may withdraw from it by failure to perform his part of the agreement or by the consent of the other party.[32]

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location notice and substituted the name of another. It was held by the court that the parties were engaged in a joint adventure and a fiduciary relation existed between them and that the coadventurer was entitled to recover one-half of the claim. Cascaden vs O'Connor, 257 Fed. 930. There are many cases decided by the courts holding that a person occupying fiduciary relations with the owner of a mining claim is precluded from relocating the same. Lowry vs. Silver City Co., 179 U. S. 196; dist'g. 19 Utah 334, 57 Pac. 11; Lockhart vs. Leeds, 195 U. S. 427; rev'g. 12 N. M. 156, 76 Pac. 312; Fisher vs. Seymour, 23 Colo. 542, 49 Pac. 30; Lockhart vs. Rollins, 2 Ida. 540, 21 Pac. 413; Largey vs. Bartlett, 18 Mont. 265, 44 Pac. 962; Miller vs. Walser, *supra* (13); O'Neill vs. Otero, 15 N. M. 707, 113 Pac. 614; Utah Co. vs. Dickert Co., 6 Utah 183, 21 Pac. 1002; Argentine Co. vs. Benedict, 18 Utah 183, 55 Pac. 559; Kittilsby vs. Vevelstadt, 103 Wash. 126, 173 Pac. 744. In other words, whenever one person is placed in such a relation to another, by the act or consent of that other, or the act of a third person, or the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in the subject antagonistic to the person with whose interests he has become associated. Keech vs. Sanford, 1 White & T. Lead Cas. in Equity (4th American ed.) 62; see Mandeville vs. Solomon, 39 Cal. 133. The fiduciary relationship created by a joint adventure makes each of the parties trustee for the other, and a court of equity has always had jurisdiction in cases of fraud, misrepresentation and concealment. Houston vs. Dexter & Carpenter, 300 Fed. 365. See, also, Maas vs. Lonstorf, 194 Fed. 577; Foster vs. Callaghan & Co., 248 Fed. 944; Plews vs. Burrage, 19 Fed. (2d) 412; Dexter vs. Houston, *supra* (28). A defrauded member may rescind the agreement and recover as damages the money contributed by him, or he may sue in equity for an accounting, but he is not bound to do either; he may sue for damages for the deceit. Hey vs. Duncan, *supra* (28). See, also, Proctor vs. Gamble, 288 Fed. 297.

For a collection of cases affecting the mutual rights and liabilities of parties to joint adventures, see 17 Ann. Cas. 1022; Ann. Cas. 1912 c 202; Ann. Cas. 1914 c 691; Ann. Cas. 1916 a 1210, 33 C. J. 839.

It has been held that a complaint based on the doctrine of joint adventure should state the agreement of the parties; the consideration upon which it was based; the thing that was to be done in pursuance thereof, namely the acquisition of the claims and the interest of each in the subject matter of the contract. No further averment is required to invest the arrangement with all the elements of a joint adventure. Schmidt vs. Horton, 52 Nev. 302, 287 Pac. 276.

It is well settled that one joint adventurer may sue another at law. Jordan vs. Harriss, *supra*; Julian Corp. vs. Courtney Co., *supra* (26); O'Brien vs. Mackey, 36 Fed. (2d) 89.

See *supra*, note 10.

[30a] Keyes vs. Nims, *supra* (27). See Irer vs. Gawn, *supra* (28).

[31] Knight vs. Cecil, 110 Okla. 57, 235 Pac 1107, citing 23 Cyc. 462, subd. F.

See, generally, Schmidt vs. Horton, *supra* (30).

[32] *Id.* Irer vs. Gawn, *supra* (28). If any party to the joint adventure has refused to substantially perform his obligation, his associates may terminate their relation with him and carry out the enterprise to his exclusion, and if for this or any other valid reason they choose to terminate the relationship, they can do so only by giving notice to him that the relationship was then and there ended. Dike vs. Martin, 85 Okla. 103, 204 Pac. 1106; 13 C. J. 618.

§ 907. Grub Stake Contracts.

A grub stake or prospecting contract is an agreement, not within the Statute of Frauds, and therefore, not necessarily in writing,[33] except in Alaska,[33a] Idaho,[34] Nevada,[35] and Oregon.[36] It is an agreement between two or more persons to locate mining claims upon the public domain by their joint effort, labor or expense, whereby each is to acquire by virtue of the act of location such an interest in the location as is agreed on in the contract. The title accrues to each as an original locator, though the location be made in the name of one or more of the parties only. Such a contract, whether oral or written, when clearly established, will be enforced in equity,[37] provided it is not vague, uncertain, inequitable nor unjust.[38] It must be based upon an adequate consideration.[39]

§ 908. Nature of Contract.

A grub stake contract is in the nature of a qualified partnership.[40] It does not constitute a "mining partnership" unless the parties thereto actually engage in the joint working of the property;[41] otherwise the parties are tenants in common in the property thus acquired.[42]

[33] Shea vs. Nilima, *supra* (6); Cascaden vs. Dunbar, 157 Fed. 62; Hendrichs vs. Morgan, 167 Fed. 106; Moritz vs. Lavelle, 77 Cal. 10, 18 Pac. 803; Murley vs. Ennis, 2 Colo. 300; Meylette vs. Brennan, 20 Colo. 242, 38 Pac. 75; Doyle vs. Burns, 123 Iowa 488, 99 N. W. 195; Clark vs. Mitchell, 35 Nev. 447, 130 Pac. 760, 134 Pac. 449; Eberle vs. Carmichael, 8 N. M. 169, 47 Pac. 717; Raymond vs. Johnson, 17 Wash. 232, 49 Pac. 492.

[33a] Sess. Laws, 1913, p. 103.

[34] Ida. Civil Code, § 901; § 2784.

[35] Nev. Stats. 1907, p. 370; Rev. Laws, 1912, § 2475. See Williams vs. Cordingly, 46 Nev. 313, 213 Pac. 105.

[36] Or. Stats. 1898, p. 18, Ball. Codes, § 3985, Laws, 1920, § 7628.

[37] Hendrichs vs. Morgan, *supra* (33); McMahon vs. Meehan, 2 Alaska 278; Cascaden vs. Dunbar, 2 Alaska 408; Elliott vs. Elliott, 3 Alaska 252; Mattocks vs. Gibbons, 94 Wash. 44, 162 Pac. 19. It is not essential to the validity of a grub stake contract that it should specifically state the interest of each party thereto. In such cases, *prima facie*, the interest of each is equal, although, of course, the contrary may be shown. Tupella vs. Chichagoff Co., 267 Fed. 766; Hamilton vs. Young, 285 Fed. 226.

A location may be made by one person in the name of another. Moore vs. Hamerstag, 109 Cal. 122, 41 Pac. 805; see, also, Byrne vs. Knight,, 12 Cal. A. 56, 106 Pac. 593; Hardin vs. Hardin, 26 S. Dak. 601, 129 N. W. 108; Sly vs. Abbott, 89 Cal. A. 216, 264 Pac. 507; see Bowman vs. Carroll, 91 Cal. A. 621, 266 Pac. 840.

[38] Cisna vs. Mallory, 84 Fed. 851; Marks vs. Gates, 154 Fed. 481, aff'g. 2 Alaska 519; Cascaden vs. Dunbar, *supra* (33); Copper Co. vs. McClellan, 2 Alaska 134; Rickert vs. Mathews, 3 Alaska 269; Prince vs. Lamb, *supra* (2); Rice vs. Rigley, *supra* (29); Morrow vs. Mathew, *supra* (29); see, Stewart vs. Douglass, 148 Cal. 511, 83 Pac. 699; Brown vs. Bowman, 119 Ga. 153, 46 S. E. 410.

[39] *Id.*

For a definition of the term "adequate consideration" see Boulenger vs. Morison, 88 Cal. A. 669, 264 Pac. 256.

[40] Berry vs. Woodburn, *supra* (3); Meylette vs. Brennan, *supra* (33); Bisbour vs. Reeding, 3 Mont. 15; Prince vs. Lamb, *supra* (2); Hartney vs. Gosling, *supra* (1); see Lawrence vs. Robinson, *supra* (26).

"Grub stake contracts have sometimes been called prospecting partnerships, and are said to partake of the character of 'qualified partnerships.' Yet, unless the agreement goes beyond the mere furnishing of supplies in consideration of a participation in the discoveries, the word 'partnership' is improperly used and is misleading. It is simply a common venture, wherein one, called the 'outfitter,' supplies the 'grub,' and the other, called the prospector, performs the labor, and all discoveries inure to the benefit of the parties in the proportion fixed by the agreement." Costello vs. Scott, *supra* (7). See Cisna vs. Mallory, *supra* (38); Prince vs. Lamb, *supra* (2); Craw vs. Wilson, 22 Nev. 385, 40 Pac. 1076.

An agreement to furnish supplies and expenses necessary for the prospector's outfit in developing mines in consideration of a certain interest in mines already located by the prospector is one of bargain and sale and not a partnership nor a grubstake contract. Roberts vs. Date, 123 Fed. 743.

[41] Skillman vs. Lachman, *supra* (9); Dorsey vs. Newcomer, *supra* (4); Manville vs. Parks, 7 Colo. 128, 2 Pac. 212; Anaconda Co. vs. Butte Co., *supra* (1).

[42] GVB Co. vs. Bank, *supra* (16); Cascaden vs. Dunbar, *supra* (33); Marks vs. Gates, *supra* (38); Gore vs. McBrayer, *supra* (13); Hartney vs. Gosling, *supra* (1). There is no presumption of a partnership from cotenancy, nor even from the operation of a mining lease by cotenants. Neill vs. Shamburg, 158 Pa. 263, 27 Atl. 992; Gillespie vs. Shufflin, *supra* (9), but, of course, owners of mines and oil leases can by agreement make an ordinary partnership therein. Childers vs. Neely, 47 W. Va. 70, 34 S. E. 289.

with reciprocal rights and duties as agents and trustees in the prosecution of the joint adventure.[43] Contracting to pay wages to the prospector and in addition to give him an interest in property secured by him,[44] or exchanging interests in subsisting claims do not constitute a grub stake contract.[45]

§ 909. Termination of Contract.

A grub stake contract may expire by limitation of time, be dissolved by mutual consent[46] or, if its terms permit, at the option of either party,[47] be abandoned or become impracticable,[48] or rights therein be lost by laches or by the statute of limitations.[49] Accrued rights are not disturbed by the termination of the contract.[50] That is, such rights as have arisen by means of the grub stake and pursuant to the provisions of the grub stake contract.[51]

§ 910. Subsequent Locations.

In the absence of fraud either party may locate unappropriated discoveries known to him during the existence of the grub stake contract.[52]

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[43] Shea vs. Nilima, *supra* (6); Hendricks vs. Morgan, *supra* (33); Settembre vs. Putnam, 30 Cal. 490; Moritz vs. Lavelle, *supra* (33); Stewart vs. Douglass, *supra* (38); Harper vs. Sloan, *supra* (1); Byrne vs. Knight, *supra* (37); Jennings vs. Rickard, 10 Colo. 395, 15 Pac. 677; Meagher vs. Reed, 14 Colo. 356, 24 Pac. 681; Hardin vs. Hardin, *supra* (37); see Botsford vs. Van Riper, *supra* (28).

"The rule which has been adopted and followed by courts of equity requiring a plaintiff who seeks to establish a trust in real property contrary to the express terms of the deed which vested title in another to make out his case 'clearly and satisfactorily beyond a reasonable doubt' does not find the same reason for its application in a case where a party to a grubstake agreement invokes the aid of a court of equity in establishing a trust in mining claims located upon the public domain by one of the parties to such agreement. A location notice is not an instrument of like solemnity and dignity as sealed instruments at common law, and in cases seeking to establish a trust is not entitled to protection under the same rules applicable to sealed instruments.

The courts will not refuse to enforce a grubstake agreement simply because a plaintiff can not produce that great preponderance of evidence which produces a moral certainty and precludes all reasonable doubt." Morrow vs. Mathew, *supra* (29). See Rice vs. Rigley, 7 Ida. 115, 61 Pac. 290, and see, also, Cisna vs. Mallory, *supra* (38); Prince vs. Lamb, *supra* (2); Boulenger vs. Morison, *supra* (39).

[44] Berry vs. Woodburn, *supra* (3); Mattlocks vs. Gibbons, *supra* (37); see, also, Gillespie vs. Shufflin, *supra* (9).

[45] Roberts vs. Date, *supra* (40).

[46] Page vs. Summers, 70 Cal. 121, 12 Pac. 120; McLaughlin vs. Thompson, 2 Colo. A. 135, 29 Pac. 816; see, also, McKenzie vs. Coslett, 28 Nev. 65, 80 Pac. 1070.

[47] Lawrence vs. Robinson, *supra* (26).

Where a grubstake contract is dissolved by mutual consent unperfected locations are subject to subsequent location and may be made by any of the parties free from any trust for the others. Page vs. Summers, *supra*.

[48] Roberts vs. Date, *supra* (40); Eubanks vs. Petree, 1 Alaska 427; Miller vs. Butterfield, 79 Cal. 62, 21 Pac. 543; distg'd. in Bowman vs. Carroll, 91 Cal. A. 62, 266 Pac. 840; Sly vs. Abbott, 89 Cal. A. 216, 264 Pac. 840; Murley vs. Ennis, *supra* (33); McLaughlin vs. Thompson, *supra* (46); see McGahey vs. Oregon King Co., 165 Fed. 86. For inference of abandonment see collection of cases in Lockhart vs. Washington Co., 16 N. M. 246, 117 Pac. 833.

[49] Cisna vs. Mallory, *supra* (38). It has been held that, where one party misleads or the facts are concealed, laches is excused, and that even statutes of limitations do not run. For a compilation of the authorities on this point, see note to Shellenberger vs. Ransom, in 25 L. R. A. 564; Williams vs. Bennett, 75 Ark. 312, 88 S. W. 600. There is no absolute rule as to what constitutes laches. Each case is to be determined according to its own particular circumstances, 21 C. J. 217, under note 2; see, also, 21 C. J. 243, note 1; Dexter vs. Houston, *supra* (28).

[50] Lawrence vs. Robinson, *supra* (26).

[51] Prince vs. Lamb, *supra* (2); see Cascaden vs. Dunbar, *supra* (33).

[52] Page vs. Summers, *supra* (46). See *supra*, note 46.

As to discoveries after ending of grubstake contract see McGahey vs. Oregon King Co., 165 Fed. 86; McLaughlin vs. Thompson, 2 Colo. A. 135, 29 Pac. 816.

§ 911. Duty of Outfitter.

The outfitter must furnish the supplies agreed upon or the contract will fail [53] and the prospector thereafter may locate entirely upon his own account.[54]

§ 912. Duty of Prospector.

It is the duty of the prospector to use reasonable diligence and make reasonable exertions in seeking mineral,[55] and within a reasonable time make proper location covering discovery.[56]

§ 913. Essential Right.

It is essential to a right in property under a grub stake contract that such property should be acquired by means of the grub stake furnished and pursuant to the grub stake contract.[57]

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[53] Prince vs. Lamb, *supra* (2). The prospector has the right to insist on the outfitter performing his part of the agreement as a condition precedent to participating in his discoveries. Costello vs. Scott, *supra* (7) See, also, Miller vs. Butterfield, *supra* (48); Commercial Bank vs. Weldon, 148 Cal. 601, 81 Pac. 171; Sly vs. Abbott, 89 Cal. A. 216, 264 Pac. 507.

[54] Miller vs. Butterfield, *supra* (48); Murley vs. Ennis, *supra* (33).

[55] See Skidmore vs. Eikenberry, 53 Iowa 621; Ray vs. Hodge, 15 Or. 20, 13 Pac. 599.

[56] Murley vs. Ennis, *supra* (33). Where a grub stake prospector permits a location to be made in fraud of the outfitter, he and his coconspirators are trustees for the outfitter. Lockhart vs. Washington Co., *supra* (48), or where he fraudulently conceals locations made by him during the duration of the grubstake contract he will be compelled to account for such locations to the outfitter. Jennnings vs. Rickard, 10 Colo. 395, 15 Pac. 677.

[57] Cisna vs. Mallory, *supra* (6); Prince vs. Lamb, *supra* (2).

A grubstake agreement is properly admitted in evidence in an action to quiet title and for an injunction relative to property acquired in pursuance of such an agreement. Hawley vs. Romney, 42 Ida. 650, 247 Pac. 1069.

CHAPTER XLVIII.

MINING PATENTS.

§ 914. Rights Conferred by Patent.

A patent is the deed of the government.[1] It is not a distinct grant, but is the consummation of a grant which had its inception in the location of the claim patented.[2] It carries with it the rights conferred by law. These can not be enlarged nor diminished by reservation of the land department, depending upon their fitness on its judgment.[3] It

[1] St. Louis Co. vs. Montana Co., 113 Fed. 900, aff'd. 194 U. S. 235; U. S. vs. Kostelak, 207 Fed. 447; Van Ness vs. Rooney, 160 Cal. 131, 116 Pac. 392; Talbott vs. King, 6 Mont. 76, 9 Pac. 434; McCarty vs. Helbling, 73 Or. 356, 144 Pac. 499. The patent is the superior and exclusive evidence of the legal title. Bagnell vs. Broderick, 38 U. S. 436; Steel vs. St. Louis Co., 106 U. S. 447; Iron Co. vs. Campbell, 135 U. S. 286; Frellsen & Co. vs. Crandell, 217 U. S. 71, aff'g. 120 La. 712, 45 So. 558; Lonabaugh vs. U. S., 179 Fed. 476. See Hickey vs. Anaconda Co., 33 Mont. 46, 81 Pac. 806. In its potency a patent is iron clad against all mere speculative inferences. Standard Co. vs. Habishaw, 132 Cal. 115, 64 Pac. 113. The patent to a mining claim or a town site is a quit-claim deed from the United States. It is recorded upon its public records and its notice to the world of what it contains. McCarthy, 14 L. D. 104. The recording of the patent in law is delivery to the patentee. U. S. vs. Schurz, 102 U. S. 378. Ever since that case was decided it has been the settled law that the delivery of a patent in fee of public land is not necessary to pass the title to the patentee U. S. vs. Caster, 271 Fed. 615., dis., 257 U. S. 666, and cases therein cited. If the government possesses at the time no title to the property, none passes by its execution. Patterson vs. Tatum, Fed. Cas. 10830; Swendig vs. Washington Co., 281 Fed. 900, aff'd. 265 U. S. 322.

[2] Reed vs. Munn, 148 Fed. 737, *certiorari* denied, 207 U. S. 588. The patent and the location are regarded as one title. U. S. vs. Detroit Co., 200 U. S. 321; Birmingham vs. Doe, 181 Ala. 621, 62 So. 26; Las Vegas Co. vs. Summerfield, 35 Nev. 229, 129 Pac. 303. A patent based upon a relocation made by the original locators relates back only to the date of the relocation. Star Co. vs. Federal Co., 265 Fed. 881; Butte City Smoke House Lode Cases, 6 Mont. 397, 12 Pac. 858. The patent passes whatever title the government had to the surface and to any vein or lode not otherwise granted or reserved. Kahn vs. Old Tel. Co., 2 Utah 174; see Iron Co. vs. Elgin Co. (Horse Shoe Case), 118 U. S. 196; St. Louis Co. vs. Montana Co., 194 U. S. 235, aff'g. 113 Fed. 900; Amador Median Co. vs. South Spring Hill Co., 36 Fed. 668; Colorado Central Co. vs. Turck, 50 Fed. 888; Woods vs. Holden, 26 L. D. 375; Parrott Co. vs. Heinze, 25 Mont. 139, 64 Pac. 326; Reeves vs. Oregon Co., 127 Or. 686, 273 Pac. 389; Grand Central Co. vs. Mammoth Co., 29 Utah 490, 83 Pac. 648; see A. C. M. Co. vs. Court, 25 Mont. 507, 65 Pac. 1020. The patent decides nothing except that the patentee is entitled to the surface area applied for. That is, that the patent is a conclusive determination that to the surface area the patentee has priority. Clark-Montana Co. vs. Butte & S. Co., 233 Fed. 556, aff'd. 248 Fed. 609, *certiorari* denied, 247 U. S. 516, aff'd. 249 U. S. 12, but conflicts in respect to extralateral rights growing out of locations whose surfaces do not conflict, and which are therefore beyond the purview of the proceedings within the land department, are matters solely for the determination of the courts when subsequently arising. Round Mt. Co. vs. Round Mt. Co., 36 Nev. 543, 138 Pac. 73, rev'g. 35 Nev. 392, 129 Pac. 309. A patent for a mining claim is quite a different thing from a patent for agricultural land. The latter conveys the surface of the ground and all that lies beneath it. The former does not necessarily do so. Jones vs. Prospect Co., 21 Nev. 339, 31 Pac. 642.

[3] Davis vs. Weibbold, 139 U. S. 507. Where a right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty. Simmons vs. Wagner, 101 U. S. 260. No further authority to consider the patentee's case remains in the land office. No right to consider whether he ought in equity, or on new information, to have the title or receive the patent. There remains the duty, simply ministerial, to deliver the patent to the owner, a duty which, within all the definitions, can be enforced by writ of mandamus. U. S. vs. West, 30 Fed. (2d) 742 and cases cited. See, also, Work vs. Braffet, 19 Fed. (2d) 666. The land department can not enter into any agreement with the patentee as to the terms of the patent. Burke vs. S. P. R. Co., 234 U. S. 669; Tonopah Co. vs. Fellenbaum, 32 Nev. 278, 107 Pac. 882; or insert therein a reservation unless it is authorized by law. McGlory, 50 L. D. 623, even if the applicant consenting is a state. Dennis vs. Utah, 51 L. D. 229; see, also, Neal vs. Newton, 51 L. D. 477 and see West vs. Standard Oil Co., 278 U. S. 200, rev'g 57 App. D. C. 329, 23 Fed. (2d) 750.

affects no lien subsisting upon the property at the time of its issuance.[4] There is no restriction as to the time when it shall be applied for[5] nor as to the use[6] or sale[7] of the patented property. A patent is not essential to the use and enjoyment of a mining claim[8] as it confers no greater mining rights than those obtained by a valid location,[9] and adds but little to the security of a party in continuous possession.[10]

§ 915. Lode Patent.

A lode patent conveys the exclusive right to the surface within the patented area and all veins, lodes and ledges having their top or apex therein, together with the right to follow the same upon their dip into adjoining territory,[11] except when the latter is covered by a prior nonmineral or placer patent.[12] The lode patent conveys no part of

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[4] U. S. Comp. St., p. 5665, § 1631. As to highways, see Rockwell vs. Graham, 9 Colo. 36, 10 Pac. 281. As to a judgment creditor, see Butte Co. vs. Frank, 25 Mont. 344, 65 Pac. 1; Bradford vs. Morrison, 10 Ariz. 211, 86 Pac. 6, aff'd. 212 U. S. 389; *but see* Phoenix Co. vs. Scott, 20 Wash. 48, 54 Pac. 777. It may create a dower right. See Black vs. Elkhorn Co., 163 U. S. 445, aff'g. 52 Fed. 859, disapproving but aff'g. 49 Fed. 549; see Bradford vs. Morrison, *supra*. See *infra* note 63.

[5] Coleman vs. McKenzie, 28 L. D. 348. See Van Ness vs. Rooney, *supra* [1]. A mining claim which has not gone to patent is of no higher dignity than unpatented claims under the Homestead and kindred laws. Cameron vs. U. S., 252 U. S. 451, aff'g. 250 Fed. 943; see Cameron vs. Bass, 19 Ariz. 246, 168 Pac. 645.

In Wilbur vs. Krushnic, 280 U. S. 317, aff'g. 30 Fed. (2d) 742, the court said: "The owner (of a mining claim) is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent." See *infra* notes 8, 9 and 10.

[6] St. Louis Co. vs. Kemp, 104 U. S. 636; Schwab vs. Beam, 86 Fed. 41; see U. S. vs. Rizzinelli, 182 Fed. 675.

[7] 5 U. S. Comp. St., p. 5623, § 4623. § 2326 of the Revised Statutes expressly provides that "nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

[8] Coleman vs. McKenzie, *supra* [5]. It is wholly a matter of self interest when a patent shall be applied for. It is sufficient to comply with all the requirements necessary to maintain the possessory right. Chapman vs. Toy Long, Fed. Cas. 2610; Gillis vs. Downey, 85 Fed. 483; Daggett vs. Yreka Co., 149 Cal. 357, 86 Pac. 968. See, also, Clipper Co. vs. Eli Co., 194 U. S. 220, aff'g. 29 Colo. 377, 68 Pac. 286.

[9] Forbes vs. Gracey, 94 U. S. 766; Duggan vs. Davey, 4 Dak. 110, 26 N. W. 887; Chapman vs. Toy Long, *supra* [5]. The mining law creates three distinct classes of title: (1) Title in fee simple; (2) title by possession; (3) the complete equitable title. The first is indefeasible; the second is a title in the nature of an easement and may be defeated at any time by a failure to perform the annual assessment work. The third accrues immediately from purchase, as the entry entitles the purchaser to a patent, and the right to a patent once vested, is as to third parties equivalent to a patent issued. Benson Co. vs. Alta Co., 145 U. S. 430; Fulkerson vs. Chisna Co., 122 Fed. 786; O'Connell vs. Pinnacle Co., 131 Fed. 110, aff'd. 140 Fed. 854. See Black vs. Elkhorn Co., *supra* [4].

[10] Haws vs. Victoria Co., 160 U. S. 303. See Wilbur vs Krushnic, *supra* [5].

[11] Iron Co. vs. Cheesman, 116 U. S. 529; Butte & S. Co. vs. Clark-Montana Co., 249 U. S. 12, aff'g. 218 Fed. 609, aff'g. 233 Fed. 556; Doe vs. Waterloo Co., 54 Fed. 935, aff'd. 82 Fed. 45. The patent, however, does not necessarily assert a discovery prior to the date of the patent. Creede Co. vs. Uinta Co., 196 U. S. 337, aff'g. 119 Fed. 164. The entries and patents to lode mining claims vest the title thereof in the applicant subject to the rights of the prior claimant of a statutory tunnel-site, just as they vest them subject to the rights of adjoining lode claimants to follow the dip of veins or lodes having their apices in such location. Iron Co. vs. Campbell, *supra* [1]; Enterprise Co. vs. Rico-Aspen Co., 66 Fed. 210; Branagan vs. Dulaney, 8 Colo. 412, 8 Pac. 669; Lee vs. Stahl, 9 Colo. 210, 11 Pac. 77; Morganson vs. Middlesex Co., 11 Colo. 179, 17 Pac. 513. See next succeeding note.

It should, perhaps, be stated that the early Colorado cases cited *supra* go further than the later cases. The former announce a rule as to cross-veins which was materially modified in Calhoun Co. vs. Ajax Co., 27 Colo. 1, 59 Pac. 609, aff'd. 182 U. S. 499, leaving the Colorado rule to be that the junior locator of a cross-lode has a right of way throughout the senior location. This is the rule in Pardee vs. Murray, 14 Mont. 234, 2 Pac. 16. But even this is denied the junior locator in California Eclipse Co. vs. Spring, 59 Cal. 304, and Wilhelm Co. vs. Leach, 4 Ariz. 34, 33 Pac. 418. See on this subject 2 Lindl. Mines (3d Ed.), page 1248, §§ 557 to 562.

[12] Amador Median Co. vs. South Spring Hill Co., *supra* [2]. An "agricultural" patent conveys the surface of the ground embraced therein and all that lies beneath it. See Eastern Oregon Co. vs. Willow River Co., 187 Fed. 466; Woods vs. Holden, *supra* [2]; Reeves vs. Oregon Co., *supra* [2].

the lode or vein upon its strike or of the land upon the surface beyond the exterior boundaries of the claim as located.[13]

§ 916. Placer Patent.

A patent for a placer claim conveys all minerals within the location, including veins or lodes not known to exist at the time of the application for patent. Such a patent establishes *prima facie* title to all the land therein described and all ores and minerals lying within the boundaries thereof.[14] It confers, however, no extralateral rights.[15]

[13] Whildin vs. Maryland Co., 33 Cal. A. 270, 164 Pac. 908; Jones vs. Prospect Co., *supra* (2).

[14] The rights conferred by respective patents for placer and lode claims and the conditions upon which they are held are entirely different. U. S. vs. Iron Co., 128 U. S. 673; aff'g. 24 Fed. 568; see St. Louis Co. vs. Kemp, *supra* (6); Iron Co. vs. Reynolds, 124 U. S. 374, s. c. 116 U. S. 687; Iron Co. vs. Mike and Starr Co., 143 U. S. 405; Migeon vs. Montana Co., 77 Fed. 256; Thomas vs. South Butte Co., 211 Fed. 106; Mason vs. Washington-Butte Co., 214 Fed. 34; Barnard Co. vs. Nolan, 215 Fed. 996; McKay vs. Mesch, 274 Fed. 869; Mutchmor vs. McCarty, 149 Cal. 609, 87 Pac. 85.

If the proof is that lodes are known to exist within the placer claim, the applicant is required to survey them, and if not claimed and as known lodes included in his application for patent, he is required to exclude them, whereupon he enters and pays for only the net area of his placer claim, and patent issues to him, conveying said net area alone.

If the proof is that lodes are not known to exist within the placer claim, the applicant enters and pays for the entire area of his placer claim, and patent issues to him, conveying the whole thereof; but the Land Department inserts in the nature of an exception that, should any lode be known or claimed to exist when the patent was applied for, it is expressly excepted or excluded (though not defined) from the grant. There is no warrant in the law for this insertion, and it is broader than the law implies, if the statute implies any exception. Perhaps the reason it is held that the law does imply an exception of known lodes, contrary to the holding in the matter of patents by virtue of analagous laws and inappropriate to lodes and mineral lands, is that this Land Department practice confronted in the first case involving the question, if not given undue weight, at least suggested the exception—more suggested it than did settled principles of construction. Since lodes known to exist are excepted from a placer grant, title to them continues in the United States, and they are open to location as lodes in public land and by any one at any time.

If located, in any controversy involving the respective rights of the lode claimant and the placer patentee, the burden is upon the lode claimant to prove the lode was known to exist when the placer patent was applied for. And the proof in effect impeaching the patent proceedings, if not the patent, for fraud, seeking to withdraw or except from a solemn grant over the seal of the United States premises *prima facie* conveyed by it, must be clear and convincing, in quality and quantity that inspires confidence and produces conviction.

To so establish that a lode was known to exist when the placer patent was applied for, it must appear that at that time the lode was clearly ascertained and defined, and of such known extent and content that, in view of all circumstances and conditions affecting its worth, such as the importance locally attached to like lodes under similar conditions, ease or difficulty of development, facilities for ore treatment, cost of mining and reducing ores, reasonable probabilities of development, and the like, it then would have justified location, development, and exploitation, and because of it and the area attaching to or excluded with it then were valuable, and more valuable than for placer mining purposes.

Float, outcrop, lodes, and abandoned lode locations, separately or combined, are not sufficient to constitute a lode "known to exist" within the exception of a placer patent. In addition must be the known quality above defined. And the reason is lodes exist throughout the mining country. Not one in hundreds justifies development and proves of value. No reason exists to except the valueless from placer patents or grants, and such patents issued or grants made without excluding them *prima facie* lodes of value did not exist. The issue is determined now by conditions as they were when the placer patent was applied for, even as though tried and determined then. Subsequent development and results, however marvelous, are immaterial. For if they are received in evidence and given evidentiary value, judgment is not based upon conditions as they were when the placer patent was applied for, but upon subsequent events, not consequences—the most fallible and dangerous of all criteria. The sanctity of a solemn grant of lands by the United States and the definiteness and certainty that should attach thereto and the stability of titles evidenced thereby, can only thus be preserved. See Iron Silver Case, 143 U. S. 405; Migeon vs. Montana Co., 77 Fed. 256; Thomas vs. Mining Co., 211 Fed. 106; Mason vs. Mining Co., 214 Fed. 34; Clark-Montana Co. vs. Ferguson, 218 Fed. 963.

In Iron Co. vs. Mike and Starr Co., *supra*, it is said: "It is undoubtedly true that not every crevice in the rocks, not every outcropping on the surface which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute." In the same case it was held that the term "known vein" is not synonymous with "located vein."

[15] Noyes vs. Mantle, 127 U. S. 348; Sullivan vs. Iron Co., 143 U. S. 431; Clipper Co. vs. Eli Co., *supra* (8); Mt. Rosa Co. vs. Palmer, 26 Colo. 56, 56 Pac. 176.

A patent for a lode claim may be carved out of land previously patented as placer ground.[16]

§ 917. Mill Site Patent.

A patent for a mill site usually is issued in conjunction with one or more mining locations [17] or, singly, in connection with a quartz mill or reduction works.[18]

§ 918. Group Patents.

There is no limitation upon the number of contiguous mining locations which may be included within a lode or placer patent.[19]

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[16] Iron Co. vs. Campbell, *supra* (1). Before the land department can issue a second patent for a lode claim within a placer claim it must be shown that the lode was known to exist prior to the issuance of the placer patent. Valley Lode (on review), 22 L. D. 713. *See supra*, note 14. The issuance of a patent on the lode claim subsequent to the issue of the placer patent does not create a conclusive presumption that the vein was known to exist at the date of the placer patent. Iron Co. vs. Campbell, *supra* (1).

In Reynolds vs. Iron Co., 116 U. S. 687, a patent was granted for a placer mine within which when the patent was issued a quartz mine was known to exist. Speaking of the effect of the grant to the placer claim patentee under this circumstance, the court said: "He (the placer patentee) takes his surface land and his placer mine and such lodes or veins of mineral matter within it as were unknown, but as such as were known to exist he gets by that patent no right, whatsoever. The title remaining in his grantor, the United States, to this vein, the existence of which was known, he has no interest in it as authorizes him to disturb any one else in the peaceable possession and mining that vein. When it is once known that the vein was known to exist at the time he acquired title to the placer, it is shown that he acquired no title or interest in that vein by his patent. Whether the defendant has title or is a mere trespasser, it is certain that he is in possession and that is a sufficient defense against one who has no title at all nor ever had one."

[17] See St. Louis Co. vs. Kemp, *supra* (6); Donnelly vs. U. S., 228 U. S. 265; Warren Mill Site vs. Copper Prince Lode, 1 L. D. 555; Alta Mill Site, 8 L. D. 195; Emerald Oil Co., 48 L. D. 243; Hales vs. Symons, 51 L. D. 123; Pacific Co., 51 L. D. 459; Poire vs. Wells, 6 Colo. 412; Cleary vs. Skiffich, 28 Colo. 362, 65 Pac. 59; Hamburg Co. vs. Stephenson, 17 Nev. 449, 30 Pac. 1088; Rev. St., § 2337.

[18] 5 U. S. Comp. St., p. 5691, § 4645; Rico Townsite, 1 L. D. 556; Hecla Co., 14 L. D. 11.

[19] Carson City Co. vs. North Star Co., 83 Fed. 664; see, also, Tucker vs. Masser, 113 U. S. 203; Cook vs. Klonos, 164 Fed. 538; Peabody Co. vs. Gold Hill Co., 111 Fed. 817; *but see* U. S. vs. Bunker Hill Co., 48 L. D. 598. An application for patent may embrace two or more lode claims held in common only where such claims are contiguous. Claims which merely corner on one another or are bisected by a millsite are not so contiguous. Hales vs. Symons, *supra* (17); U. S. vs. Bunker Hill Co., *supra*.

On application for patent for a group of several mining claims, the land department necessarily adjudicates and determines the priorities in case of surface conflict, and does not leave such question for subsequent determination by the courts, as it was not the intention of congress or the land department to leave such questions unsettled after patent, as evidenced by the rule requiring the field notes of the mineral surveyor to state the conflict in connection with the location from which the conflicting area is excluded. A patent to group of mining claims does not merely describe the exterior boundaries of the land which is embraced by the group, but describes each location and each embraces a separate portion of the grant to the exclusion of every other claim, the same as if a separate patent issued for each particular location within the group. Round Mt. Co. vs. Round Mt. Co., *supra* (2).

Where a number of valid lode locations, forming upon the ground a contiguous group, are embraced in a single application for patent, upon which due publication and posting of notice has been had, and the application is rejected as to one of the claims because of insufficient patent improvements, Dawson, 40 L. D. 17, or because of want of discovery in one or more of such claims, the remainder of the locations, although not in themselves contiguous, may be retained and embraced within a single entry and patent. U. S. vs. Bunker Hill Co., *supra*. In this case it is said: "With reference to the fact that the elimination from the entry of claims upon which a satisfactory discovery has not been shown will render other claims noncontiguous, the department is not disposed to cancel such noncontiguous claims, in view of the fact that the claims as located and held by applicant company form a contiguous body of land held and worked under the general mining laws, and will occupy that status after the cancellation of the entry to the extent of the claims upon which discovery has not been made. As stated above, with reference to the question of discovery after application, no good purpose would be served in a case like this by cancellation of the said locations and the subjecting of the company to new proceedings. The law is met, in my judgment, by the fact above stated that the group of claims forms a contiguous body, held and worked in common ownership—contiguous in fact—upon the ground, and which, presumably, will be made contiguous upon the records by subsequent proceedings by the applicant after discovery shall have been established upon the claims now held for cancellation because of nondiscovery."

§ 919. Town Site Patents.

A patent issued under the general town site laws does not convey the title to any lands known to be valuable for mining at the date of the town site entry, nor to any valid mining claim [20] or mill site [21] held under the mining laws at the date of such entry.

§ 920. Restricted Patents.

The severance of surface from subsurface rights in land which an individual proprietor, in its disposal may make as he will, has been authorized by sundry acts of congress relative to the disposal by the United States of its public domain.[22] Among these may be mentioned the act of June 22, 1910, which permitted agricultural entry of the surface rights in withdrawn or classified coal lands;[23] the act of July 17, 1914,[24] which permitted like entry of the surface rights in withdrawn phosphate, oil, gas, and other specified mineral lands; the act of February 25, 1920,[25] which provided for the disposal by lease of the subsurface rights separated from the surface ownership, in lands containing certain specified minerals. A restricted patent carries but a qualified right to the surface as the miner, under certain restrictions, may enter thereon for the purpose of prospecting for mineral therein and mine and remove the same; occupying so much of the surface as may be required for all purposes incident to the business of mining.[26]

§ 921. Register's Certificate.

An uncancelled certificate of purchase, that is, a register's certificate of final entry, for many purposes, is equivalent to a patent so far as the rights of third parties are concerned,[27] and gives the holder thereof an equitable right to demand the patent from the government.[28] After

[20] Golden Center Co., 47 L. D. 27; see Lalande vs. Townsite, 32 L. D. 211. Where it appears that a townsite patent has issued for lands embracing a known lode claim duly recorded prior to the townsite entry, judicial proceedings should be instituted for the vacation of the patent so far as it conflicts with the mining claim; and a patent should then issue to the mineral claimant, and under such circumstances the land department may order a hearing to ascertain whether the grounds embraced in the mineral claim were known to be valuable for minerals at the date of the townsite entry. Cameron Lode, 13 L. D. 369; see Plymouth Lode, 12 L. D. 513. See generally, Deffeback vs. Hawke, 115 U. S. 392; Davis vs. Weibbold, *supra* [3]; Dower vs. Richards, 151 U. S. 663, aff'g. 81 Cal. 44, 22 Pac. 304. See also 73 Cal. 447, 15 Pac. 105; Larned vs. Hill, 89 Cal. 122, 26 Pac. 644.

[21] Davis vs. Weibbold, *supra* [3]; Cleary vs. Skiffich, *supra* [17]; Hartman vs. Smith, 7 Mont. 19, 14 Pac. 648.

[22] Emerald Oil Co., *supra* [17]. Where the law provides that certain lands are open to entry, but that patents issued shall contain a reservation to the United States of all underlying mineral a patent issued without such reservation is void in so far as it attempts to convey such mineral and the United States is at all times the owner of such mineral. Proctor vs. Painter, 15 Fed. (2d) 974. See, also, Kansas City Co. vs. Clay, 3 Ariz. 328, 29 Pac. 9.

[23] 36 Stats. 583.

[24] 5 U. S. Comp. St., p. 5683, §§ 4640*a*–4640*c*; Stock-Raising Homesteads, 48 L. D. 485, 496.

[25] 2 Supp. U. S. Comp. St., p. 1404, § 46404.

[26] Son vs. Adamson, 188 Cal. 99, 204 Pac. 392. Midland Oil Co. vs. Rudneck, 188 Cal. 265, 204 Pac. 1074.

[27] Brown vs. Gurney, 201 U. S. 193, aff'g. 32 Colo. 484, 77 Pac. 357; Aurora Hill Co. vs. Eighty-Five Co., 34 Fed. 515, Davis vs. Fell, 59 Cal. A. 438, 211 Pac. 30. The final entry is not made until the certificate of the register is issued. The mere receipt of the money by the receiver, until the papers are accepted as a final entry by the register, and the register's receipt issued, is not a "receipt on final entry." Stockley vs. U. S., 271 Fed. 632. The right to a certificate has its inception at the making of an application for patent; when issued the right relates back to the time of its inception for the purpose of supporting any right of the holder thereof. Deffeback vs. Hawke, *supra* [20]; Rea vs. Stephenson, 15 L. D. 37.

[28] Langdon vs. Sherwood, 124 U. S. 74; Bowne vs. Wolcott, 1 N. Dak. 402, 48 N. W. 336.

the issuance of the register's certificate, annual expenditure upon the mining claim affected thereby is unnecessary.[29]

§ 922. Cancellation of Certificate.

The land department in a proper case may cancel a register's certificate upon its own motion [30] or upon protest on the ground of fraud in obtaining the same [31] or if it be shown that the applicant has failed to comply with the terms of the mining statute,[32] at any time before patent issues,[33] after notice given to the applicant and an opportunity to be heard.[34]

§ 923. Effect of Cancellation of Certificate.

In Cameron vs. Bass,[35] it is said that it may be conceded that the land department is without jurisdiction to order the cancellation of a mining location on an application for a patent; but the determination of that department of the fact that the ground applied for was not mineral land, in effect destroys every step taken by an applicant under the mining law, and necessarily includes his mining location.[36]

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[29] Benson Co. vs. Alta Co., *supra* (9); Deno vs. Griffin, 20 Nev. 249, 20 Pac. 308; see South End Co. vs. Tinney, 22 Nev. 19, 35 Pac. 89.

[30] Germania Co. vs. Hayden, 21 Colo. 127, 40 Pac. 453. Mineral Farm Co. vs. Barrick, 33 Colo. 410, 80 Pac. 1055. The cancellation of the receipt is binding upon the courts, is conclusive that the applicant failed to meet all the statutory requirements and deprives him of the ability to claim any right under his receipt. The fact that the purchase money remains on deposit gives him no equitable rights; nor does the fact that the applicant has procured an official survey to be made of the claim alone create any title in him. Shank vs. Holmes, 15 Ariz. 229, 137 Pac. 871.

[31] Murray vs. Polglase, 17 Mont. 455, 43 Pac. 505. See Murray vs. Polglase, 23 Mont. 401, 59 Pac. 439.

[32] El Paso Co. vs. McKnight, 233 U. S. 258; rev'g. 16 N. M. 721, 120 Pac. 694; Hughes vs. Ochsner, 27 L. D. 396; South End Co. vs. Tinney, *supra* (29). The mere suspension of a mineral entry for the purpose of requiring compliance with regulations does not destroy the force of the certificate of entry nor enable third persons to attack its validity. Gurney vs. Brown, 32 Colo. 484, 77 Pac. 357, aff'd. in 201 U. S. 184; see Last Chance Co. vs. Tyler Co., 61 Fed. 557. In the case of Bush, 2 L. D. 788, the land department held that a mining entry should not be held for cancellation upon the report of a special agent, but a hearing should be duly ordered and evidence submitted showing the illegality of the entry. Pearsall vs. Freeman, 6 L. D. 227.

[33] Rebecca Co. vs. Bryant, 31 Colo. 119, 71 Pac. 1110. In an application for patent otherwise sufficient, the final receipt can not be canceled solely because of the irregularity in executing the proof of posting the notice upon the claim. The irregularity can be cured, and, being cured, the patent should issue. El Paso Co. vs. McKnight, *supra* (32).

[34] Cameron vs. U. S., *supra* (5); Cameron vs. Bass, *supra* (5). Mineral Farm Co. vs. Barrick, *supra* (30). A mineral entry should not be canceled unless it is shown affirmatively that the applicant had notice of the intention of the Land Department to cancel entry, and an entry so improperly canceled should be reinstated and on such reinstatement an opportunity afforded a transferee to show the facts as to his compliance with the law. San Juan Placer, 12 L. D. 125; McGowan vs. Alps Co., 23 L. D. 113; Southern Cross Co. vs. Sexton, 147 Cal. 758, 82 Pac. 423; Beals vs. Cone, 27 Colo. 483, 62 Pac. 948; Rebecca Co. vs. Bryant, *supra* (33); see Kirk vs. Olson, 245 U. S. 225, aff'g. 35 S. Dak. 620, 153 N. W. 893.

[35] 252 U. S. 451.

[36] See Clipper Co. vs. Eli Co., *supra* (8), in which case it is said that while the land department has the power to set aside a mining location and restore the land to the public domain, yet the mere rejection of an application for entry on the ground that the land was not placer mining ground, nor subject to entry as a placer mining claim, does not have that effect, and the applicant may submit a second or amended application and offer further testimony as to his right to a patent. Clipper Co. vs. Eli Co., 33 L. D. 660. So, the cancellation of an entry of a mining claim for failure to perform the antecedent statutory requirements does not affect the possessory title of the applicant, Magruder, 1 L. D. 526, and is not determinative of another application, and the facts found upon which such cancellation was based are not admissible to support an adverse claim against a second application for the same premises. Beals vs. Cone, *supra* (34); Clipper Co. vs. Eli Co., 29 Colo. 377, 68 Pac. 286, aff'd. 194 U. S. 220. In Shank vs. Holmes, *supra* (30), it is held that the cancellation of an entry of the register's certificate, like its issuance, is a mere incident in the proceedings prescribed for procuring title from the government; and while the register's certificate when in force is evidence of compliance with preliminary patent conditions, yet its revocation or cancellation and nothing more, does not, of itself, evidence either the forfeiture or relinquishment of the location made by applicant, and it has no necessary connection either with the segregation of the land from the public domain or its restoration thereto. See, also, Rebecca Co. vs. Bryant, *supra* (33); Murray vs. Polglase, *supra* (31).

§ 924. Second Patent.

Several patents sometimes are issued to different parties for the same land,[37] or for a part thereof.[38] In such case the junior patent is void and subject to collateral attack.[39] The right of the United States to vacate and annul patents erroneously issued by the land department is sustained by an unbroken line of authority.[40]

§ 925.. Void Patent.

A patent for a mining claim is void if the government officers act without authority of law, or if the lands conveyed were never within their control, or if they had been withdrawn from their control before the patent issued[41] and may collaterally be impeached in an action at law.[42]

§ 926. Cancellation and Vacation of Patent.

A patent for a mining claim can only be vacated or limited by regular judicial proceedings taken in the name of the government for that special purpose.[43] A patent, though irregularly issued, is not void,

[37] Hermocilla vs. Hubbell, 89 Cal. 5, 26 Pac. 611; distinguished in Graham vs. Reed, 83 Cal. A. 516, 257 Pac. 131. An instructive case. Where each of two parties has a patent for the same claim, the question as to the superiority of title may depend upon extrinsic facts not shown by the patents themselves; and it is competent in a controversy in a judicial proceeding to establish such priority by proof of such facts. Iron Co. vs. Campbell, *supra* (1); see Last Chance Co., vs. Tyler Co., *supra* (32).

[38] Adams vs. Smith Co., 273 Fed. 656. In this case it appears that two patents were issued covering in part the same land, one for a placer claim and one for a timber claim, and it was held that the patent for the placer claim must yield to the patent for the timber claim, which was the one first issued. Where several parties are found to be entitled to separate and different portions of the same mining claim each may pay for his part, Iron Co. vs. Campbell, *supra* (1), and receive a patent therefor in his own name, or if dead the patent will issue to his heirs. Liddia Claim, 33 L. D. 127; Min. Regs., par. 71; see Tripp vs. Dunphy, 28 L. D. 14; Slothower vs. Hunter, 15 Wyo. 189, 88 Pac. 36.

[39] Davis vs. Weibbold, *supra* (3); Francoeur vs. Newhouse, 40 Fed. 618; N. P. R. Co. vs. Barden, 46 Fed. 606. The government having issued a patent for a mining claim can not by the authority of its own officers invalidate such patent by issuing of a second one for the same property. Round Mt. Co. vs. Round Mt. Co., *supra* (2).

[40] U. S. vs. Stone, 2 Wall. 525; Colorado Coal Co. vs. U. S., 123 U. S. 307; see Brown vs. Gurney, *supra* (27).

See Federal Statutes of Limitations.

[41] N. P. R. Co. vs. Cannon, 54 Fed. 258; see St. Louis Co. vs. Kemp, *supra* (6); Steel vs. St. Louis Co., *supra* (1); Reynolds vs. Iron Co., *supra* (14); Kansas Co. vs. Clay, *supra* (22); Board vs. Mansfield, 17 S. Dak. 81, 95 N. W. 286. A patent issued for a mining claim where the title has already passed out of the United States is utterly void, and is subject to collateral attack.

[42] Patterson vs. Wynn, 24 U. S. 380; St. Louis Co. vs. Kemp, *supra* (6); Steel vs. St. Louis Co., *supra* (1); Peabody Co. vs. Gold Hill Co., *supra* (19); Chilberg vs. Con. Co., 3 Alaska 241; see Doolan vs. Carr, 125 U. S. 618; Knight vs. U. S. Land Ass'n., 142 U. S. 161; Lakin vs. Dolly, 53 Fed. 333; Klauber vs. Higgins, 117 Cal. 451, 49 Pac. 466; Huntington vs. Donovan, 183 Cal. 746, 192 Pac. 543; Heydenfeldt vs. Daney Co., 10 Nev. 308. "The question whether a patent from the United States for public lands is valid or invalid is not always one of easy solution. The Supreme Court has repeatedly held that patents for lands which have been previously granted, reserved or appropriated are absolutely void. Morton vs. Nebraska, 21 Wall. 660; St. Louis Co. vs. Kemp, *supra* (6); Burfenning vs. Chicago Co., 163 U. S. 321; Salt Lake Inv. Co. vs Oregon Short Line, 246 U. S. 446, aff'g. 46 Utah 203, 148 Pac. 439. On the other hand, if the land department has jurisdiction to dispose of the land and to issue a patent therefor, an erroneous determination of the facts upon which the right to a patent depends, or an entire failure to determine such facts, will not avoid the patent. Burke vs. S. P. R. Co., *supra* (3)." Proctor vs. Painter, *supra* (22).

[43] Steel vs. St. Louis Co., *supra* (6); Peabody Co. vs. Gold Hill Co., *supra* (19); Jameson vs. James, 155 Cal. 275, 100 Pac. 700; Quinn vs. Baldwin Co., 19 Colo. A. 505, 76 Pac. 552; see Justice Co. vs. Lee, 21 Colo. 260, 40 Pac. 444. If a party is not entitled to control the legal title, yet seeks to annul the patent or limit its operation he must make application to the government to take the proper steps to that end, as such a suit can be maintained only by and in the name of the United States. Lee vs. Johnson, 116 U. S. 48; Carter vs. Thompson, 65 Fed. 329; Poire vs. Wells, *supra* (17); see Doolan vs. Carr, *supra* (42); South End Co. vs. Tinney, *supra* (29).

and until vacated and set aside by appropriate judicial proceedings is of full force and effect.[44]

§ 927. Annulment for Fraud.

A patent for a mining claim passes the legal title, though procured by fraud, but it may be assailed by a proceeding in equity and set aside on proof of the fraud, if rights of innocent purchasers have not intervened.[45] It is a fraud on the government when a claimant obtains a patent on representations that the land described is valuable for its mineral deposits and that the purpose of obtaining the patent is because of such mineral deposits, when in fact the land is not valuable for such deposits and is not desired by the patentee for that purpose, but for other and different purposes.[46]

§ 928. Nonmineral Patent not Defeated.

A mineral discovery, other than by the patentee or his grantee, when made subsequent to the grant of the "agricultural" title by the United

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[44] St. Louis Co. vs. Kemp, *supra* (6); Proctor vs. Painter, *supra* (22); Sinnott vs. Jewett, 33 L. D. 91; Chino Co. vs. Hamaker, 39 Cal. A. 274, 178 Pac. 738, decided on the authority of Burke vs. S. P. R. Co., *supra* (3). See s. c. 171 Cal. 689, 154 Pac. 180. Patents for mining claims being the accredited evidence of rights and title are not to be set aside nor modified for mistakes unless such alleged mistakes are proved by evidence that is plain and convincing beyond reasonable controversy. Thallman vs. Thomas, 111 Fed. 282.

In U. S. vs. Peterson, 34 Fed. (2d) 249, the court, citing numerous cases, said: "Where a patent is obtained by false and fraudulent proofs submitted for the purpose of deceiving the officers of the government, and of thus obtaining public lands without compliance with the requirements of the law, while the patent is not void or subject to collateral attack, it may be directly assailed in a suit by the government against the parties claiming under it. In such case, the respect due to a patent, the presumption that all the preceding steps required by the law had been observed before its issue, and the immense importance of stability of titles dependent upon these instruments, demand that suit to cancel them should be sustained only by proof which produces conviction."

See, also, U. S. vs. Hays, 35 Fed. (2d) 948.

[45] U. S. vs. Minor, 114 U. S. 242; Colorado Coal Co. vs. U. S., *supra* (40); Montana Co. vs. Migeon, 68 Fed. 813. Where a patent was procured by fraud and misrepresentation and against the rights of an adverse claimant, a court of equity may at the instance of the government cancel the patent and afford the adverse claimant an opportunity to contest his rights Diamond Coal Co. vs. U. S., 233 U. S. 239; Brien vs. Moffitt, 35 L. D. 32; see McLaughlin vs. U. S., 107 U. S. 528; W. P. R. Co. vs U. S., 108 U. S. 510; Mullan vs. U. S., 118 U. S. 278–279; U. S. vs. Iron Co., *supra* (14); Overgaard vs. Westerberg, 3 Alaska 174; Cascaden vs. Bartolis, 3 Alaska 206. The defense of bona fide purchaser is affirmative and must be set up and established by such person. U. S. vs. Poland, 251 U. S. 221, rev'g. 231 Fed. 810; U. S. vs. Cooksey, 275 Fed. 670; see Huntington vs. Donovan, *supra* (41)

Despite satisfactory proof of fraud in obtaining the patent, if the legal title has passed, *bona fide* purchase for value is a perfect defense. U. S. vs. Peterson, *supra* (42), and cases therein cited.

[46] U. S. vs. Lavenson, 206 Fed. 763. A court will not set aside a patent for mineral land on the ground of fraud merely because the applicant was mistaken as to the character of the land, and where witnesses disagree on the question as to whether the land was in fact mineral land, must clearly appear that the representations were false and fraudulent in fact before the court will act in such a case. U. S. vs. Iron Co., 24 Fed. 570; see U. S. vs. Kostelak, *supra* (1). See U. S. vs. N. P. R. R. Co., 1 Fed. (2d) 53. False testimony or forged documents will not defeat the patent if the disputed matter actually has been presented to or considered by the appropriate tribunal. Greenameyer vs. Coate, 212 U. S. 434; U. S. vs. Reed, 28 Fed. 482; Peabody Co. vs. Gold Hill Co., *supra* (19); Jameson vs. James, *supra* (43); Cragie vs. Roberts, 6 Cal. A. 309, 92 Pac. 97; see U. S. vs. Smith, 181 Fed. 545. To be considered the perjury must be extrinsic or collateral to the matter determined, U. S. vs. White, 17 Fed. 561; U. S. vs. Minor, *supra* (45); Cragie vs. Roberts, *supra*. A concealment of facts is not sufficient basis for an attack upon a patent. U. S. vs. Atherton, 102 U. S. 372; U. S. vs. McGraw, 12 Fed. 449. See Kerns vs. Lee, 142 Fed. 985.

See Federal Statutes of Limitation. See Suits Affecting Mining Patents.

States or by a state does not affect such title nor give the discoverer or locator any right thereto adverse to the patent holder.[47]

§ 929. When Patent is Conclusive.

A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency it is iron-clad against all mere speculative inferences.[48] Unless set aside and annulled by direct proceedings by the government, a patent regular upon its face[49] establishes the regularity of its issuance,[50] the fact that no adverse claim exists,[51] the

[47] Colorado Coal Co. vs. U. S., *supra* (40); Shaw vs. Kellogg, 170 U. S. 332; Cowell vs. Lammers, 21 Fed. 200; U. S. vs. Porter Co., 247 Fed. 771; Riley, 33 L. D. 70; Graham vs. Reed, *supra* (37); distinguishing Ivanhoe Co. vs. Keystone Co., 102 U. S. 168, and Saunders vs. La Purisima Co., 125 Cal. 159, 57 Pac. 565. A patent conveying mineral land, knowingly purchased as agricultural will be canceled. U. S. vs. Culver, 52 Fed. 81; see U. S. vs. Beeman, 242 Fed. 876; see, also, U. S. vs. N. P. R. Co., *supra* (46). A patent for lands as agricultural lands passes no interest or title to any mining claim upon the land or to known deposits of the precious metals. U. S. vs. Culver, *supra;* Standard Co. vs. Habishaw, *supra* (1); U. S. vs. San Pedro Co., 4 N. M. 405, 17 Pac. 337. To justify the annulment of a homestead patent as wrongfully covering mineral lands, it must appear that at the time of the proceedings which resulted in the patent the "land was known to be valuable for mineral"; that is to say, it must appear that the known conditions were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. If at that time the land was not thus known to be valuable for mineral subsequent discoveries will not affect the patent. The inquiry must be directed to the situation at that time, as were the applicants' proofs and the finding of the land officers. If the proof were not false then, they can not be condemned, nor the good faith of the applicant impugned, by reason of any subsequent change in the conditions. U. S. vs. Porter, *supra.*

In Saunders vs. La Purisima Co., *supra*, the court adopts the rule laid down in Dreyfus vs. Badger, 108 Cal. 58, 41 Pac. 279, and other cases fully commented upon, that "where a patent, regular on its face, has been issued by the government (federal or state) for land which it owns, under a law providing for a disposal of the land patented, upon the ascertainment of certain facts, the officers of the Land Department of the government have jurisdiction to determine such facts, and the issuance of a patent is, upon collateral attack, a conclusive declaration, as against all claiming under said government, that the facts have been found in favor of the patentee. And this rule applies to the determination of the particular character of the land which is the subject of the patent." In the Dreyfus case the issue was between a state patent to lieu land and a claim under the preemption and homestead acts. In Graham vs. Reed, *supra*, the court said: "We hold that where the state's patent was issued to plaintiff's predecessor in interest long prior to the location of defendant's mining claim, investigation as to the character of the land is concluded and the state's patent is not subject to collateral attack, but can only be attacked on a direct proceeding to set aside the patent on the ground of fraud or other invalidity."

[48] Standard Co vs. Habishaw, *supra* (1), citing the Eureka-Richmond case, 4 Fed. Cas. 320.

The action of the land department in issuing patents for the public lands is conclusive as to the legal title, when acting within the scope of its authority. Silver Bow Co. vs. Clark, 5 Mont. 378, 5 Pac. 570.

See § 930.

[49] Barden vs. N. P. R. Co., 154 U. S. 288; Burfenning vs. Chicago Co., *supra* (42); see, also, Corrine Co. vs. Johnson, 156 U. S. 574; Bishop vs. Gibbons, 158 U. S. 155; Shaw vs. Kellogg, *supra* (47); Carter vs. Thompson, *supra* (43); U. S. vs. Winona Co., 67 Fed. 948; Beley vs. Naphtaly, 73 Fed. 120; Dreyfus vs. Badger, *supra* (47); Galbraith vs. Shasta Co., 143 Cal. 94, 76 Pac. 901, 1127.

[50] Hooper vs. Young, 140 Cal. 274, 74 Pac. 140 and cases therein cited; Dreyfus vs. Badger, *supra* (47), "for the reason that this is an issue between the parties to a proceeding before the land department which that tribunal necessarily considers and decides when it permits entry of the lands, and its decisions of questions within its jurisdiction are impervious to collateral attack." King vs. McAndrews, 111 Fed. 860; Calhoun Co. vs. Ajax Co., 182 U. S. 499. See, also, New Dunderberg Co. vs. Old, 79 Fed. 598; Davis vs. Shepherd, 31 Colo. 146, 72 Pac. 58; Talbott vs. King, *supra* (1). A patent from the United States for land is conclusive in a court of law as to all matters properly determined by the land department. If patent issued without jurisdiction it may be collaterally impeached. St. Louis Co. vs. Kemp, *supra* (6); Boggs vs. Merced Co., 14 Cal. 380; Meyendorf vs. Frohner, 3 Mont. 282; Kahn vs. Old Telegraph Co., *supra* (2).

For conclusiveness of patents for mining claims, see 28 C. C. A. 346; 48 C. C. A. 674.

See § 949.

[51] See Rev. St., § 2326; Rose vs. Richmond Co., 17 Nev. 25, 27 Pac. 1105; Deno vs. Griffin, *supra* (29); Saunders vs. La Purisima Co., *supra* (47).

character of the land,[52] the exterior boundaries of the claim[53] and that a discovery within such boundaries has been made according to law.[54] If a lode patent that, the apex of a vein or lode exists within the location,[55] but not that such vein or lode dips beyond the side lines, nor that it is the apex of a vein or lode in dispute between adverse dip claimants.[56]

§ 930. When Patent is not Conclusive. Surface Exception.

The fact that the patent for one mining claim excepts certain ground is not conclusive on the question of the priority of location, and the owner of such excepted ground is not precluded from contesting the claim.[57]

§ 931. Initiatory Proceeding.

The conclusions of a patent do not prevent a party from showing that no entry of the land was made as an initiatory proceeding, where such fact is not stated in the instrument.[58]

§ 932. Existence of Vein or Lode.

A patent is not conclusive on the question of the existence of a vein or lode to the extent of giving the patentee the right to follow the alleged vein or lode downward on its dip outside of the lines of the location.[59]

§ 933. Priority of Right.

The rule that of two adverse mining locations made that which is prior in right does not apply where a junior locator makes an application for a patent and, on due notice, the senior locator either fails to

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[52] Barden vs. N. P. R. Co., *supra* (48); Burke vs. S. P. Co., *supra* (3); West vs. Standard Oil Co., *supra* (3); U. S. vs. Kostelak, *supra* (1); Gale vs. Best, 78 Cal. 235, 20 Pac. 550; Saunders vs. La Purisima Co., *supra* (47); Graham vs. Reed, *supra* (37); Standard Co. vs. Habishaw, *supra* (1).

[53] Waterloo Co. vs. Doe, 82 Fed. 45, aff'g. 54 Fed. 935; Doe vs. Sanger, 83 Cal. 203, 23 Pac. 365. The end lines as fixed in the patent fix the limits beyond which the owner of a mining claim can not go, upon either a discovery or secondary vein, and also fix the boundary lines within which extralateral rights may be exercised in following the vein upon its dip, but it does not follow that to secure extralateral rights the vein must extend from end line to end line or, for that matter, intersect either end line, if it lies lengthwise of the claim. Work Co. vs. Doctor Jack Pot Co., 194 Fed. 629.

[54] Calhoun Co. vs. Ajax Co., *supra* (50); Talbott vs. King, *supra* (1). In Work Co. vs. Doctor Jack Pot Co., *supra* (53), the court said: "Whatever may have been the right of the defendant to raise the question, by protest or other appropriate proceedings, of no discovery within the patented ground prior to patent, that question was forever foreclosed when the patent issued, except by direct proceeding to set aside the patent or to declare that the grantee therein held it in trust for some party having a better right."

[55] Work Co. vs. Doctor Jack Pot Co., *supra* (53); Grand Central Co. vs. Mammoth Co., 29 Utah 490, 83 Pac. 648. It makes no difference in what portion of the patented claim the apex is. Ajax Co. vs. Hilkey, 31 Colo. 131, 72 Pac. 447.

[56] Grand Central Co. vs. Mammoth Co., *supra* (55); see Lawson vs. U. S. Co., 207 U. S. 1, aff'g. 134 Fed. 769.

[57] Van Zandt vs. Argentine Co., 8 Fed. 728.

[58] St. Louis Co. vs. Kemp, *supra* (6), citing Polk vs. Wendal, 9 Cranch 87.

[59] Con. Wyoming Co. vs. Champion Co., 63 Fed. 552. Where a patent does not give the date of location and the date of actual discovery such facts must be proved *de hors* the patent. Lawson vs. U. S. Co., 207 U. S. 1, aff'g. 134 Fed. 769; Tyler vs. Sweeney, 79 Fed. 280, aff'g. 61 Fed. 557, rev'g. 54 Fed. 284; see, also, 157 U. S. 683; Uinta Co. vs. Creede Co., 119 Fed. 164, aff'd. 196 U .S. 337; Uinta Co. vs. Ajax Co., 141 Fed. 563; Champion Co. vs. Con. Wyoming Co., 75 Cal. 82, 16 Pac. 514; Jefferson Co. vs. Anchoria-Leland Co., 32 Colo. 176, 75 Pac. 1070; Hickey vs. Anaconda Co., 33 Mont. 46, 81 Pac. 606; Kahn vs. Old Tel. Co., 2 Utah 174. See Cosmopolitan Co. vs. Foote, 101 Fed. 518; Round Mt. Co. vs. Round Mt. Co., *supra* (2)

appear and adverse the claims, or having appeared the adverse claim is decided against him and after a patent is issued the patentee has the older and better title.[60]

§ 934. Where Veins Unite.

A patent for a mining claim issued on a regular application after due notice and where no adverse claim has been filed is conclusive against third persons as to those things with respect to which adverse claims could be filed, but it does not settle the question as to the right to a vein or lode below the point of junction where two separate surface veins or lodes unite.[61]

§ 935. Blind Vein in Tunnel.

A lode patented across a tunnel site carries no title to blind veins cut later by the tunnel and claimed properly by the owner of the tunnel site.[62]

§ 936. Known Lodes.

Neither a placer[63] nor a town site patent[64] is conclusive as against a known lode.

§ 937. Title.

As elsewhere stated, a patent is not conclusive as to the title of the patentee[65] or that liens[66] or easements[67] do not exist against the land covered by the patent.

§ 938. Presumptions.

The presumption is that a patent is *prima facie* valid; and the burden of showing its invalidity is on the party attacking[68] it. That the owner of a patented claim is in the possession thereof.[69] That

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[60] Hall vs Equator Co., Fed. Cas. 5931; new trial granted 106 U. S. 86.

[61] Champion Co. vs. Con. Wyoming Co., *supra* [59].

[62] Creede Co. vs. Uinta Co., *supra* [49].

[63] See Crane's Gulch Co. vs. Scherrer, 134 Cal. 350, 66 Pac. 487; Pacific Slope Lode, 12 L. D. 688; Lalande vs. Townsite, *supra* [59]; Old Dominion Co. vs. Haverly, 11 Ariz. 253, 90 Pac. 333.

Under the law as settled by the Supreme Court, the issuance by the land department of a patent for a placer mining claim is not conclusive that there is no known lode therein, and a general exception in the patent of any known lode may be invoked by any subsequent claimant of a lode, though the effect may be to lessen or wholly destroy the value of the placer claim. McKay vs. Mesch, *supra* [14].

[64] See *supra*, note 20.

[65] See *infra*, note 77.

[66] See *supra*, note 4.

[67] *Id.* The fact that a mining claim is subject to an easement in the shape of a right of a railroad company to lay tracks and place necessary station buildings upon the same will not prevent the issuance of a patent to the mineral claimant. McCarthy, 14 L. D. 105. See Eyrad, 45 L. D. 214. A patentee of a mining claim, over which an adjoining owner had for several years, by local custom and from necessity, maintained a ditch to carry detritus from an hydraulic mine to a river, took subject to the easement. Jacob vs. Day, 111 Cal. 571, 44 Pac. 243.

[68] Minter vs. Crommelin, 18 How. 88; Eureka Co. vs. Richmond Co., Fed. Cas. 4548; aff'd. 103 U. S. 239; Leviston vs. Ryan, 75 Cal. 293, 17 Pac. 239. The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the alienation of public lands, can only be overcome by clear and convincing proof. U. S. vs. Iron Co., *supra* [14].

[69] Original Co. vs. Abbott, 167 Fed. 681. In this case the court said: "The presumptions in favor of the holder of a patent for a lode mining claim are in favor of the right of possession and enjoyment of all the surface included within the lines of his location, and of all veins, lodes, or ledges throughout their entire depth, the top or apexes of which lie inside of such surface lines extended downward vertically. § 2322 Rev. Stat. U. S., U. S. Comp. St. 1901, p. 1425. Maloney vs. King, 27 Mont. 428, 71 Pac. 469; Lindley on Mines, § 780. See, also, § 486, Code Civ. Proc. Mont.

following a vein or lode upon its dip into territory adversely held (whether patented or not) is a trespass.[70] The fact that a prior locator abstains or refuses to litigate the conflict area claimed by a subsequent locator can not create a presumption to his prejudice in respect to the remainder of his claim.[71]

If upon any theory of facts as developed in a contest over the rights of a patented mining location or mineral vein the patent may be sustained, it is the duty of a court to indulge the presumption that the facts existed and were properly brought to the attention of the land department before the patent was issued and all intendments are in favor of the validity of such a patent.[72]

1895 (Rev. Codes, § 6435). The burden of proof is upon defendant and cross-complainant, who claims by adverse possession. § 486, Code Civ. Proc. Mont. McConnell vs. Day, 61 Ark. 464, 33 S. W. 731. A defendant and cross-complainant, claiming by adverse possession, must prove that his possession was notorious, continuous, open, and adverse. Holtzman vs. Douglas, 168 U. S. 280."

[70] Con. Wyoming Co. vs. Champion Co., *supra* (59); Waterloo Co., *supra* (52); Duggan vs. Davey, *supra* (9). A patent is not to be collaterally attacked, nor to be impeached by trespassers. Cowell vs. Lammers, *supra* (11). The ownership of orebodies found beneath the surface of a patented mining claim presumptively belong to the owner of that claim. Lawson vs. U. S. Co., *supra* (50); Stewart vs. Bourne, 218 Fed. 328, aff'd. 237 U. S. 350.

[71] Clark-Montana Co. vs. Butte & S. Co., *supra* (2).

[72] Peabody Co. vs. Gold Hill Co., *supra* (19). See, also, Iron Co. vs. Mike and Starr Co., *supra* (34); Alford vs. Barnum, 45 Cal. 482. In favor of the validity and integrity of a patent it must be presumed that all antecedent steps necessary to its issuance were duly taken. Iron Co. vs. Campbell, 17 Colo. 267, 29 Pac. 513, see s. c. *supra* (3); but this presumption has no place in a suit by the United States directly assailing the patent and seeking its cancellation for fraud, etc. Moffat vs. U. S., 112 U. S. 24; U. S. vs. Minor, *supra* (45).

A patent for a mining claim or for agricultural lands subsequently claimed to be mineral is an adjudication by the land department and a conveyance of title to the land which the patent described, and raises a presumption of right and regularity in all the proceedings antedating it and of perfect title in the grantee. When a patent is issued for agricultural lands it is an adjudication of the land department that the land so granted was not mineral land, and such adjudication is impervious to collateral attack. The government may avoid such a patent by suit in equity for false and deceitful representations of material facts which induced its issuance, but the burden is upon the government in such an action to establish the fraud charge, not only by a preponderance of conflicting evidence, but by evidence that commands respect and that amount of it which produces conviction. U. S. vs. Beaman, *supra* (47).

In Moffat vs. U. S., 112 U. S. 30, the court said: "It may be admitted that, if, upon any state of facts, the patent might have been lawfully issued, the court will presume, as against such collateral attacks, that the facts existed; but that presumption has no place in a suit by the United States directly assailing the patent and seeking its cancellation for fraud in the conduct of their officers. In such a suit the burden of proof is undoubtedly, in the first instance, on the government to show a fatal irregularity or correct conduct on their part; but when a case is established, which, if unexplained, would warrant a conclusion against them, the burden of proof is shifted, and they must show such integrity of conduct, and such a compliance with the law, as will sustain the patent."

A patentee of a mining claim can not be compelled by an intruder to establish the validity of the action of the land department and the correctnesss of its ruling, as the presumptions attending it are not open to rebuttal and its unassailable character is what gives it value as a means of quieting the possession and enjoyment of the claim. St. Louis Co. vs. Kemp, *supra* (6); see Steel vs. St. Louis Co., *supra* (1); Calhoun Co. vs. Ajax Co., *supra* (39); Moore vs. Wilkinson, 13 Cal. 478. Where a patent has been issued to a relocator, the presumption is that the proceedings in the Land Office prior to the issuance of the patent were regular and that the evidence was sufficient to show an abandonment and to authorize the granting of the patent. Harkrader vs. Carroll, 76 Fed. 476; following a vein or lode upon its dip into territory adversely held (whether patented or not) is a *prima facie* trespass. Con. Wyoming Co. vs. Champion Co., *supra* (58); Waterloo Co. vs. Doe, *supra* (52); Duggan vs. Davey, *supra* (9). When a mining claim has been duly patented the conclusive presumption is that there was a discovery found within the limits of the patented claim, that the land was properly located and in case of lode locations that the boundaries of the claim so marked on the ground as to embrace not exceeding three hundred feet on each side of the middle of the vein, and not exceeding fifteen hundred feet in length along the vein, and that all preliminary and precedent acts necessary to authorize the issuance of the patent had been performed as the law required. Stewart Co. vs. Bourne, *supra* (70). In an action involving the possessory right to a mining claim in the absence of the record of an adverse suit there is no presumption that anything was considered or determined except the question of the right to the surface. The rule is that on the application for a patent only surface rights are determined. Lawson vs. U. S. Co., *supra* (59); Clark-Montana Co. vs. Butte &

§ 939. Patent Operates by Relation.

A patent is proof of discovery and relates back to the date of the location and is conclusive on that point.[73]

§ 940. Reservations in Patent.

The land department has no authority to insert in a mining patent any other terms than those of conveyance with a recital showing compliance with all statutory conditions.[74]

S. Co., *supra* (2). See also, Conkling Co. vs. Silver King Co., 230 Fed. 558. The only distinction between a patentee of a mining claim and a mineral locator is in the ownership of the fee. Forbes vs. Gracey, *supra* (9); Duggan vs. Davey, *supra* (9); see Pacific Co. vs. Spargo, 13 Fed. 348; Wolfley vs. Lebanon Co., 4 Colo. 114; McCormick vs. Varnes, 2 Utah 362.

[73] Calhoun Co. vs. Ajax Co., *supra* (9); Creede Co. vs. Uinta Co., aff'g. 119 Fed. 164; see Davis vs. Weibbold *supra* (3); Cosmos Co. vs. Gray Eagle Co., 112 Fed. 11; Deno vs. Griffin, *supra* (29). See Brigham City vs. Rich, 34 Utah 130, 97 Pac. 220.

In Hickey vs. Anaconda Co., *supra* (1), the court said: "The doctrine of relation is a fiction of law, and whether a patent relates to the date of location is to be determined by the facts of each particular case. It may be conceded that the patent is conclusive that everything has been done which the federal statutes require shall be done as condition precedent to patent, but we can not believe that it is conclusive of matters with respect to which the government issuing the patent has not any concern. * * * If it be contended that the doctrine of relation applies to every patent, it is pertinent to inquire, to what date would a patent issued under the provisions of § 2332 (Rev. St.) relate? We are satisfied that the patent is not conclusive of the fact that a declaratory statement in due form of law was filed for record. In our judgment, when a patentee seeks to show that his title is older than the evidence of his title indicates—when he seeks to show that, notwithstanding the date of his patent or receiver's final receipt, his title in fact relates back to the date of his location, he must show affirmatively a location valid under the laws of the state where the claim is situated."

The conclusiveness of a patent does not prevent the patentee from showing the date of the original proceedings for the acquisition of the title, where it is not stated in the instrument, as the patent takes effect by relation as of that date, for the purpose of cutting off intervening claims. St. Louis Co. vs. Kemp, *supra* (6). Where the patent for a mining claim is silent as to the date of location, such fact may be shown by any competent evidence in the same manner as any other question not settled by the patent itself. Last Chance Co. vs. Tyler Co., *supra* (32); see Champion Co., vs. Con. Wyoming Co., *supra* (59); Kahn vs. Old Co., *supra* (2). In Gibbons vs. Frazier, 68 Utah 182, 249 Pac. 473, it is said: "The plaintiffs contend that their patent is conclusive proof of the previous location of the claim at the date of the notice of location. It is true that a patent is conclusive evidence, as against collateral attack, that there has been a valid location prior to the issuance of the patent, but not for any particular time prior thereto. As against any claim to the patented premises arising after the issuance of the patent, the patent is conclusive proof of a previous valid location, but, as against a conflicting claim of title arising before the application for patent, the patent is not evidence of a valid location earlier than the conflicting claim. In such case the question of when the location was made is one of fact depending on the proof. Uinta Co. vs. Creede Co., *supra* (13); Hickey vs. Anaconda Co., *supra*.

See Butte & S. Co. vs. Clark-Montana Co., 249 U. S. 12, aff'g. 248 Fed. 609, aff'g. 233 Fed. 556.

In connection with the subject of the doctrine of relation Mr. Lindley says: "The fact and date of discovery or lack of discovery prior to entry may, and necessarily, in many cases, must be, inquired into. This is not inconsistent with the doctrine as to the conclusiveness of a patent. * * * While these (patent) records are ordinarily received in the court as evidence of the facts stated therein we are of the opinion that the original location and the date of actual discovery must also be proved by evidence other than that furnished by the patent record. This seems to be the rule sanctioned by the courts." In discussing the Hickey-Anaconda Case, *supra*, Mr. Lindley says: "Chief Justice Brantly, concurring in the result reached by the majority, is of the opinion that it should relate to the discovery, and in this case we think the chief justice is sustained by the weight of authority." 3 Lindl. Mines (3d ed..), p. 1920, § 783.

Hickey vs. Anaconda Co., *supra*. It is provided in California that, "where any patent for mineral lands within the State of California, issued or granted by the United States of America, shall contain a statement of the date of the location of a claim or claims, upon which the granting or issuance of such patent is based, such statement shall be *prima facie* evidence of the date of such location. C .C. P., § 1927.

A patent is not conclusive on the question of the existence of a vein or lode to the extent of giving the grantee the right to follow the alleged vein or lode downward on its dip outside of the line of his location. Con. Wyoming Co. vs. Champion Co., *supra*.

[74] Deffeback vs. Hawke, *supra* (20); Davis vs. Weibbold, *supra* (3); Burke vs. S. P. Co., *supra* (3); Pikes Peak Lode, 10 L. D. 204. The law does not authorize any exception as to the exclusion of lands in a patent, but if an exception is made, and it is no broader than the statute in its signification, it adds nothing to and takes nothing from the effect of the statute, and if it is broader than the statute, then it is wholly unauthorized by law and as to such excess, at least is utterly void. Cowell

§ 941. Correcting Mistakes in Patents.

The land department is without jurisdiction or authority to correct any mistake in a patent issued for a mining claim, so long as the patent remains outstanding.[75] But where title to a mining claim has been erroneously given, the parties may reconvey to the United States for the purpose of correcting the error without resorting to the courts and the title received by the government in this way is as good as if reconveyed in a judicial proceeding.[76]

§ 942. Equitable Title.

The person named as the patentee is not necessarily the exclusive owner of the premises described in the patent.[77] He may judicially be

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vs. Lammers, *supra* (47). To the same effect see Clary vs. Hazlitt, 67 Cal. 286, 7 Pac. 701; citing Stark vs. Starrs, 6 Wall. 402; Wolfley vs. Lebanon, *supra* (72). See, also, Pike's Peak Lode, *supra*; Silver Bow Co. vs. Clark, 5 Mont. 378.

There is no legal authority for inserting in a mining patent a clause reserving the right of a town site. Antediluvian Site, 8 L. D. 602. Patents may contain a reservation to the effect that the premises granted with the exception of the surface may be entered by the proprietor of any vein or lode, the apex of which lies outside of the boundaries of the granted premises if it extends into the premises granted. Waterloo Co. vs. Doe, *supra* (53).

An unauthorized reservation in a patent is ineffective. Neal vs. Newton, 51 L. D. 477.

[75] Mono Fraction, 31 L. D. 121. Round Mt. Co. vs. Round Mt. Co., *supra* (2). Ordinarily mistakes and omissions can not be corrected, after patent issues. Whitten vs. Reed, 50 L. D. 10. Where a patent was inadvertently issued for lands involved in proceedings before the Land Department its jurisdiction is lost, and further proceedings will not be entertained on request of the patentee, while the patent is outstanding. U. S. vs. C. P. R. Co., 51 L. D. 403; see West vs. Standard Oil Co., *supra* (3).

The transferee of one to whom a patent issued describing a different tract of land than the one actually entered, etc., is entitled (on reconveying to the government the land erroneously patented), to a new patent in his own name for the land intended to be conveyed. Harris vs. Miller, 51 L. D. 281.

Omission of a reservation required by law does not enlarge the interest of the patentee. The effect of the patent is the same as if the reservation were inserted. Mission Claims, 51 L. D. 170.

[76] See Juanita Lode, 13 L. D. 715; Baldwin Co. vs. Quinn, 28 L. D. 307; Owers vs. Killoran, 29 L. D. 160; see Winter Lode, 22 L. D. 362. Where the United States can successfully maintain a suit to vacate a patent for a mining claim or for a homestead entry on mineral lands, the land department may accept a reconveyance of the ground for which the patent was wrongfully obtained and may then issue a patent to the mineral claimant. San Francisco Co., 29 L. D. 397. Where a patent has been duly issued for a placer claim according to the survey and description furnished by the applicant, there is no method by which such patent can be corrected under such circumstances as to include land not applied for nor surveyed. Eureka Co., 24 L. D. 512.

A new patent for a mining claim can not issue without a proper application under a corrected survey and unless the patentee surrenders the invalid patent and reconveys to the United States the land incorrectly described therein, and a suit to vacate the patent should be recommended to the Department of Justice. U. S. vs. Rumsey, 22 L. D. 102. Where parties acting in good faith reconvey for the purpose of enabling the United States to convey ground by mineral patent which had been previously included in a homestead patent as the result of a mistake, the deed should be accepted for such purpose and patent issued to the mineral claimant in accordance with his entry. Tryon, 29 L. D. 477.

[77] Hunt vs. Patchin, 35 Fed. 816; see, also, Silver vs. Ladd, 74 U. S. 219; Johnson vs. Towsley, 80 U. S. 72; Sanford vs. Sanford, 139 U. S. 642; Monroe Cattle Co. vs. Becker, 147 U. S. 47; Greenameyer vs. Coate, *supra* (46); Lakin vs. Sierra Buttes Co., 25 Fed. 337; Stevens vs. Grand Central Co., 133 Fed. 28; Snider vs. Ostrander, 26 Colo. A. 468, 145 Pac. 283; Sussenbach vs. Bank, 5 Dak. 477, 41 N. W. 662; Wilson vs. Wilson, 64 Mont. 533, 210 Pac. 896; Rose vs. Richmond Co., *supra* (50); and see Hartman vs. Warren, 76 Fed. 157; Delmoe vs. Long, 35 Mont. 139, 88 Pac. 778; South End Co. vs. Tinney, *supra* (20); Oregon Co. vs. Hertzberg, 26 Or. 216, 37 Pac. 1019. In Van Sice vs. Ibex Co., 173 Fed. 895, the interest of one of the named patentees had previously passed by forfeiture to the others.

Where a man enters upon the lands of the United States in good faith, and fully complies with the land laws relating thereto, then, although a mistake may have been made in the description of his entry or in the patent, he obtains an equitable title thereto, particularly if occupied for a long time, and valuable improvements are put thereon, and that one who locates upon the same land subsequently with knowledge of the actual entry and occupancy can not take advantage of the mistake; that, if he obtains a patent to such land, he holds it in trust for the equitable owner, in other words, that a court of equity can correct the mistake, if the equities demand it. Wirth vs. Branson, 98 U. S. 118; Widdicombe vs. Childers, 124 U. S. 400, aff'g. 84 Mo. 382; Hedrick vs. Atchison Co., 167 U. S. 673; Godkin vs. Cohn, 80 Fed. 458;

declared to be a trustee,[78] unless suit be barred by limitation or laches.[79] An adjudication against the government in a suit brought by it to annul a patent, will not prevent the assertion of equitable rights in the land by a person not a party thereto.[80]

§ 943. Plat and Field Notes.

Plat and field notes referred to in patents issued by the United States may be resorted to for the purpose of determining the limits of the area that passed under such patent. The plat, with all its notes, lines, descriptions and landmarks, becomes as such, a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out in the patents.[81]

§ 944. State Legislation.

After the issuance of the patent the land described therein is subject to state legislation so far as the same may be consistent with the admission that the title passed and vested according to the laws of the United States.[82]

Snider vs. Ostrander, *supra;* Fearns vs. Atchison Co., 33 Kan. 275, 6 Pac. 237; Hedrick vs. Beeler, 110 Mo. 91, 19 S. W. 492; Mason vs. Braught, 33 S. Dak. 559, 146 N. W. 687; Bently vs. Jenne, 33 Wyo. 1, 236 Pac. 509; Porter vs. Carstensen, 40 Wyo. 156, 274 Pac. 1072.

There seems to be no doubt as to the right of the courts, in contests between private citizens in which the United States has no interest or has parted with the legal title to the lands in dispute, to declare the holder of such title a trustee holding the same for the use and benefit of the true and equitable owner of the lands and require a transfer of such tile in the manner approved by courts of equity. Snider vs. Ostrander, *supra*, and cases therein cited.

[78] Thomas vs. Horst, 54 Mont. 260, 169 Pac. 731; Mery vs. Brodt, 121 Cal. 332, 53 Pac. 818.

Whether the title taken by parties having no interest in the land as a matter of convenience or for any other reason, it is inequitable that they should avail themselves of their own act in thus procuring the legal title to their own use. In such cases a court of equity will control the legal title for the benefit of the *cestui que trust.* Salmon vs. Symons, 30 Cal. 307. A transfer of title by an applicant for patent during the pendency of the application has the effect of making him a trustee and, as such, he holds the title only for the purpose of such application, and when the patent is issued, the title immediately reverts to his grantee. Slothower vs. Hunter, 15 Wyo. 198, 88 Pac. 41.

It is a common practice to obtain patents from the government in the names of the original locators of a mining claim without regard to intervening changes in right of ownership, and a mining company so obtaining a patent in the names of such locators is not estopped from asserting that the interest of one of such patentees had been forfeited by his coowners for failure to perform or contribute to the performance of the annual assessment work. Van Sice vs. Ibex Co., *supra* [77], *certiorari* denied, 215 U. S. 607, dis. for want of jurisdiction, 223 U. S. 712.

[79] Alsop vs. Riker, 155 U. S. 446; Patterson vs. Hewitt, 195 U. S. 309; see Holt vs. Murphy, 207 U. S. 407; Hanchett vs. Blair, 100 Fed. 817; Potts vs. Alexander, 118 Fed. 885.

[80] Brandon vs. Ard, 211 U. S. 11.

[81] Alaska United Co. vs. Cincinnati-Alaska Co., 45 L. D. 330. For both an affirmation and an exception to the rule stated in the text, see Jeems Bayou Club vs. U. S., 260 U. S. 561; see, also, U. S. vs. Lane, 260 U. S. 662.

It is well settled that a reference in a patent to the official plat and surveys makes such plat and field notes of such survey "a part of the description of the land granted, as fully as if they were incorporated at length in the patents." Cragin vs. Powell, 128 U. S. 691; U. S. Co. vs. Lawson, 134 Fed. 769, rev'g. 115 Fed. 1005, aff'd. 207 U. S. 1; Foss vs. Johnstone, 158 Cal. 119, 110 Pac. 294. In Round Mt. Co. vs. Round Mt. Co., *supra* [2], the court said: "The plat and field notes referred to in patents have been referred to frequently by the courts to determine matters of boundary. The question of a reference to the field notes for the purpose of construing a patent to a group of mining locations has not heretofore been resorted to so far as we are advised. We can see no reason why such references may not be made. The real boundaries of the several conflicting locations may be determined only by a knowledge of the exclusions of the territory in conflict between them."

See, also, Miller vs. Grunsky, 141 Cal. 450, 75 Pac. 48.

[82] Wilcox vs. McConnell, 13 Pet. 498; see Black vs. Elkhorn Co., *supra* [4]. In the Wilcox case the court said: "We hold the true principle to be this: that whenever the question in any court, state or federal, is whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the

§ 945. Reservation of Water Rights.

A provision in a patent making it subject to any vested and accrued water rights for mining or other purposes, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises granted, as provided by law, refers only to mines located outside of the claim patented, and does not refer to a mine discovered and located within the patented premises, nor does it mean parties claiming to be "proprietors" who located mines after the issue of the patent, but only to persons who are proprietors of mines at the time the patent issued.[83]

§ 946. Description.

An erroneous description or calls in a patent must give way to the monuments of the mining claim as placed upon the ground.[84]

§ 947. Dower.

There is no right of dower in an unpatented mining claim, but such right attaches to a patented mining claim in a state within which dower right exists.[85]

§ 948 Relocation of Patented Claims.

It has been said in Sharkey vs. Candiani [86] that where the validity of mining claims is established by a patent therefor, until abandonment thereof by the patentees, so as to render the premises a part of the unappropriated public domain, no location can be made thereon by other parties.[87]

Notwithstanding the ruling of the court in this case it would seem that the only way to obtain title to abandoned patented mining property is by adverse possession under the law of the particular state within which the property may be situate. The difficulty of proving abandonment in the case of abandoned real property is apparent. The owner of such property, subsequent to abandonment, can not pass title thereto by deed; although he may be estopped by failure to assert his right, if any, with due diligence. In other words, until passage of the title in fee by prescription no title can be secured to abandoned patented mining property; and such title in fee may be perfected by a suit to quiet title. A location notice would, merely, be a link in the chain of evidence as to when the adverse possession was initiated.

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title shall have passed, then that property, like all other property in the state, is subject to state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." See Favot vs. Kingsbury, 98 Cal. A. 284, 276 Pac. 1083.

[83] Pacific Coast Co. vs. Spargo, 16 Fed. 348; see also, Atchison vs. Peterson, 87 U. S. 507; Basey vs. Gallagher, 87 U. S. 670; Union Co. vs. Dangberg, 81 Fed. 73; Howell vs. Johnson, 89 Fed. 556; Kern Co., 38 L. D. 302; McFarland vs. Alaska-Perseverance Co., 3 Alaska 308; Osgood vs. El Dorado Co., 56 Cal. 571; Himes vs. Johnson, 61 Cal. 259; Jacob vs. Lorenz, 98 Cal. 332, 33 Pac. 119; Oliver vs. Agasse, 132 Cal. 298, 64 Pac. 401; Woolman vs. Garringer, 1 Mont. 535.

The usual reservation in mining patents of all vested and accrued water rights does not give notice that any such exist; and the land is not subject to secret easements of which the owner has neither actual nor constructive notice. San Bernardino Bank vs. Jones, 207 Cal. 613, 271 Pac. 1103.

[84] 6 Fed. St. Ann., p. 573, § 2327.

[85] Black vs. Elkhorn Co., *supra* [4], on this point aff'g. 52 Fed. 862; see 47 Fed. 600, dist'd. in Bradford vs. Morrison, *supra* [4]; O'Connell vs. Pinnacle Co., *supra* [9]; Bechtol vs. Bechtol, 2 Alaska 401; Clift vs. Clift, 87 Tenn. 25, 9 S. W. 198.

[86] 48 Or. 112, 85 Pac. 219, 7 L. R. A., N. S. 791; Standard Co. vs. Habishaw, *supra* [1]; Goodrich vs. Union Oil Co., 85 Colo. 218, 274 Pac. 935.

[87] See *supra*, note 68.

§ 949. Advantages and Disadvantages of Patent.

Mr. Costigan says:[88] "A mining patent establishes once for all, except on direct attack by the government for fraud, the mineral character of the land (citing cases), the fact of a valid discovery (citing cases), and the legal existence of the location merged in the patent as prior to any other conflicting location not excepted from it (citing cases). Patent also confers certain advantages in a contest for extralateral rights (citing cases). A patent establishes that any secondary known or blind vein apexing within the patented ground belongs to the patentee, even though it may be more than three hundred feet away from the discovery veins (citing cases). Still another advantage of a patent in the case of a placer is that all lodes discovered after application for placer patent belong to the patentee (citing cases). With the delivery of a patent the title which the United States had in the patented property vests in the patentee. He takes a new start in the world as a fee-simple owner (citing case). Even the running of the statute of limitations against him is stopped by the patent, and its running must now date from the patent (citing cases). What is more, once the government has parted with title, all right to recall it, except by resort to a suit in equity, is gone (citing cases). It is the conclusiveness of title to the land owned, and to every part thereof, that a patent excels a location (citing cases), while the disadvantages of a patent are few." "Not all questions," continues Mr. Costigan, "are settled by a patent, however. The patent necessarily contains various conditions and exceptions, and even if these are not expressed they are implied. While conditions and exceptions put in the patent by the land department without authority of law are absolutely void, and for that reason are disregarded (citing cases), the law itself fixes certain ones. A patentee, for instance, takes subject to preexisting easements for ditches and reservoirs used in connection with water rights acquired under the federal statutes (citing cases), and to easements for highways (citing statutes). So a placer patent does not convey lodes known to exist at the time of the application for placer patent (citing case). A lode patented across a tunnel site, where the lode was located after the tunnel site, does not get blind veins cut later by the tunnel and claimed properly by the tunnel owner (citing case). So a town site patent is not conclusive as against a known lode (citing cases). But in all these respects a patented claim is at no disadvantage as contrasted with an unpatented one. Other disadvantages are that in a state where dower exists it will attach to a patented claim, but will not to an unpatented claim (citing cases). Another disadvantage of patent, however, is that after patent it is no longer possible to swing the claim or adjust boundaries, so as to make the location lie along the subsequently ascertained course of the vein, or so as to make the end lines parallel."

[88] Costigan Min. Law, pp. 393, 396, §§ 107, 108.
See, generally, Suits Affecting Mining Patents.

CHAPTER XLIX.

MORTGAGES.

§ 950. Mortgage of Mining Claims.

Mining claims, whether patented or unpatented, are subject to mortgage,[1] without infringing the title of the United States.[2]

§ 951. Rights of Mortgagee.

The owners of a mining claim who have mortgaged the same, may not abandon it so as to permit the property to be located as unoccupied mineral lands, and defeat the mortgage lien.[3] An application for patent by the mortgagor inures to the benefit of the mortgagee.[4]

§ 952. Mortgage Bonds.

Claims for materials, supplies, and labor furnished to a mining company before the appointment of a receiver, under the general principles of equity, are not entitled to priority over the lien of the mortgage bonds thereof.[5]

§ 953. Income of Mortgaged Property.

Until the mortgage is foreclosed the mortgagor has the right to the income of the property, as such income is derived by working or operating the mine, requiring a constant expenditure of money to make it productive.[6]

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[1] St. Louis Co. vs. Montana Co., 171 U. S. 655; Wilbur vs. Krushnic, 280 U. S. 306, aff'g. 30 Fed. (2d) 742.

[2] Forbes vs. Gracey, 94 U. S. 767; see, also, Del Monte Co. vs. Last Chance Co., 171 U. S. 55; Wilbur vs. Krushnic, *supra* [1]; Reed vs. Munn, 148 Fed. 757.

[3] Alexander vs. Sherman, 2 Ariz. 326, 16 Pac. 45; see Wailes vs. Davies, 158 Fed. 667.

[4] Rev. St., § 2332; 6 Fed. St. Ann., p. 580, § 2332. This section reads:
"Nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of the patent." See, generally, Turner vs. Sawyer, 150 U. S. 578; Stevens vs. Grand Central Co., 133 Fed. 31; Nowell vs. McBride, 162 Fed. 441.

[5] Fidelity Co. vs. Shenandoah Co., 42 Fed. 372; Nowell vs. International Co., 169 Fed. 505; *but see* Atlantic Co. vs. Ropes Co., 119 Mich. 260, 77 N. W. 938.

[6] Young vs. Northern Co., 13 Fed. 806. See Chung Kee vs. Davidson, 102 Cal. 188, 36 Pac. 519; Ward vs. Carp River Co., 50 Mich. 522, 15 N. W. 522.

CHAPTER L.

OIL AND GAS LANDS.

(In private ownership.)

§ 954. Introductory.

It is immaterial whether the instrument giving rights and privileges to take oil and gas is called a lease, license, sale, contract, grant, deed or conveyance, a right to land, or other name. It is the language used aside from the terms used therein which will determine its legal effect.[1]

The term "lease" is applied to such instruments merely through habit and for convenience. Such an instrument creates no interest in land but simply a kind of license.[2] It creates an incorporeal heredita-

[1] Gulf Co. vs. Hayne, 138 La. 555, 70 So. 509. See, also, Monaghan vs. Mount, 36 Ind. A. 188, 74 N. E. 579; Summers Oil and Gas, p. 160 § 50. In estimating the language which constitutes a lease, the form of words used is of no consequence. It is not necessary that the term "lease" should be used. Whatever is equivalent will be equally available. If the word assume the form of a license, covenant, or agreement, and the other requisites of a lease are present, they will be sufficient. Pelton vs. Minah Co., 11 Mont. 281, 28 Pac. 310; see, also, Hudepohl vs. Liberty Hill Co., 80 Cal. 553, 22 Pac. 339; Michalek vs. New Almaden Co., 42 Cal. A. 741, 184 Pac. 56. For a conjoint deed and lease see Wright vs. Carter Oil Co., 97 Okla., 46, 223 Pac. 835. An oil and gas lease, whether a chattel real, an incorporeal hereditament, or whatever termed, is a right or interest relating to real estate, and while it does not rise to the dignity of an estate prior to entry by a lessee, yet it is property, and as such is subject to transfer and sale. Shaffer vs. Marks, 241 Fed. 139; Gray vs. Cornelius, 40 Fed. (2d) 67, and cases therein cited. A lease granted to the lessee the exclusive right to sink shafts, to drill wells, and to extract any and all kinds of minerals, especially petroleum, from the land for a term of twenty years unless sooner forfeited. The lessee agreed to incorporate a company for the operation and development of the leased property before commencement of active operations on the property and to commence active work of boring for oil not later than a specified date, and to prosecute such labors diligently. The court held that the lease was a lease of the land itself and not an ordinary oil and gas lease by which the lessor remains in possession and control of the land, giving the mere right of entry to the lessee to begin the prosecution of search for oil; and the discovery of oil was not a prerequisite to the existence of a cause of action on the part of the lessee or its assigns for the failure of the lessor to place the lessee in possession of the property. Kline vs. Guaranty Oil Co., 167 Cal. 476, 140 Pac. 1; Allan vs. Guaranty Co., 176 Cal. 421, 168 Pac. 884, A. C. 15 B. 807, note; see Cooke vs. Gulf Co., 135 La. 609, 65 So. 758. A contract or lease of land for the exploration of land for minerals, oil and gas, although designated a sale by the parties, was a grant of an exclusive right to search for, take and appropriate the minerals mentioned in the contract, and is in effect a lease of the land described for mining purposes. DeMoss vs. Sample, 143 La. 243, 78 So. 482.

A contract to equally share the net proceeds of all minerals and oils taken from certain land is not a conveyance of nor a contract for an interest in such land, but is a personal contract. Hodges vs. Rutherford, 34 N. M. 664, 287 Pac. 289.

A "lease" has a defined legal meaning, which is less than a "sale"—necessarily implying a conveyance of less than the complete and entire title or ownership held by the lessor at the time of the lease. Although the instrument is so entitled, and such title is an element in ascertaining the character of the instrument, yet the intent of the parties, as revealed in and as effectuated by the entire language in the instrument, must determine its legal definition. United States vs. Shea, 152 U. S. 178, 189; Burkett vs. Commissioner, 31 Fed. (2d) 667.

A lease is distinguished from a license in Taylor vs. Hamilton, 194 Cal. 768, 230 Pac. 656. See, generally, Funk vs. Haldeman, 53 Pa. St. 229.

[2] Huston vs. Cox, 103 Kan. 73, 172 Pac. 972; McKean Oil Co. vs. Walcott, 254 Pa. St. 323, 98 Atl. 955; *but see* Gray vs. Cornelius, 40 Fed. (2d) 69; Shaffer vs. Marks, *supra* [1]; Ewert vs. Robinson, 289 Fed. 740; Exchange Bank vs. Head, 155 La. 309, 99 So. 272. "In its inception at least, and before oil is found on the leased property, an ordinary oil lease has no effect on the title to the premises covered by the lease. It occupies a position differing no appreciable degree from any other contract, and upon its breach in a material part, may be canceled in a similar manner. The title, if any, transferred by an oil lease is inchoate in its nature. At the outset the purpose of the instrument is not to effect a conveyance of any interest in the land, but to permit only a temporary possession thereof for the purposes of exploration. If the quest be unsuccessful, no estate vests in the licensee and whatever rights may have inured to the so-called lessee end when the search is abandoned. Payne vs. Neuval, 155 Cal. 46, 99 Pac. 476; Taylor vs. Hamilton, *supra* [1]; Ventura Oil Co. vs. Fretts, 152 Pa. St. 451, 25 Atl. 732; Pittsburg Co. vs. Bailey, 76 Kan. 42, 90

ment, a right growing out of or concerning or annexed to a corporeal thing, but not the substance of the thing itself.[3]

§ 955. Nature of Oil and Gas Lease.

Because of the peculiar nature of petroleum oil and natural gas, leases for land of that character are governed by different principles than leases of other classes of real property.[4] The reason is the danger of loss to the landowner from draining his oil away by wells sunk on the surrounding lands; and such leases are construed most strictly against the lessee and in favor of the lessor, especially where the lessee may delay performance indefinitely,[5] and the law will imply conditions to attain the end sought by the execution of such lease.[6]

Pac. 803; Kelly vs. Keys, 213 Pa. St. 295, 62 Atl. 911; Steelsmith vs. Gartlan, 45 W. Va. 27, 29 N. E. 978; notes, 26 L. R. A. (N. S.) 619; 2 Ann. Cas. 446, 448; Thornton on Oil and Gas (2d ed.), 87." In Louisiana a lease does not give title, but it is a cloud upon the title. Weaver vs. Atlas Co., 31 Fed. (2d) 484.

In Kentucky, contrary to the general rule, the courts seem to have adopted the doctrine that oil and gas may be conveyed in place and that such oil and gas therefore partakes of the nature of real property; *compare* Kennedy vs. Hicks, 189 Ky. 562, 203 S. W. 318; Scott vs. Laws, 185 Ky. 440, 215 S. W. 81, 13 A. L. R. 369; Hudson & Collins vs. McGuire, 188 Ky. 712, 223 S. W. 1101, 17 A. L. R. 148; Crain vs. West, 191 Ky. 1, 229 S. W. 51; Foxwell vs. Justice, 191 Ky. 749, 231 S. W. 509; Eli vs. Trent, 195 Ky. 26, 241 S. W. 324. Under a contract in which a present sale of oil and gas in place is attempted, delivery to be made upon capture, an immediate equitable interest in such gas and in the leases themselves is created in the vendee. No legal title is conveyed, but an equitable title passes as soon as the gas is produced and the purchaser may come into equity to enforce such equitable title or interest. Union Stock-Yards Bank vs. Gillespie, 137 U. S. 411, 11 S. Ct. 118, 34 L. Ed. 724; United Fuel Co. vs. Swiss Oil Corp. 41 Fed. (2d) 4.

[3] Gulf Co. vs. Hayne, *supra* (1). A grant by lease of oil and gas when they are in the ground is a grant, not of the oil and gas in the ground, but of such part of the oil and gas as the lessee finds and reduces to possession. Parker vs. Reilly, 243 Fed. 42. The mere fact that oil and gas leases are not a grant of the oil or gas or mineral in the ground is not a finding that they may not, by their terms, convey an interest in the land, or grant more than a mere license or incorporeal hereditament. Von Baumbach vs. Sargent Co., 242 U. S. 503; Webb. vs. O'Brien, 263 U. S. 313; Ewart vs. Robinson, *supra* (2). See, generally, *Ex parte* Okahara, 191 Cal. 353, 216 Pac. 614; dist'd. in Porterfield vs. Webb, 195 Cal. 71, 231 Pac. 554. See Dudley vs. Lowell, 201 Cal. 380, 257 Pac. 57. A lessee acquires no title to oil until it is taken from the ground. Mexican Oil Co. vs. Compania, 281 Fed. 148. Homestead Co. vs. Schoregge, 81 Mont. 604, 264 Pac. 388; Richfield Oil Co., vs. Hercules Gas Co., 64 C. A. D. 950, -- Pac. --.

The lessor's interest reserved in the minerals is real property, if reserved in place as such, but if under the terms of the lease it is a royalty deliverable after it is severed from the land only—it is not real but personal property. Curlee vs. Anderson, 235 S. W. 622; Continental Co. vs. Texas Co., — Tex. C. A. —, 7 S. W. (2d) 174, aff'd. 18 S. W. (2d) 602. The test as to whether the lessor retains an interest in the land or has only a chattel interest and in the products depends on whether his royalty is in kind or is at lessee's option payable in cash. Continental Co. vs. Texas Co., *supra*.

A mortgagee must first sell surface rights and leave the minerals unaffected, unless the sale does not produce enough to satisfy his claim, if, after the mortgage was executed the mortgagee has conveyed the minerals to another. Continental Co. vs. Graham, — Tex. C. A. —, 8 S. W. (2d) 719.

[4] Acme Oil Co. vs. Williams, 140 Cal. 691, 74 Pac. 296; see Becker vs. Submarine Oil Co., 55 Cal. A. 703, 204 Pac. 245; Owens vs. Corsicana Co., — Tex. C. A. —, 169 S. W. 192; Leonard vs. Caruthers, — Tex. C. A. —, 236 S. W. 189.

[5] Huggins vs. Daley, 99 Fed. 606; Habermel vs. Mong, 31 Fed. (2d) 823; Warner vs. Page, 59 Okla. 259, 159 Pac. 264. Where the lease requires the lessee to begin a well within a time certain or pay a stipulated rent for each year such work was delayed, the lessee can not refuse to begin the development of the property for an unreasonable time and extend the lease indefinitely by the payment of a mere nominal rent. Warren Co. vs. Gilliam, 182 Ky. 807, 207 S. W. 698; Hughes vs. Parsons, 183 Ky. 584, 209 S. W. 853; see Bristow vs. Christine Co., 139 La. 312, 71 So. 521. Where the lease does not specify the time within which the well or wells shall be completed the law will imply a reasonable time, and it is too clear to need argument that the lessee could in no event be held responsible until such reasonable time had elapsed. Barquin vs. Hall Co., 28 Wyo. 168, 201 Pac. 352.

[6] Acme Co. vs. Williams, *supra* (4). An oil lease is to be construed to compel development, Kelley vs. Hardwick, 228 Ky. 349, 14 S. W. (2d) 1098, and prevent delay and unproductiveness, Berton vs. Coss, 139 Okla. 42, 281 Pac. 1093. Where the language in an oil and gas lease was as much that of the lessee as that of the lessor, the lease will be construed most strongly against the lessee in order to provoke development and prevent delay and unproductiveness, looking to all parts of the instrument in the light of the facts in connection with the operation. Paraffine Oil Co. vs. Cruce, 63 Okla. 95, 162 Pac. 716; see, also, Hughes vs. Busseyville Co., 180 Ky. 545, 203 S. W. 515. Where the terms of an oil and gas lease are clear and explicit, and

§ 956. Time as Essence.

In an oil and gas lease time, ordinarily, is of the essence of the contract. A proper construction of the language used will not limit the lessee to the particular term mentioned in the lease where he has demonstrated that the leased land is underlaid with oil or gas and that he is proceeding with all diligence in an efficient manner to produce the oil or gas therefrom in paying quantities.[7]

§ 957. Mutuality.

An oil or gas lease for a stated term of years or as long as oil or gas is produced and providing that operations should be commenced within a stated period, or, if not, for the payment of a certain stated annual rental, and giving the lessor a certain royalty on the oil and gas produced, is not void for want of mutuality. It is not an unilateral contract.[8]

§ 958. Surrender Clause.

The presence of the surrender clause in the lease does not render the lease void for want of mutuality nor does it confer on the lessor the right to terminate the lease at will.[9]

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the meaning is not doubtful, and there is no latent ambiguity, the lease can not be varied by the subsequent conduct of the parties or surrounding circumstances. The parties must be deemed to be bound by the lease, regardless of the results produced. Jameson vs. Chanslor-Canfield Co., 176 Cal. 1, 167 Pac. 372; *compare* Kelly vs. Harris, 62 Okla. 236, 162 Pac. 221.

[7] Ohio Oil Co. vs. Greenleaf, 84 W. Va. 67, 199, S. E. 274. The parties expressly stipulated in the lease that it was "the essence of the contract" that drilling should be commenced "within a reasonable time" and prosecuted with diligence They thus emphasized a condition which is inherent in all oil and gas leases. So much is time considered to be an "essence" of such leases that a court is without power or right to grant an extension for performance. Murray vs. Barnhart, 117 La. 1023, 42 So. 489; Woodley vs. Hollingsworth, 154 La. 686, 98 So. 87. The term "reasonable time" is a relative one, and the meaning is dependent upon the circumstances of the particular case in which the court is called upon to define it. Woodley vs. Hollingsworth, *supra*. The question what is a reasonable time to do the work agreed to be done under an oil lease is a mixed question of law and fact. Armstrong vs. Federal Supply Co.,— Tex. C. A. —, 17 S. W. (2d) 170. Where the lease did not provide that time was of essence, a slight delay in monthly payments due under the lease, did not operate to forfeit the lease. Jackson vs. Twin States Oil Co., 95 Okla. 96, 218 Pac. 325. See Taylor vs. Hamilton, supra [(1)]. The right to insist upon time as the essence of a contract may be waived expressly or by necessary implication. Craig vs. Cosgrove, 277 Pa. St. 580, 121 Atl. 408; Garfield Oil Co. vs. Champlin, 78 Okla. 91, 189 Pac. 214; Petitt vs. Double-O Co., 82 Okla. 13, 198 Pac. 616; see also, Virginia Co. vs. Haeder, 32 Ida. 240, 181 Pac. 141. Even though the contract contain no express provision making time the essence thereof, where it appears that such was within the contemplation of the parties, the courts will so construe the contract. Taylor vs. Hamilton, *supra* [(1)].

[8] Hughes vs. Parsons, *supra* [(5)]; Ohio Oil Co. vs. Irvin Co., 184 Ky. 517, 212 S. E. 130. A unilateral contract is one in which there is a promise on one side only, the consideration on the other side being executed. Rich vs. Doneghey, 71 Okla. 204, 177 Pac. 86. Such contracts are construed strictly, Bearman vs. Dux Co., 64 Okla. 147, 166 Pac. 199; see Northwestern Co. vs. Branine, 71 Okla. 107, 175 Pac. 533. A land owner executed an oil and gas lease for certain lands for a term of five years for a cash consideration of two hundred and forty dollars. The lessee agreed to pay to the lessor one-eighth of the oil produced and to pay a stipulated sum per annum for each gas well. The lessee was to complete a well on the premises within twelve months from the date of the lease or pay two hundred and forty dollars quarterly in advance for each year such completion was delayed. The lease contained a provision that upon the payment of one dollar at any time to the lessor, the lessee should have the right to surrender the lease for cancellation. Such a lease is not unilateral and is not void for want of mutuality. The cash bonus supports each and all the covenants of the lease, and although no well has been commenced on the premises, the lessor had not the option to refuse the timely tender of payments and terminate the lease. Magnolia Co. vs. Saylor, 72 Okla. 282, 180 Pac. 861; see Northwestern Co. vs. Branine, *supra*; Rich vs. Doneghey, *supra*; see, also, Shaffer vs. Marks, *supra* [(1)]. For instances of want of mutuality see Davis vs. Riddle, 25 Colo. A. 162, 136 Pac. 551; Caddo Co. vs. Producers' Co., 134 La. 701, 64 So. 684.

[9] Carter Oil Co. vs. Tiffin, 74 Okla. 34, 176 Pac. 912; Gypsy Oil Co. vs. Van Slyke, 72 Okla. 41, 178 Pac. 683; Northwestern Oil Co. vs. Branine, *supra* [(8)]; See Ewart vs. Robinson, *supra* [(3)]. The option to surrender an oil and gas lease can not be declared inequitable. In case it was not exercised the lessee would be bound by his covenants.

§ 959. Construction of Surrender Clause.

The surrender clause in oil and gas leases will be construed strictly in favor of the landowner, the party who is bound, and against the lessee, the party who is not bound.[10]

§ 960. "Unless Lease."

Most of the oil and gas leases fall into two classes, commonly designated as the "unless lease" and the "or lease." The leases belonging to these respective classes possess such marked distinctions in the rights and liabilities that these distinctions should not be lost sight of in the construction of such a lease. Under an "unless lease," the lessee, so long as he pays the rentals in the manner provided, has an option to continue the lease in force. Such a lease is subject to termination at the will of the lessee, and the privilege may be exercised by a mere

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If exercised the lessor would be free to deal with the premises as he chose. Rechard vs. Cowley, 202 Ala. 337, 80 So. 419; see, generally, Eastern Oil Co. vs. Beatty, 71 Okla. 275, 177 Pac. 104; Rich vs. Doneghey, *supra* (8); Riddle vs. Keechi, 74 Okla. 73, 176 Pac. 737; *but see* Advance Oil Co. vs. Hunt,, 66 Ind. A. 228, 116 N. E. 340, in which case it is said: That an oil and gas lease provided that the lessee was to complete a well within three months from its date or pay a stipulated rental until a well should be completed. The lease gave the lessee the right at any time on the payment of one dollar to surrender the lease for cancellation and thereafter all payments and liabilities should cease and terminate. Such a lease or contract is wanting in mutuality because, for a nominal sum, the lessee is given the right to annul it at any time and end all liability thereafter accruing under the lease. The lessee of such a lease can not enforce its terms by injunction as courts refuse to grant equitable relief where, if granted, one of them may nullify so taken by the exercise of a discretionary right which either the law or his contract has conferred upon him.

An oil and gas lease contained the usual surrender clause and contained this further provision: "This surrender clause and the option herein reserved to the lessee shall cease and become absolutely inoperative immediately and concurrently with the institution of any suit in any of its terms." Such a provision is valid and binding, and when the lessee filed a suit to enjoin the lessor from re-leasing the premises and further interfering with his rights under the lease the surrender clause became inoperative and the lessee thereby became bound to perform the covenants of the lease and is entitled to be protected in his rights under the lease. Pucini vs. Baumgarner, 71 Okla. 105, 175 Pac. 537; cited in Brunson vs. Carter Oil Co., 259 Fed. 665; see, also, Rich vs. Doneghey, *supra*; and see Eastern Oil Co. vs. Beatty, *supra*. A lessor may refuse to accept a surrender of an oil and gas lease though the lease contains a clause giving the lessee the right to surrender, when the lessee denies liability on an unperformed covenant of the lease to be performed by him in lieu of development, but in postponement of operations. The lessor's refusal is justified when the lessee denies liability on the covenant broken, and where the surrender expressly states that the acceptance thereof will operate as a waiver of performance of the covenants and conditions broken. Hefner vs. Light Co., 77 W. Va., 217, 87 S. E. 206.

In Pursel vs. Reading Co., 232 Fed. 808, the court said: "Though the lease contained provision for surrender upon written notice, such a provision did not preclude the parties from waiving it and from ending the lease by other means equally legal. This we think the parties did by mutually consenting to its termination. The proper inferences from the conduct of the parties support this conclusion, and in adopting the interpretation of the parties as its own, the trial court committed no error."

[10] Shaffer vs. Marks, *supra* (1); see, also, Ewart vs. Robinson, *supra* (3). For reciprocal rights see Melton vs. Cherokee Co., 67 Okla. 247, 170 Pac. 691. An oil and gas lease contained a clause giving the lessee the right to surrender the lease at any time, but provided that the right to surrender should cease and become inoperative upon the institution of any suit by the lessee to enforce any rights under the lease. Such a clause does not prevent a court from enforcing specific performance of the lease at a suit by the lessee, for the reason that the institution of the suit renders the surrender clause ineffective, and the lease is no longer an unilateral contract. Downey vs. Gooch, 240 Fed. 520; *but see* Hill Oil Co. vs. White, 53 Okla. 748, 157 Pac. 710, in which it is said: that a surrender clause in an oil and gas lease which gives to the lessee the right at any time to surrender and terminate the lease, after which all payments or liabilities should cease and terminate, deprives the lessee of the right of specific performance, directly or indirectly, until he has performed the contract or placed himself in such a position that he might be compelled to perform it on his part. The owner of land under an existing oil and gas lease executed a second lease that contained a clause by the terms of which the lessee could at any time upon the payment of one dollar surrender the premises and relieve himself from any obligation under the lease. This provision makes such a lease unilateral, and is such a one as a court of equity will refuse to enforce, and it will furnish the basis for an action in ejectment or other real action. The lessee in such a lease has no standing to question the validity of the first lease nor to maintain ejectment against the original lessee. Brennan vs. Hunter, 68 Okla. 172, Pac. 49.

failure to pay the stipulated rental at the time due and upon which the lease automatically terminates, and the lessor can not sue under the lease for the rentals; but under such a lease the lessor has not the right to terminate the lease so long as the lessee complies with its terms.[11]

§ 961. "Or Lease."

Under an "or lease," even when containing a surrender clause, the payment of rentals by the lessee as required is not necessary to keep it alive from time to time, nor does the failure to pay automatically terminate the contract, as under an "unless lease." Where the lessee makes default in the payment of rentals the lessor may waive the forfeiture clause and sue and recover rentals due according to the lease. The lessee may terminate the lease at any time by availing himself of the right to do so contained in the surrender clause, and by paying all the accrued rentals, due at the time of surrender.[12]

§ 962. Implied Covenants.

Implied covenants are those only which, on grounds of legal necessity, the courts may read into the contract for the proper effectuating the manifest intention of the parties.[13]

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[11] Northwestern Oil Co. vs. Branine, *supra* (8); Ireland vs. Chapman, 87 Okla. 223, 208 Pac. 408. An oil and gas lease containing the "unless" clause confers an optional right upon the lessee, and should be strictly construed in favor of the lessor and against the lessee, and time is of the essence of the contract. McKinley vs. Feagins, 82 Okla. 193, 198 Pac. 997; see, generally, Guffey vs. Smith, 237 U. S. 101; Hopkins vs. Zeigler, 259 Fed. 46; Leeper vs. Lemon G. Neely Co., 293 Fed. 971; Garfield Oil Co. vs. Champlin, 78 Okla. 91, 189 Pac. 514; 3 A. L. R. 344, 352; Thornton's Oil and Gas (3d ed), §§ 192, 193. An "unless" lease does, by its terms, become null and void when the lessee intentionally fails to make the payment at the time and in the manner stipulated. Shaffer vs. Marks, *supra* (1); see, also, Brunson vs. Carter Oil Co., *supra* (9); see, also, Saling vs. Flesch, 85 Mont. 106, 277 Pac. 612. For a lease which was neither an "unless" nor an "or" lease see Brennan vs. Hunter, *supra* (10). In Saling vs. Flesch, *supra*, it was said that a lease containing an "unless clause" expires on default of the payment of rentals.

[12] Northwestern Oil Co. vs. Branine, *supra* (8). In the case of an "or" surrender clause lease, the lessor can elect as to whether he will cancel and terminate the lease for nonpayment or treat it as continuing in force and collect the stipulated rental. An intentional failure to pay as stipulated, in every case, may be treated as an abandonment of the lease. Shaffer vs. Marks, *supra* (1); see Healdton Co. vs. Smith, 80 Okla. 242, 195 Pac. 756. An "or" lease is one in which the lessee agrees to drill, or in lieu of drilling to pay a rental. McMillan vs. Philadelphia Co., 159 Pa. St. 142, 28 Atl. 220.

[13] Allen vs. Colonial Co., 92 W. Va. 689, 115 S. E. 842. Leases for oil and gas are subject to the implied covenants that the lessee will do all that is necessary to carry into effect the purposes and objects of the lease. There is an implied covenant, in the absence of an express agreement to begin work within a certain time, to begin the operation within a reasonable time. This implied covenant is, after oil or gas has been discovered, as effectual and forceful as if it were expressed in direct terms. Implication is but another term for intention. And the practically universal interpretation of oil and gas leases is that in the absence of an express covenant there arises a legal implication that the lessee will drill as many wells as will afford sufficient protection against drainage and otherwise so develop the leased premises as to serve the mutual benefit of both lessor and lessee. Jennings vs. South Carbon Co., 73 W. Va. 215, 80 S. E. 368; Chandler vs. French, 73 W. Va. 658, 81 S. E. 825; Freeport Co. vs. American Co., — Tex. —, 6 S. W. (2d) 1039, aff'g. 276 S. W. 448; see, also, Brewster vs. Lanyon Zinc Co., 140 Fed 801; Daughetee vs. Ohio Oil Co., 263 Ill. 518, 105 N. E. 308; Donaldson vs. Josey, 106 Okla. 11, 232 Pac. 821; Hitt vs. Henderson, 112 Okla. 191, 240 Pac. 745; Berton vs. Coss, *supra* (6). The doctrine of implied covenants in mineral leases has been limited generally to cases in which it has been invoked to supply a consideration when none has been expressed and to make effective a principle of surrender by operation of law when the premises have been abandoned after discovery of mineral and delay rentals have ceased, and to prevent loss of the subject matter of the lease through wells on adjacent lands. Carper vs. United Co., 78 W. Va., 433, 89 S. E. 14.

The interesting and very important subjects of implied covenants of the proper measure of damages are presented in the case of Freeport Co. vs. American Co., — Tex. —, 6 S. W. (2d) 1039.

See Diligence.

§ 963. Joint and Several Covenants.

A covenant in an oil and gas lease may be construed to be joint or several according to the interest of the parties appearing upon the face of the lease, if the words are capable of such construction. But the covenant will be construed to be several by reason of several interests if it be expressly joint. This rule was applied to an oil and gas lease executed by a husband and wife as "parties of the first part" where the rentals were to be paid to the "party of the first part." Under this ruling a payment of rentals to the wife was a discharge of the obligation, although the title to the land was in the husband.[14]

§ 964. No Covenant Implied.

No covenant to develop the land can be implied under an oil and gas lease in the face of an expressed stipulation for periodical payments for delay thereof not extending beyond a definite term. Development on other lands in the vicinity may show the premises to be situated in an oil and gas territory and prove the adaptability of the land for profitable mining operations, but the lessor has no legal cause for complaining so long as he receives compensation for the delay for which he contracted and the operations on neighboring lands do not drain the leased premises. Under such circumstances a court will not imply a covenant for diligent operation or operation at all. The lessor is deemed to have assented to the postponement through the several periods and bound to accept the periodical payments therefor.[15]

§ 965. Breach of Implied Covenant.

Equity rarely will arbitrarily declare the forfeiture for the breach of an implied covenant. It never will do so where less drastic redress will satisfy the demands of justice.[16] Where the lessee fails to begin operations within a reasonable time he will be presumed to have aban-

[14] Jens Marie Oil Co. vs. Rixse, 72 Okla. 93, 178 Pac. 658; see, also, Jenkins vs. Williams, 191 Ky. 165, 229 S. W. 98.

Covenants may be implied, as well as express, and in oil leases, and others of that particular character, where the consideration of the lease is solely the payment of royalties, there is an implied covenant, not only that the wells will be sunk, but that if the oil is produced in paying quantities they will be diligently operated for the best advantage and benefit of the lessee and lessor. Acme Oil Co. vs. Williams, 140 Cal. 684, 74 Pac. 296.

It is not necessary that technical words should be inserted in such a lease in order to raise the condition. If a reasonable and fair interpretation of its terms shows that it was made to depend on something essential to its object and purpose, the law implies the condition to attain that end. Id. Petroleum Co. vs. Coal Co., 89 Tenn. 391, 18 S. W. 65; Conrad vs. Moorhead, 89 N. C. 35. Where there is a substantial breach of such implied condition, the lessor may reenter and claim a forfeiture of the lease. Hall vs. Augur, 82 Cal. A. 601, 256 Pac. 232.

[15] Eastern Oil Co. vs. Beatty, *supra* [9]. An implied covenant may exist to reasonably operate the premises, but there is no implied or express covenant on the part of the lessee to leave the premises and forfeit his lease for a breach of such implied covenant. A lease provided for a forfeiture for the failure to comply with its conditions or to pay the cash consideration according to the agreement, but a breach of the implied covenant to reasonably operate the premises was not included in the causes of forfeiture. Where some causes of forfeiture are expressly mentioned none others can be implied. The remedy for a breach of the implied covenant to reasonably operate the premises is, therefore, not by way of forfeiture of the lease, but must be brought in a proper action for a breach of covenant. Grubb vs. McAfee, 109 Tex. C. A. 383, 212 S. W. 464; see Harris vs. Ohio Oil Co., 57 Ohio St. 131, 48 N. E. 502; Poe vs. Ulrey, 233 Ill. 56, 84 N. E. 46.

No implied obligation will be raised to do the impossible. Smith vs. White Star Co., 227 Ky. 219, 12 S. W. (2d) 283.

See Diligence.

[16] Alford vs. Dennis, 102 Kan. 403, 170 Pac. 1005; see Rembarger vs. Losch, 70 Ind. 98, 118 S. W. 831; Hughes vs. Busseyville Co., *supra* [6].

The general rule is that a court of equity will not cancel an oil or gas lease for failure to comply with an implied covenant to diligently develop such lease unless

doned his rights, and a court of equity will, at the suit of the lessor, cancel the lease as constituting a cloud upon the title.[17]

§ 966. Diligence.

The question of reasonable diligence is one of fact.[18] Whether or not due diligence has been exercised depends on the facts and circumstances of the case. If an oil and gas lease is not operated with due diligence under the facts and circumstances of the case, then a court

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notice has been served upon lessee that a failure to commence drilling operations will be considered grounds for cancellation of the lease. There are, however, cases in which the giving of such notice may be unnecessary, or where the circumstances excuse the failure to give it, as where the lessee's abandonment of the contract may be inferred from the fact that he has been in default for a long period of years. Hitt vs. Henderson, *supra* [15]. It is error for a court to instruct a jury in an action to cancel or forfeit an oil and gas lease to the effect that the law looks with disfavor upon and discourages the forfeiture of rights of parties and declares that before a forfeiture will be decreed the evidence on which the forfeiture is predicated must preponderate in favor of the forfeiture. The general rule of law does not apply where the grant is in the hope and expectation of pecuniary profit from mineral development. In such cases the rule that equity abhors forfeitures does not apply for the reason that forfeitures when the lessee is guilty of laches is in that respect but equity. Munsey vs. Marnet Co., — Tex. C. A. —, 199 S. W. 686.

[17] Horse Creek Co. vs. Trees, 75 W. Va. 401, 84 S. E. 376; see United Co. vs. Smith, 93 W. Va. 646, 117 S. E. 902. The lessor in an oil and gas lease for a stated term and conditions and requiring the lessee to drill a well within a specified time and to pay certain stipulated royalties, may sue the lessee for a breach of any express or implied covenant of the lease resulting in damages to him. A cause of action immediately arises in his favor. He is not required to wait until the abandonment of the premises or expiration of the lease to bring his action. The remedy in such case is not the forfeiture but a right to sue for a breach of the contract. In an action against the lessee of an oil and gas lease for damages for breach of a covenant, in that the lessee failed to diligently develop the premises after the discovery of oil in paying quantities, the lessor is not prevented from recovery because the damages are speculative or conjectural. The rule is that while the law will not permit witnesses to speculate or conjecture as to the possible or probable damages, still the best evidence of which the subject will permit is receivable. This is often nothing better than the opinion of well-informed persons on the subject matter under investigation. The lessee in such an action is not liable for damages though he has committed no fraud and has acted in good faith and has not drained oil from the lessor's premises by means of wells on other adjacent lands. Nor, is he permitted to escape for a failure to drill and operate additional wells if, acting on his own judgment, he believes that it will not be profitable for him to do so, as his determination in such case is not final. Such a lease can not be construed to save the lessee harmless on his arbitrary refusal to further explore and develop the leased premises. In such case the lessor is not required to prove that oil and gas have actually been lost to him by being drawn from the leased premises through wells on adjacent premises or by some wrongful or fraudulent act of the lessee. Under such a lease it clearly is the contemplation of the parties and the primary object in making the lease that the lessee shall go on and drill additional wells, market the product, and pay the lessor his royalties thereon. The lessee, in effect, agrees to do this in order that the lessor can realize on the value of the product. Daughetee vs. Ohio Co., *supra* [13]; Indiana Co. vs. McCrory, 42 Okla. 136, 140 Pac. 610; Hammett Co. vs. Gypsy Oil Co., 95 Okla. 235, 218 Pac. 501.

Abandonment of all of leased land by lessee save ten acres and one well thereon, justifies cancellation of all the rest of the lease. Leonard vs. Prater, — Tex. C. A. —, 18 S. W. (2d) 681.

[18] Buffalo Valley Co. vs. Jones, 75 Kan. 18, 88 Pac. 537; Chapman vs. Sunshine Oil Co., — Tex. C. A. —, 256 S. W. 327. As a net result of consideration of the cases which hold that, in the absence of express and definite stipulation as to the measure of diligence, an implied covenant exists demanding reasonable diligence in the development of the premises leased, it may be fairly said, in determnng whether or not other wells should have been drilled, consideration must be given to a number of facts regarded collectively. Some of these are: the result of oil operations on adjacent premises; the extent of the subterranean oil reservoir; also its character and contour as affecting the question of drainage to and from the property in question; market conditions; the quantity and quality of oil thus far produced; the prospects for further production as indicated and the knowledge possessed by those expert in locating oil bodies; the demands made upon the lessee in the maintenance of the wells already drilled and his diligence in operating them to secure the greatest possible production. Leases are intended for the benefit of both parties. The lessee has a right to regard his own interest as well as that of the lessor. In short, the diligence required of the lessee involves such a course of conduct upon his part as operators of ordinary diligence would pursue, having in mind the securing of the financial benefits sought by both lessor and lessee. Becker vs. Submarine Oil Co., *supra* [4]. A lease of certain lands granted "all the oil and gas" under the lands described together with the right to enter at all times for the purpose of drilling and operating, together with the right to erect and maintain structures, pipe lines, and machinery necessary for the production and transportation of oil and gas and gave the right to use sufficient water, oil, and gas to run the necessary engines in the

upon proper showing may declare the lease forfeited.[19] Where the only consideration the lessor receives for the exclusive right to explore, develop and remove the minerals is a royalty, whether it be oil or gas or other minerals, the courts have read into the lease the implied covenant to develop and operate with reasonable diligence.[20] It is an implied covenant in an oil and gas lease providing for the payment of royalties that the lessee will use reasonable diligence and good faith in exploring and developing the property.[21] The question of due diligence may be affected by the fact that the lessee worked in a "wild cat" field.[22] In Wapa Co. vs. McBride,[23] the court, in stating his reason for cancelling the lease, stated it was for failure to comply with the implied covenant which was to protect the premises from drainage of off-set wells. A court of equity will declare a forfeiture of an oil and gas lease because of the breach of an implied covenant to diligently operate and develop the property when such forfeiture will effectuate justice, but the granting of such relief depends upon the facts and circumstances surrounding the particular case; and if the evidence shows that a part of the leased premises under an oil and gas lease has been properly developed with reasonable diligence by the lessee, and other parts have not, the court may cancel the lease as to the undeveloped portion and permit the lessee to continue the developed part.[24] Where a mining lease provided for an annual payment as an advance payment, to continue "until mining is commenced or during the continuance of this agreement," the court said: "That the exploration for minerals should be made within a reasonable time is of the very essence of the agreement; and a condition precedent to the accruing of the right to take the minerals discovered upon the terms of

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prosecution of the business. The lease reserved to the lessor substantial royalties in kind and in money on the oil produced and saved and on the gas used off the premises, the lease indicating that the promise of such royalties was the controlling inducement to the grant. While expressly requiring that such drilling commence within a stated time from the date of the lease, but not expressly defining the measure of diligence to be exercised by the lessee in the work of development and production after the expiration of the stated period, the lease was held to contain a covenant on the part of the lessee arising by necessary implication from the nature of the lease and the stipulations therein contained to the effect that if during the term of the lease whether oil or gas is found in paying quantities then the work of development and production shall be continued with reasonable diligence and along lines as will reasonably be calculated to make the extraction of oil and gas from the leased land of mutual advantage and profit to the lessor and lessee. Indiana Co. vs. McCrory, *supra* (17). Though a lessee not guilty of fraud or bad faith may be liable for failure to exercise reasonable diligence in drilling protection wells, and where the lease has no express requirements, no breach of an implied covenant can occur, except when the absence of such diligence is both certain and substantial in view of the actual circumstances as distinguished from mere expectancy on the part of the lessor and conjectures on the part of mining enthusiasts. The expense of exploration, and development, and the fact that the lessee must bear the loss of unsuccessful operations, entitles him to proceed with due regard for his own interests as well as those of the lessor. Goodwin vs. Standard Oil Co., 290 Fed. 92.

[19] Strange vs. Hicks, 78 Okla. 1, 188 Pac. 350.

There are few other mining enterprises where delay is so dangerous, and where diligence in securing immediate possession of the mineral is so necessary as in mining for oil. As to the precious metals, fixed in veins which hold them, they remain intact until extracted. Oil, on the contrary, is of a fluctuating, uncertain, fugitive nature, lies at unknown depths, and the quantity, extent, and trend of its flow are uncertain. Acme Oil Co. vs. Williams, *supra* (6). The mining for mineral oils or natural gas cannot safely be conducted by awaiting developments in nearby land of similar character as those substances because of their wandering nature, belong to the owner of the land only so long as they remain therein. Brown vs. Spilman, 155 U. S. 665; Acme Co. vs. Williams, *supra;* Westmoreland Co. vs. DeWitt, 130 Pa. St. 235, 18 Atl. 724.

[20] Cotner vs. Munday, 92 Okla. 268, 219 Pac. 321.

[21] Peoples Gas Co. vs. Dean, 193 Fed. 938.

[22] Keechi Co. vs. Smith, 81 Okla. 266, 198 Pac. 588.

[23] 84 Okla. 184, 201 Pac. 984.

[24] Papoose Oil Co. vs. Rainey, 89 Okla. 110, 213 Pac. 882.

payment indicated. The failure to make such exploration within a reasonable time, and to make it with such thoroughness and certainty as to determine the existence of mineral or oil, would be fatal to the agreement. Upon this, we think, this lease depended as a condition precedent."[25] Where an oil and gas lease covering lands located in a field which is being actively developed is given for a term of two years and contains a provision that, in case oil or gas is found on the premises, the lease may be continued in force by lessee so long as he diligently develops the land and markets the product, the failure of the lessee to use reasonable diligence in the respects named will cause said lease to lapse.[26] Where the lessee undertakes to pay the lessor until, in the judgment of the lessee, "oil or gas can not be found on the premises, or, having been found, has ceased to exist," clearly implies an engagement to explore and develop the premises.[27] The extent of the development and number of wells to be drilled, and as to the protection of the lines is often, if not usually, expressed in the lease: and that is certainly the better practice. When the extent of the development and protection of the lines is provided for in the lease, there can be no implied covenant for further development and protection of the lines. The implied covenant arises only when the lease is silent on the subject.[28] The smaller the tract of land demised, the more important is the need of prompt exploration and development, because the lessor is entitled to his royalty as promptly as it can be had, and delay endangers the drainage of oil and gas from the demised premises through wells in its immediate vicinity.[29]

§ 967. Surface Rights.

Ordinarily, by implication, the lease carries with it the right to use so much of the surface as is necessary for extracting and removing the minerals thereunder.[30]

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[25] Tenn. Oil Co. vs. Brown, 131 Fed. 700.
[26] Buffalo Valley vs. Jones, *supra*.(25)
[27] Consumers Co. vs. Littler, 162 Ind. 320, 70 N. E. 363.
[28] Harris vs. Ohio Oil Co., *supra* (15); see Brewster vs. Lanyon Zinc Co., *supra* (13).
[29] Federal Oil Co. vs. Western Oil Co., 112 Fed. 375.
[30] It is familiar law that there may be two freeholds in the same body of land, that is to say, a freehold in the surface soil and enough of the earth lying beneath the surface to support it, and a freehold in the minerals underneath the surface estate, with a right of access to mine and extract the minerals. It is also well established, by the great weight of authority, that the owner of the surface has a right to have the superincumbent soil supported from below in its natural state, and that such right is an incident to the ownership of the surface. Washburn's Easements and Servitudes, p. 631; 2 Snyder on Mines, §§ 1018, 1020, and 1021. Evans Co. vs. Leyda, 77 Colo. 356, 236 Pac. 1024.

The lessor and the lessee under an oil and gas lease are both in possession of the surface. Each, in the exercise of his right therein and thereon, is in duty bound to have due regard for the rights of the other. The lessee in exercising his rights under such a lease owes the duty to the lessor to not unnecessarily, carelessly, or wantonly injure him in the proper use of the surface. In choosing between two locations for drilling a well equally available to him, the lessee is bound to choose the one to do least injury to the lessor. He is not at liberty to choose locations for the drilling of wells in utter disregard of the rights of the lessor. Likewise the lessor in the use of the surface for any available purposes is in duty bound to exercise reasonable care not to interfere with, injure, or annoy the lessee in drilling and operating his oil wells. Under such circumstances each is bound to use his own so as not to injure the rights of the other. Gillespie vs. American Zinc Co., 247 Pa. St. 222, 93 Atl. 272; see Moore vs. Decker, — Tex. C. A. —, 220 S. W. 773.

"The right to damage or destroy the surface is clearly a subject for bargain, grant, or reservation, and the rule of construction of a reservation of the minerals in a deed of conveyance is not to imply a right to injure or destroy the surface, unless the right to do so is made clear and expressed in terms so plain as to admit of no doubt. Burgner vs. Humphrey, 41 Ohio St. 340; Catron vs. South Butte Co., 181 F. 941, 104 C. C. A. 405; Collins vs. Gleason Co., 140 Iowa 114, 115 N. W. 497, 118 N. W. 36, 18 L. R. A. (N. S.) 736; Piedmont and George's Creek

§ 968. Location of Wells.

An oil and gas lease provided that no wells be drilled within two hundred feet of the buildings on the leased premises without the consent of the lessor. During the development of the land by the lessee and over the objections of the lessor the lessee located and drilled a well within the prohibited distance with full knowledge that the well was so located. The lessor was entitled to an injunction perpetually restraining the lessee from operating the well so drilled and from entering upon or in any manner using any ground within two hundred feet of the buildings upon the demised premises.[31]

§ 969. Additional Wells.

The number and location of oil wells requisite to the performance of the covenant to develop on the part of the lessee depends upon the character of the leased lands. The area of the lands does not determine the number and their relation to one another and is not governed by any fixed rule. Whether, after discovery of oil or gas by means of the

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Coal Co. vs. Kearney, 114 Md. 496, 79 A. 1013; Silver Springs Co. vs. Van Ness, 45 Fla. 559, 34 So. 884; Jones on Easements § 599." Evans Co. vs. Leyda, *supra*.

In a case where the owner of the fee granted the surface and reserved the mineral underneath, with the right to extract and remove the mineral, it was said that "such reservation standing alone, does not imply immunity from damage for the subsidence of the surface caused by the removal of the mineral." Mickle vs. Douglas, 75 Iowa 78, 39 N. W. 198; Evans Co. vs. Leyda, *supra*. See, also, H. B. Jones Co. vs. Mays, 225 Ky. 365, 8 S. W. (2d) 626.

Injunction lies to prevent the surface owner of land from obstructing the mineral owner in the right to use surface. Squires vs. Lafferty, 95 W. Va. 307, 121 S. E. 90. In the absence of a specific covenant in an oil and gas lease making the lessee liable for damages to growing crops and their surface rights, the lessee is not liable for such damages as are necessarily incident to the operations authorized by the lease. Such a lease carries within its implications, if not within its expression, such rights to the surface as may be necessarily incident to the performance of the objects of the contract. Yet these implications go no further. The lessee must protect the surface of the ground in so far as such incident necessity does not exist and is liable to the lessor for any damages to the surface resulting from acts not within the implications of the lease. Pulaski Oil Co. vs. Conner, 62 Okla. 211, 162 Pac. 466. A custom among miners is not allowed to destroy the surface support by removing pillars. Such custom would be void. Railroad vs. Mining Co., 138 Mo. App. 132, 119 S. W. 983. See, also, Snyder on Mines, §§ 1018, 1019; Horner vs. Watson, 79 Pa. 242; Hilton vs. Granville, 5 Q. B. 701; Randolph vs. Holden, 44 Iowa 327; Coleman vs. Chadwick, 80 Pa. St. 81; Fleming vs. King, 100 Ga. 449, 28 S. E. 239; 3 Ency. Ev. 957. A lessee having the right under his lease to go upon certain described land of the lessor and bore and develop said land for oil and gas, with the necessary usual and convenient rights therefor, has a right to build a road over the land where the building of such road is necessary to enable him to haul material for his rig and tools and machinery for drilling. If, after building such road in good faith, he abandons the contemplated exploration for oil and gas before drilling a well, he is liable to the lessor for damages to the land caused by the building of said road. Coffindaffer vs. Hope Co., 74 W. Va. 107, 81 S. E. 966. The right of the owner of surface of land to subjacent support includes the right to use the soil for the agricultural pursuits to which it may be adapted. Cole vs. Signal Knob Co., 95 W. Va. 702, 122 S. E. 268; see Walsh vs. Kansas Fuel Co., 91 Kan. 310, 137 Pac. 941.

A conveyance of the minerals, with the right to remove them in the most convenient way, does not give the right to erect a barn and watchman's house upon the land. General Co. vs. James, 222 Ky. 652, 1 S. W. (2d) 1059. A lease covering oil and gas and "other minerals" gives the lessee no right to take gravel from the land, the lessees providing for the erection only of machinery adapted to producing oil and gas, and the rental being a royalty of one-eighth of the minerals in tanks and pipes. Praeletorian Ass'n. vs. Garvey, — Tex. C. A. —, 15 S. W. (2d) 698.

As to rights of miner in use of surface see Stonegap Co. vs. Kelly, 48 L. R. A. N. S. 883, and extended note.

[31] Kelly vs. Phillips Co., 262 Pa. St. 412, 105 Atl. 631. A stipulation in an oil and gas lease to the effect that no wells should be drilled within three hundred feet of a dwelling house unless with the consent of both parties, indicates that the parties in making the lease did not intend to burden the property. This intention will prevail as against an effort to make the provision a covenant running with the land. McFarland vs. Gulf Co., — Tex. C. A. —, 204 S. W. 460. A regulation prohibiting wells within three hundred feet of a completed well, or one hundred and fifty feet of a boundary line is reasonable and valid. Railroad Com. vs. Bass, — Tex. C. A. —, 10 S. W. (2d) 596.

initial or experimental well, there is a duty to sink additional wells depends upon the probability arising from the circumstances surrounding the property, that an additional well will be profitable to the lessee. The lessee in an oil lease is under no duty to operate at a loss to himself in order to make the premises profitable to the lessor. It is only under circumstances indicative of mutual profit to the lessee as well as to the lessor that the duty to develop devolves.[32]

§ 970. Drainage of Adjoining Lands.

While oil wells drilled and operated may, by reason of their proximity to a division line, in fact drain oil from adjoining lands, yet such operations, in the absence of special circumstances or relations between the parties, offer no basis for a claim to a share in or accounting for the oil so produced, or for a receivership for the operation of the wells.[33]

§ 971. Off-set Wells.

The courts are not harmonious as to whether or not in an ordinary lease of oil and gas lands there is no implied covenant by the lessee to protect the leased premises against drainage through flowing wells on

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[32] Steele vs. American Oil Co., 80 W. Va. 206, 92 S. E. 410; and see Burt vs. Deorsam, — Tex. Co. C. A. —, 227, S. W. 354; Humble Oil Co. vs. Strauss, -- Tex. C. A. —, 243 S. W. 536; Clark vs. Cooper, — Tex. C. A. —, 247 S. W. 929. For a clear and full discussion of the principle of law, see Brewster vs. Lanyon Zinc Co., *supra* (13). The number and location of wells requisite to the performance of a covenant to drill under an oil and gas lease depend upon the character of the leased territory and whether after the discovery of oil or gas there is a duty to sink an additional well or wells depends upon the probabilities arising from the circumstances surrounding the property and whether they will be profitable to the lessee. The lessee is under no duty to operate a lease at a loss to himself to make the premises profitable to the lessor. The lessee must bear all the burdens incident to development and if a well is dry he loses its cost; but if it proves rich in either mineral the lessor receives his share but loses nothing in any event. For such reasons the lessee, except where he fraudulently fails or refuses to act when affirmative action is required, must control the prosecution of the necessary operations, but he can not unduly delay operations where clearly the conditions surrounding the property are such as require speedy progress to effect development and to afford protection against drainage. Jennings vs. South Carbon Co., *supra* (13).

[33] Gain vs. South Penn. Co., 76 W. Va. 769, 86 S. E. 883; see Fairbanks vs. Warrum, 56 Ind. A. 337, 104 N. E. 1114. The courts of Texas recognize that a cause of action may be alleged and proved against a lessee for failure to act so as to save from waste the leased premises caused by outside wells under express, as well as by implied agreement. Burt vs. Deorsam, *supra* (32); Humble Oil Co. vs. Strauss, *supra* (32); Texas Co. vs. Barker, — Tex. C. A. —, 252 S. W. 809. As to measure of damages see Texas Co. vs. Barker, *supra*. A lessee who obtained an oil and gas lease from the owner of land and who was unable to obtain a lease from the adjoining landowner, is not to be charged with fraud by the latter and is not liable to such adjoining landowner for any part of the oil produced by him from wells on the leased land, though located so near the line as to drain the oil from the adjoining premises. The mere execution of such a lease causes no inference of a fraudulent intent and justifies no implication on the part of the lessee to wrong the adjoining landowner. Gain vs. South Penn. Co., *supra*. Drainage can be prevented only by drilling off-set wells. Eastern Oil Co. vs. Beatty, *supra*.(9) The authorities are generally agreed upon the rule that because of the peculiar nature of the subject matter of the contract and the probability of great loss likely to result to the lessor from the failure by the lessee to prosecute drilling operations promptly, by reason of drainage from the leased property into surrounding wells already in operation, such leases are most strictly construed against the lessee and in favor of the lessor. Taylor vs. Hamilton, *supra*.(1)

There is no limit to the particular territorial area beneath the surface from which oil or gas may be drawn through any opening. S. P. R. Co. vs. San Francisco Savings Union, 146 Cal. 290, 79 Pac. 961; Brookshire Oil Co. vs. Casmalia Co., 156 Cal. 211, 103 Pac. 927. But the owner of superincumbent land can not, lawfully, drain the property of another of its oil or gas simply for the purpose of depreciating its mineral value. Ohio Oil Co. vs. Indiana, 177 U. S. 190; Chesley vs. King, 74 Me. 164; Westmoreland Co. vs. De Witt, 130 Pa. St. 235, 18 Atl. 724. The obvious difficulty in establishing the amount of oil or the amount diverted therefrom by the wells on adjacent lands would be a serious obstacle to the recovery of adequate damages at law. Brewster vs. Lanyon Zinc Co., *supra* (13). In other words, every surface owner may take without limit from the stores of oil and gas beneath his land, subject to the rights of adjoining owners. Phelps vs. Springfield Co., 76 Kan. 783, 92 Pac. 1119.

adjacent land by drilling off-set wells. There is an implied condition that he will do so upon the demand of the lessor.[34]

§ 972. Failure to Drill Off-set Wells.

In order that a lessor may recover damages from a lessee in an oil and gas lease because of the failure to drill off-set wells to prevent the drainage of the oil in the leased lands by wells drilled on adjacent lands, it must appear from the evidence that it is reasonably certain that the oil from the lessor's land has been or is being drained by the wells drilled on adjacent land. It is not possible to prove this with absolute certainty. It is not impossible, nor is it difficult, to prove such circumstances as would reasonably lead to the conclusion that such was the fact. Thus, it would be easy to show the character of the sand in which the oil was found on the adjoining land. That wells had been drilled on such lands; their distance from the land, and the oil produced therefrom. It could also be shown what area would probably be drained of oil by the wells drilled in the particular sand in which the wells were drilled on the adjoining land. If such area, so probably drained, included a part of the leased lands, it could then be reasonably assumed that the wells on the adjoining lands were draining oil from the leased lands.[35]

§ 973. Rentals.

The development of the leased premises is a controlling consideration with oil and gas leases and lessees may be held liable in damages, or the

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[34] Stanley vs. United Co., 78 W. Va. 793, 90 S. E. 344; *but see* United Co. vs. Meredith, — Tex. C. A. —, 258 S. W. 550; Chambers vs. Perrine, 81 W. Va. 321, 94 S. E. 381; *compare* Jennings vs. Southern Carbon Co., *supra* (13); Chandler vs. French, *supra* (13). The rule that should govern in determining whether off-set wells should be drilled, and the intent, etc., is that which in the circumstances would be reasonably expected of operators of ordinary prudence and it is not necessary to prove that the lessee acted fraudulently. Burt vs. Deorsam, *supra* (32); Texas Co vs. Ramsower, — Tex. C. A. —, 7 S. W. (2d) 872, aff'g. 255 S. W. 466, rehearing denied, 10 S. W. (2d) 537. In a lease of land for the production of oil and gas in which the lessee obligated himself to begin the drilling of a well within a specified time or forfeit the lease, there is no implied covenant on his part to drill as many wells as may reasonably be necessary to secure the oil or gas for the common advantage of the lessor and the lessee within such time, where oil or gas has not been found in paying quantities. Nabors vs. Producers Co., 140 La. 985, 74 S. E. 527; but see Carper vs. United Co., *supra* (13). The practically universal interpretation of oil and gas leases is, that where the contract does not expressly state what shall be done by the lessee, there lies the legal implication that if he finds oil and gas, or if they are found on adjoining lands, he will drill as many wells as will offer sufficient protection against drainage, and so otherwise develop the leased lands as to serve the mutual benefit of lessor and lessee. The necessity for such interpretation is based on the illusive and migratory nature of oil and gas, their disposition to travel and to find vent through the most readily accessible opening. The lessee, though experienced, as against the lessor, who is without experience, can not fraudulently exercise his judgment solely to promote his individual interest, ignoring the interest of the lessor, but to serve him, his judgment must conform to that generally exercised by other operators in similar circumstances and conditions and in view of the intention of the parties entering into the lease. Steele vs. American Oil Co., *supra* (32); see, also, Doddridge Oil Co. vs. Smith, 154 Fed. 970; Harris vs. Ohio Oil Co., *supra* (15); Highfield Co. vs. Kirk, *supra* (8), Guffey Co. vs. Jeff Chaison Co., 48 Tex. C. A. 555, 107 S. W. 609; Texas Co. vs. Ramsower, *supra*.

A covenant to protect by drilling off-set wells is held implied: the lessee's judgment is not determinative; the payment of a cash rental is not a defense to the action for damages. The lessor had the option of affirming or rescinding for default on the part of the lessee. Damages for the amount of oil are recoverable. Texas Co. vs. Ramsower, *supra*.

[35] Steele vs. American Oil Co., *supra* (32). In Texas Co. vs. Ramsower, *supra* (34), the testimony sustains verdict for damages for failure to drill off-set wells. The evidence is discussed, and consists of proof of production over a period of time from neighboring wells, and the time and cost of drilling wells. In the absence of an averment of the existence of oil and gas in the land in paying quantities a recovery of anything more than nominal damages is not authorized, for failure to develop as agreed. Ward vs. Daugherty, 228 Ky. 326, 14 S. W. (2d) 1089. See, also, Gwynn vs. Wisdom, — Tex. C. A. —, 14 S. W. (2d) 265.

lease forfeited and canceled according to its provisions for failure to develop in accordance with the fair and reasonable interpretation of the lease. But this does not prevent the contracting parties from stipulating for the payment of a fixed sum as a minimum rental in lieu of development.[36]

§ 974. By-products.

The fact that the lessee of an oil and gas lease, who had drilled and was operating oil wells, installed and connected vacuum pumps in connection with such wells for the purpose of increasing the production thereof, and the further fact that the lessee successfully utilized what was called "vapor," which was emitted from the wells at the casing head, and by process of distillation and compression converted the escaping substance into gasoline for the mutual advantage and benefit of the lessor and lessee, did not thereby render the lessee liable for the annual rental of gas wells, under the terms of the lease. The mere collecting of the vapor or volatile substance and the manufacture of gasoline therefrom was no indication of proof of gas in the wells, and did not bring them within the terms of the lease as producing gas wells.[37]

§ 975. Delay Rentals.

A covenant in an oil and gas lease for quarterly delay rentals, performed in part only, is separate, distinct, and disassociated from a covenant to drill or pay rentals. Performance or part performance of the former covenant does not excuse the nonperformance of the latter.[38]

[36] Gilbert vs. Bolds, 62 Ind. A. 595, 113 N. E. 379; see Carper vs. United Co., *supra* (13). A provision in an oil and gas lease rendering it null and void for failure to pay the rent as stipulated is for the protection of the lessor. In order to terminate the lease by reason thereof it requires affirmative action on his part. Notwithstanding the failure to pay the rent the tenancy continues until the lessor declares a forfeiture. If before the lessor takes action the rent due is paid or tendered it heals the breach and saves the tenancy. McKean Co. vs. Walcott, *supra* (2). In an oil and gas lease where development is contemplated and an annual rent is provided for, if in case wells are not drilled within a stated time the payment of rent is not of the essence of the contract. Payment at any reasonable time or upon reasonable demand would be sufficient to avoid forfeiture. Bloom vs. Rugh, 98 Kan. 589; 160 Pac. 1135. A clause in an oil and gas lease to the effect that the failure of the lessee to complete a well upon the premises described within the time specified or to pay the rentals at the time and manner as therein provided shall *ipso facto* work a forfeiture of the lease without notices applies only to rentals provided to be paid for delay in drilling and not to rentals or royalties to be paid for gas from a producing well. Castlebrook Co. vs. Ferrell, 76 W. Va. 300, 85 S. E. 544. A lessee of an oil and gas lease may be required to pay rent as long as he holds possession, although the lease by its terms may be at an end; but the execution of an oil and gas lease creates no presumption of subsequent possession by the lessee. Ash Grove Co. vs. Chanute Co., 100 Kan. 547, 164 Pac. 1087. Where the lands of which the husband died seized were subject to a valid oil and gas lease at the time of his death, yielding a rental, the widow is dowable of the reversion and the rent or royalty as an incident of the reversion. Campbell vs. Lynch, 81 W. Va. 374, 106 S. E. 869.

[37] Locke vs. Russell, 75 W. Va. 602, 84 S. E. 948; see Wemple vs. Producers Oil Co., 145 La. 1031, 83 So. 232.

[38] Hefner vs. Light Co., *supra* (9). The law affecting delay rentals is succinctly stated in Habermei vs. Mong, *supra* (5), as follows:

"It is well established that a promise to dig a well or pay delay rental, or a condition in a lease that, unless delay rental be paid, the lease shall terminate if a well be not drilled within a certain time, is ordinarily satisfied by the payment of delay rental. Allegheny Oil Co. vs. Snyder, 106 F. 764; Aggers vs. Shaffer, 256 F. 648. So. too, in Tennessee, Morris vs. Messer, 156 Tenn. 54, 299 S. W. 782. But in some jurisdictions a covenant to develop reasonably and to protect the interests of the lessor is implied, and is enforceable, notwithstanding the delay rental provision. Lyon vs. Union Co., 281 F. 674. Sometimes, too, the delay rental clause is construed as providing, not for an alternatively permissible performance, but merely for liquidated damages. Huggins vs. Daley, 99 F. 606, 48 L. R. A. 320. If the lease contains no delay rental clause, unreasonable delay on the part of the lessee in beginning to drill may work a forfeiture or breach of implied condition. Logan Co. vs. Great Southern Co., 126 F. 623. Cf. Tennessee Co. vs. Brown, 131 F. 696. And, similarly, if the delay rental provision is referable only to the drilling of the first well, the lease may be terminated for nonperformance of an express or implied promise to

A covenant in an oil and gas lease requiring the lessee to complete a well within a specified time from the date of the lease or pay the lessor a stated sum each month for each additional month such completion was delayed until a well was completed, is for the benefit of the lessor only. In case of violation of the covenant on the part of the lessee the lessor may either cancel or terminate the lease, or he may, at his option, collect the rents stipulated in the lease until the premises are reconveyed or until the term of the lease expires.[39]

§ 976. Royalty.

A royalty has been defined as rent.[40] A covenant to pay royalties is a covenant running with the land.[41] It has been held that royalty is not a perpetual interest in the oil and gas in the land.[42] A bonus may be held to be a royalty.[43]

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continue development. Brewster vs. Lanyon Zinc Co., 140 F. 801; Foster vs. Elk Fork Co., 90 F. 178. Regardless of whether or not, and, if so, when a gas and oil lease creates a vested interest in the lessee, it is clear from the foregoing cases that, at least when the parties have not fully covered the subject of delay by rental provisions, the lessee's rights terminate upon nonperformance of the condition that he develop the property promptly, a condition deemed implicit in every gas and oil lease, whether or not expressly set forth therein and reinforced by a forfeiture clause, because only in this way can the lessor secure protection and his share in the profits."

[39] McKee vs. Grimm, 57 Okla. 680, 157 Pac. 308; Brunson vs. Carter Oil Co., *supra* [11]. Where an oil and gas lease was executed before any discoveries of oil or gas had been made on the leased premises and before there had been any discoveries or developments on adjacent lands, and the lease provided for payment of rentals as to certain stated periods in lieu of development, and where after execution of the lease wells are drilled on adjacent lands that make the drainage of oil and gas under the leased premises probable and the consequent loss to the lessor imminent, the law will then imply a condition for the development of the leased premises by the lessee, on demand and notice from the lessor that he will refuse to receive further rentals. This on the theory that where an implied condition will adequately protect from the results of a contingency which it is evident the parties did not intend to disregard but for which they made no express provision and will be less onerous to one of them than a covenant for such purpose would be. The principle of equity covering any construction and the limitation of necessity upon addition by implication, make it the duty of a court to adopt the condition, not the covenant, as an unexpressed provision of the contract. Carper vs. United Co., *supra* [13]. An oil and gas lease provided that on certain conditions it should become null and void unless the payee paid quarterly in advance a specified sum as compensation in lieu of drilling within the succeeding quarter. Such a lease or agreement does not create a mere tendency at will, terminable at the option of the lessor or void as a perpetuity. But the lessor may require development after the end of any quarter for which the lessee has paid the agreed compensation for delay upon reasonable notice to the lessee. In the event of the lessee's failure to drill within reasonable time after such notice, equity will cancel the lease upon application by the lessor. Smith vs. McCullough, 285 Fed. 698; Johnson vs. Armstrong, 81 W. Va. 399, 94 S. E. 753.

In Kister Co. vs. Young, 27 Fed. (2d) 433, a statute of Kentucky requiring the enforcement, according to its term, of a clause in an oil lease giving the lessee the option of paying delay rentals or developing the land was interpreted and held applicable to both an "or lease" and an "unless lease." The statute (App. Mar. 8, 1920) required the courts to give effect to such clause according to its terms—Prior to that the courts of the state had held in a long series of cases—(cited in the opinion)—that the lessee could not secure delay by mere payment of a nominal rental, but that the lessor, despite his agreement to permit delay, could refuse the rental and require development. This case holds the statute valid and operative, thus in effect reversing these cases, and the rule they established.

[40] McIntyres' Admr. vs. Bond, 227 Ky. 607, 13 S. W. (2d) 77, Praeletorian Ass'n. vs. Garvey, *supra* [30]. In Coalinga Co. vs. Associated Oil Co., 16 Cal. A. 370, 116 Pac. 1107, the lessee was to "pay rent" to the lessor, "one-sixth part of gross amount" of oil produced "or the one-sixth part of the gross amount of moneys received from the sale thereof" at the option of the lessor.

For a distinction between "rent" and "royalty" see Ann. Cas. 1916 E. 1225. Aldridge vs. Houston, 116 Okla. 281, 244 Pac. 784.

For definitions of the terms "royalty" and "overriding royalty" see Oil Mining Terms and Phrases.

[41] Stone vs. Marshall Co., 188 Pa. St. 602, 41 Atl. 748; Curry vs. Texas Co., __ Tex. C. A. __, 8 S. W. (2d) 206, citing Pierce Ass'n. vs. Woodrum, __ Tex. C. A. __, 188 S. W. 245. For a collection of authorities upon this subject see Summers Oil and Gas, p. 611, note 52.

[42] Bellport vs. Harrison, 123 Kan. 310, 255 Pac. 53.

[43] Payne vs. U. S., 269 Fed. 874, by divided court.

Where the only consideration is prospective royalty to come from exploration and development, failure to explore and develop renders the agreement a mere *nudum pactum* and works a forfeiture of the lease; for it is the very essence of the contract that work should be done.[44]

§ 977. When Development Not Compulsory.

Where an oil and gas lease is for a definite term and provides for the payment of a stipulated sum for delay during that time and that provision still is effective, the lessor can not refuse the stipulated payments for delay and recover damages, or invoke a forfeiture for a failure to develop on demand. This, in fact, would permit one party to the contract to demand and enforce immediate performance of that which he had agreed might be deferred. A lessor suffers no injury in consequence of his inability to compel development under such circumstances except delay in realizing royalties upon oil and gas that might be produced. The oil and gas still are available for later operation and to the delay in producing that he has solemnly consented for the compensation payable as stipulated.[45]

§ 978. Lessor's Option.

An oil and gas lease required the lessee to begin drilling within a stated time or pay a certain stated sum per month for failure to commence drilling. The lease also provided that a failure upon the part of the lessee to comply with the conditions thereof would render it void. These provisions give the lessor the option as to his remedy. He may elect to put an end of the lease, or he may elect to have the lease continued in force to the end of the term and enforce the payment of the amount due each month.[46]

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[44] Huggins vs. Daley, *supra* (5).

[45] Eastern Oil Co. vs. Beatty, *supra* (9).

[46] Allen vs. Narver, 178 Cal. 202, 172 Pac. 980. An option supported by a consideration, furnishes an illustration of a contract which is valid notwithstanding the lack of mutuality. It is no objection to the validity of a contract that the holder of the option is under no obligation to exercise it. Pierce Ass'n vs. Woodrum, — Tex. C. A. —, 188 S. W. 245. Unless based upon a sufficient consideration, an option merely is a continuous offer of sale which may be withdrawn at any time before acceptance. Worlds Fair Co. vs. Powers, 224 U. S. 173; Milwaukee Co. vs. Shea, 123 Fed. 9; Brown vs. Savings Union, 134 Cal. 448, 55 Pac. 598; Hobbs vs. Davis, 168 Cal. 556, 143 Pac. 733; see Baker vs. Mulrooney, 265 Fed. 529. A consideration of one dollar, in the absence of fraud or bad faith, is sufficient. Pittsburg Co. vs. Bailey, 76 Kan. 42, 90 Pac. 803. An agreement to drill a well on the property covered by the option is sufficient consideration. Starr vs. Crenshaw, 279 Mo. 344, 213 S. W. 811. After acceptance of the terms by the holder of the option, the parties are mutually bound and either one may compel specific performance by the other. Hoogendorn vs. Daniel, 178 Fed. 765; Heyward vs. Bradley, 179 Fed. 325. That an accounting may be had, see S. P. Mines vs. Court, 33 Nev. 97, 110 Pac. 503. Time is of the essence of the option whether so expressly stated therein or not. Waterman vs. Banks, 144 U. S. 394; Mackey Wall Plaster Co. vs. U. S. Gypsum Co., 244 Fed. 275, aff'd. 252 Fed. 397; Skookum Oil Co. vs. Thomas, 162 Cal. 539, 123 Pac. 363; Champion Co. vs. Champion Mines, 164 Cal. 205, 128 Pac. 315; Merk vs. Bowery Co., 31 Mont. 298, 78 Pac. 519. The condition as to time may be waived or relieved against in equity. Wheeling Co. vs. Elder, 54 W. Va. 255, 46 S. W. 357. A further consideration is not necessarily incidental to the mere extension of time for performance of the conditions of the option. See L. R. A. 1915B. That a verbal promise to extend the time is sufficient, see Stamey vs. Hemple, 173 Fed. 61; Downey vs. Gooch, *supra* (10). One who is in possession under an agreement to convey giving him the right of possession, may maintain an action against a stranger to the title for a trespass which consists of the removal and conversion of the substance of the estate. He may even recover from his vendor for injuries amounting to waste, committed upon the premises after delivery of possession. Lightner Co. vs. Lane, 161 Cal. 689, 120 Pac. 771. See Alechoff vs. Los Angeles Corp., 84 Cal. A. 41, 257 Pac. 569, and cases therein cited. If it is provided in the option agreement that in case of default in making any of the payments the property shall revert back to the grantor of the option, it is not necessary to return the payments made nor wait until final payment

§ 979. Consideration.

Oil and gas leases are not dependent for their validity on an agreement to pay royalties and a consequent expressed or implied covenant to develop. There may be any other consideration agreeable to the parties and valuable in law, or the consideration may be wholly executory. It may be in money only, paid at the time of the execution and delivery of the instrument. The amount recited may be small, only one dollar, but a dollar is a unit of value and is a thing of value. In fact and in the eyes of the law one dollar is a sufficient consideration to support a conveyance of land. If sufficient to support the conveyance of the whole estate in land it is sufficient to support a grant of a less interest. Where one dollar was the sole consideration paid for an oil and gas lease and the payment was recited in the instrument, the instrument would not be void. But, aside from this, it may be that development and prospective royalties are the real and moving consideration for such a lease. But this can not be where the parties expressly agree that development may be deferred for a stated time. One of the considerations, and, perhaps, the principal one for such a grant, is the covenant to develop and wield prospective royalties, or pay the stipulated price in lieu thereof.[47]

§ 980. Insufficient Consideration.

The rule that contracts performed without sufficie nt consideration which are optional as to one of the parties are optional as to both, applies to contracts or oil and gas leases consisting of mutual promises wholly executory and unperformed. The promises on one side being the sole consideration for the promise on the other and in which it is optional with one of the parties whether he will perform his promise, then prior to performance by him, it is optional with the other whether he will perform his promise. The correct statement of the rule is that contracts unperformed, without sufficient consideration, which are optional as to one are optional as to both.[48]

§ 981. Ambiguous Lease.

The object of the interpretation and construction of an oil and gas lease is to arrive at and give effect to the mutual intent of the parties as expressed in the lease. Where a lease is ambiguous, the true intention, if it can be ascertained from the contract, must prevail over verbal inaccuracies, inapt expressions, and dry words of the stipulations. It is the duty of a court to place itself as far as possible in the position of the parties at the time the lease was executed and to consider the instrument itself as drawn, its purpose and the circumstances surrounding the transaction; and, from a consideration of all these elements, to

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was due and in default before bringing suit in ejectment. Williams vs. Long, 139 Cal. 186, 62 Pac. 264; see, also, Hazzard vs. Johnson, *supra* (19).

For repossession of property and fixtures, see Smith vs. Beebe, 31 Ida. 469, 174 Pac. 608; see, generally, Worlds Fair vs. Powers, *supra;* Skookum Co. vs. Thomas, 162 Cal. 539, 123 Pac. 363; Champion Co. vs. Champion Mines, *supra.*

See Options.

[47] Rich vs. Doneghey, *supra* (8); McKay vs. Lucas, — Tex. C. A. —, 220 S. W. 172; McKay vs. Kilcrease, — Tex. C. A. —, 220 S. W. 177; Davis vs. Texas Co., — Tex. C. A. —, 232 S. W. 556; *but see* Nolan vs. Young, — Tex. C. A. —, 220 S. W. 154; see Guffey vs. Smith, *supra* (11); Eastern Oil Co. vs. Beatty, *supra* (9); see Hester vs. O'Rear, 202 Ky. 176, 259 S. W. 41.

[48] Rich vs. Doneghey, *supra* (8); see Hill Oil Co. vs. White, *supra* (10).

determine upon what sense and meaning of the terms used their minds actually met.[49]

§ 982. Joint Lease.

A joint lease, by which separate owners lease their lands described as a single tract, gives the lessee the right to explore for oil upon any or all of such tracts of land. By the production of oil upon any one of such tracts there is vested in the lessee the right to extract and remove the oil from all the tracts whether by means of a well, or wells, drilled upon one of them, or more than one of them. After the oil is produced the royalties, or the royalty oil, should be delivered to the lessors and divided among them in the proportion that the parcel of land held by each of them bears to the total area of the land.[50]

§ 983. Sublease.

A lessee of certain oil and gas lands sublet a portion of the leased premises to a third person. The original lease contained a covenant against incumbrances. The lessor brought suit to recover the rents collected from a subtenant and to forfeit the original lease on the ground that the subletting was for a purpose not contemplated by the provisions of the lease and was an incumbrance in violation of the covenants of the lease. The lessor made no claim for damages nor was any proof offered of any damages by reason of the subletting and of the alleged improper use of the premises by the sublessee. The Civil Code of California [51] provides that when a thing is let for a particular purpose the hirer must not use it for any other purpose. If he does so he is liable for all damages and the lessor may treat the contract as rescinded. Under this section of the Code the lessor could only maintain an action for damages. He could not sue to recover rents received from the sublessee and have the original rescinded; nor could he on appeal change the theory of his action and insist that it was an action for damages.[52]

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[49] Witherington vs. Gypsy Oil Co., 68 Okla. 138, 172 Pac. 634; Prowant vs. Sealy, 77 Okla. 244, 187 Pac. 239. In the construction of an ambiguous oil and gas lease a court, in order to ascertain the intention of the parties will consider the interpretation placed upon the lease by the parties themselves and will also look to their actions thereunder before any controversy arose between them as to its meaning. And such construction, when reasonable, will be adopted and enforced by a court and the construction placed thereon by the parties will prevail if the language will reasonably allow of such construction, although the court would probably adopt a different one but for the particular construction already placed by the parties on their agreement. Bearman vs. Dux Co., *supra* [8].

[50] Lynch vs. Davis, 79 W. Va. 437, 92 S. E. 427; see Higgins vs. California Co., 109 Cal. 304, 41 Pac. 1087; Wettengel vs. Gormley, 160 Pa. 559, 28 Atl. 934; Gillette vs. Mitchell, — Tex. C. A. —, 214 S. W. 619; *but see* Northwestern Co. vs. Ullery, 68 Ohio St. 259, 67 N. W. 494; *compare* Pittsburg Co. vs. Ankrom, 83 W. Va. 81, 97 S. E. 593; see, generally, Fairbanks vs. Warrum, *supra* [33]; Pierce Corp. vs. Schacht, 75 Okla. 101, 181 Pac. 731.

[51] § 1930.

[52] Smith vs. United Crude Oil Co., 179 Cal. 570, 178 Pac. 141, and see Id. 50 Cal. A. 466, 195 Pac. 434. It is the duty of a person contracting for a sublease to ascertain the provisions of the original lease, and is bound by its terms and conditions. Pedro vs. Potter, 197 Cal. 760, 241 Pac. 926. In the lease under discussion in this case it was provided that all expenditures in connection with the boring of wells, erecting derricks, pumps, tanks, pipes and material, should be provided by the lessee at his own expense. The lessee expressly agreed that he would keep the premises clear and free of incumbrances and liens, particularly mechanics', material men's, and laborers' liens. There was no agreement in the lease against subletting and the lessee had a right to sublease portions of the land for the development of oil and a sublease could not be considered an incumbrance within the meaning of the lease.

An assignment of a lease is parting with the whole term, anything short of this is a sublease. McNamer vs. Sunburst Co., 76 Mont. 332, 247 Pac. 166.

§ 984. Second Lease.

A lessor can not lawfully execute a second lease to a stranger covering property held under a valid subsisting lease unless subject to the rights of the prior lessee.[53]

§ 984a. Renewal.

If a person who has a particular or special interest in a lease, obtains a renewal thereof from the circumstance of his being in possession as tenant, or from having such particular interest, the renewal lease is, in equity, considered as a mere continuance of the original lease, subject to the additional charges upon the renewal, for the purpose of protecting the equitable rights of all parties who had any interest, either legal or equitable, in the old lease.[53a]

§ 985. Lease of Homestead.

An oil and gas lease occupied as a homestead which granted the right to enter upon and operate the same for oil and gas, together with the right to lay pipes, erect power houses, stations, and fixtures necessary for the production of oil and gas, is such a grant of the use and occupancy of the homestead as requires the joint consent of the husband and wife. An oil and gas lease executed by one of the spouses alone is invalid.[54]

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[53] Equity has jurisdiction at the suit of the holder of a valid oil and gas lease, whose rights have become vested by the discovery of oil or gas, to remove as a cloud upon his rights a subsequent lease executed to a stranger covering the same tract of land. Ohio Oil Co. vs. Greenleaf, *supra* (9). See Carbon Black Co. vs. Ferrell, 76 W. Va. 300, 95 S. E. 544. Where the holder of a valid oil and gas lease has obtained vested rights by drilling wells and by the production of oil and gas, equity will enjoin the lessor from creating a cloud on his title by executing to a stranger another lease on the same property where it appears to be reasonably certain that such cloud will be created unless enjoined. Castlebrook Co. vs. Ferrell, *supra* (36). A second lessee in an oil and gas lease of certain described lands had actual and constructive notice of a prior existing lease of the same lands. Such a second lessee acquired no rights under his lease as against the prior lease. Under these circumstances the original lessee had the right to have his title to the oil and gas under the leased lands quieted as against the second lessee and to have such second lessee enjoined from interfering with his right to enter upon the land and remove the oil. Warren Oil Co. vs. Gilliam, *supra* (5); see, also, Castlebrook Co. vs. Ferrell, *supra* (56).

As to second lease by heirs see Powell vs. Schoenfield, 262 Pa. St. 588, 106 Atl. 110; see Bessho vs. General Pet. Corp., 186 Cal. 133, 199 Pac. 22; Follette vs. Pacific Corp., 189 Cal. 205, 208 Pac. 295.

[53a] Phyfe vs. Wardell, 5 Paige 268; see, also, Probst vs. Hughes, 143 Okla. 11, 286 Pac. 875.

In Clements vs. Cates, 49 Ark. 242, 4 S. W. 776, 777, the court states the rule in this language, to wit:

"The law forbids a trustee, and all other persons occupying a fiduciary or quasi fiduciary position, from taking any personal advantage touching the thing or subject as to which such fiduciary position exists; or, as expressed by another: 'Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated.' If such a person acquires an interest in property as to which such a relation exists, he holds it as a trustee for the benefit of those in whose interest he was prohibited from purchasing, to the extent of the prohibition."

[54] Gillespie vs. Fulton Co., 140 Ill. A. 147; Ray vs. Brush, 112 Kan. 110, 210 Pac. 662; Carter Co. vs. Popp, 70 Okla. 232, 174 Pac. 747. McIntyre vs. Thomason, — Tex. C. A. —, 210 S. W. 563; see Gary vs. McKinney, — Tex. C. A. —, 239 S. W. 283, 202 S. W. 103; Haynie vs. Stovall, — Tex. C. A. —, 212 S. W. 792; *but see* Rumsey vs. Sullivan, 150 N. Y. S. 287; Griffin vs. Bell, — Tex. C. A. —, 202 S. W. 173; see, generally, Caudi vs. Wagoner, 184 Ky. 381, 212 S. W. 422; Robinson vs. Smalley, 102 Kan. 842, 171 Pac. 1155; see, also, Chisholm vs. Creek Co., 273 Fed. 589. The claimant of an unperfected unrestricted homestead right can not make a valid lease of the minerals therein. Bower vs. Higbee, 9 Mo. 239; Milliken vs. Carmichael, 134 Ala. 623, 33 So. 9; see Wadkins vs. Producers Oil Co., 227 U. S. 368; Parish vs. U. S., 184 Fed. 590; Chanslor-Canfield Co. vs. U. S., 266 Fed. 145; *compare* Tiernan vs. Miller, 69 Neb. 764, 96 N. W. 661; Anderson vs. Wilder, 83 Miss. 606, 35 So. 875. In Hall vs. Augur, 82 Cal. A. 594, 256 Pac. 232, it is said that title under oil and gas leases is inchoate until oil or gas is found in quantities justifying operation. See *supra*, note 2.

§ 986. Interest and Rights of Lessee.

Oil and gas while in the earth, unlike solid minerals, are not the subject of ownership distinct from the soil, and a grant of the oil and gas is a grant not of the oil that is in the ground, but of such a part as the grantee may find and reduce to possession. It passes nothing except the right to explore for the same under the terms of the agreement or lease.[55] But the lessee is entitled to protection in his right to explore the premises for oil or gas: and he is entitled to an injunction restraining subsequent lessees of the same premises from destroying this right.[56] Where it is stipulated that the lease is to continue during the time that oil or gas is found in paying quantities, and no oil or gas has been found during the term that the lessee has the right to exploit the land, the lease expires and may be annulled.[57]

§ 987. Lessee's Right of Determination.

Where the lease does not fix the number of wells to be drilled for the development of the premises as contemplated, the lessee then has the right to determine the number of wells or the extent of the development, and his decision is conclusive on the subject so long as he acts honestly and in good faith upon sound business principles.[58] When oil is found the right to produce it becomes a vested right and the lessee will be protected in extracting it agreeably to the terms of the lease.[59]

§ 988. Lessee Can Not Set Up His Own Default.

A lessee in an oil and gas lease can not set up his own default in order to terminate the lease or escape liability under its provisions. If he fails to perform the covenants of the lease it lies with the lessor to declare a forfeiture.[60]

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[55] Warner vs. Page, *supra* (5); Kelly vs. Harris, *supra* (6); Lima Oil Co. vs. Pritchard, 92 Okla. 113, 218 Pac. 866; *but see* Terry vs. Humphreys, 27 N. M. 564, 203 Pac. 539, in which case it was held that an oil well and gas lease for a stated period or as long thereafter as oil or gas, or either of them, is produced from the demised premises, by the lessee, conveys "real property." In Daughetee vs. Ohio Oil Co., *supra* (15) it was held that where it was provided the lessee should hold the premises for a stated period and as much longer as gas and oil are found in paying quantities on the premises, the lease conveyed a freehold estate, for the reason that it may continue indefinitely. "An oil lease to have and to hold the same unto the party of the second part, his heirs and assigns, for the period of ten years from date hereof, with the right of renewal for a further term of ten years at the end of such term, or at the end of any subsequent term for which it may be renewed, gives the lessee the right of renewal in perpetuity." Becker vs. Submarine Oil Co., *supra* (4).

[56] Downey vs. Gooch, *supra* (10). The owner of an oil lease developing gas in his well, and not oil, may be enjoined at the suit of the owner of a gas lease upon the same land from appropriating the gas flowing from his well. Guffey vs. Stroud, — Tex. C. A. —, 16 S. W. (2d) 527.

See § 954, note 1.

[57] Union Co. vs. Adkins, 278 Fed. 856; Chaney vs. Ohio Co., 32 Ind. A. 193, 69 N. E. 477; Cassell vs. Crothers, 193 Pa. St. 359, 44 Atl. 446. The lessee in an oil lease is the owner of all casing head gas escaping from oil wells, where an annual sum is paid for each gas well developed. Midsouth Co. vs. Cochran, 225 Ky. 676, 9 S. W. (2d) 1004.

[58] Gilbert vs. Bolds, *supra* (56); *but see* Kirlicks vs. Texas Co., — Tex. C. A. —, 201 S. W. 687; see, also, Brewster vs. Lanyon Zinc Co., *supra* (13); Alford vs. Dennis, *supra* (16); Grubb vs. McAfee, *supra* (6).

[59] Brookshire Oil Co. vs. Casmalia Co., *supra* (53); Dickey vs. Coffeyville Co., 69 Kan. 106, 76 Pac. 398.

[60] Ohio Valley Co. vs. Irvin Co., *supra* (5); see Warren Co. vs. Gilliam, *supra* (5); Monarch Co. vs. Richardson, 124 Ky. 602, 99 S. W. 668; Maud Co. vs. Bodkin, 75 Okla. 6, 180 Pac. 959; see, also, Becker vs. Submarine Oil Co., *supra* (4). Where the lease provides that if the premises should not be operated the lease should be void the word "void" means "voidable" at the election of the lessor and he must do some act evincing an intention to avoid the lease before it can be considered void or terminated. Such provisions are for the benefit of the lessor and he has an option to discontinue the lease on default of the lessee, or affirm the continuance of the contract. If the lease provides that the lessee's failure to complete a well within a stated period or any default in the covenant thereof to pay a certain yearly rental

§ 989. Covenants Construed in Favor of the Lessee.

In oil and gas leases the compensation of the lessor generally is a royalty. The covenants to be performed by the lessee which relate to the right to drill or explore for oil or gas generally are construed most strongly in favor of the lessor. But this rule has its limitations. When a lessee has faithfully performed all his covenants and has discovered oil in paying quantities and the lessor is receiving the royalties as the lease contemplates, the lessor can not then invoke this rule to aid him in dispossessing the lessee. The lessee having performed his covenants he thereby obtained a vested interest in the oil and gas in the leased premises because of his exclusive right to drill, and the lessee holds such interest as security against the lessor.[61]

§ 990. Forfeitures.

Forfeitures are not generally favored by the law; but forfeitures which arise in oil and gas leases by reason of the neglect of a lessee to develop or operate the leased premises are favored because of the peculiar character of the minerals sought to be produced. Perhaps in no other class of leases is prompt performance of contract so essential to the rights of the parties, or delay by one party likely to prove so injurious to the other.[62] The lessee has a right to regard his own interest as well as that of the lessor. In short the diligence required of

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should render the lease null and void and all rights and claims should therefrom cease, still the lessee by his own default can not relieve himself from the liability already incurred. Lavery vs. Mid-Continent Co., 62 Okla. 206, 112 Pac. 737; see, also, McKean Co. vs. Walcott, *supra* (2). By the terms of an oil and gas lease the lessee, an oil company, for a valuable consideration specifically undertook to commence and with diligence drill a well on the premises into a designated sand. The lease contained a clause providing that a failure to commence and complete said well should work a forfeiture and render the lease null and void. The forfeiture provision was for the benefit of the owner of the leasehold interest and gave him the option to declare a forfeiture upon the failure of the oil company to discharge its obligation to drill. The oil company could not, by virtue of the forfeiture clause and without the consent of the owner, terminate the contract by its own default and thereby escape liability for resultant damages. Lavery vs. Mid-Continent Co., *supra*.

For some of the peculiar circumstances surrounding oil and gas leases which favor the right of reentry for condition broken, see Hall vs. Augur, *supra* (54); Maxwell vs. Todd, 112 N. C. 686, 16 S. E. 926; see, also, Payne vs. Neuval, *supra* (2); McIntosh vs. Robb, 4 Cal. A. 484, 88 Pac. 517; Sledge vs. Stolz, 41 Cal. A. 209, 182 Pac. 340.

[61] Burgan vs. South Penn Co., 243 Pa. St. 128, 89 Atl. 823. A covenant relating to the drilling of new wells, the erection of new derricks and buildings is a covenant running with the land. Bradford Oil Co. vs. Blake, 113 Pa. St. 83, 4 Atl. 218; Pierce Ass'n. vs. Woodrum, *supra* 46.

[62] Hughes vs. Busseyville, *supra* (6); Soaper vs. King, 167 Ky. 121, 180 S. W. 46; see, also, Alford vs. Dennis, *supra* (16); Rembarger vs. Loseh, *supra* (16). An oil and gas lease will be strictly construed against the lessee and although under the general rule forfeitures are not favored, they are in fact favored in contracts of this character. Stephenson vs. Slitz, — Tex. C. A. —, 255 S. W. 812. A forfeiture clause, for the nonpayment of rent or for failure to fulfill a covenant, is for the benefit of the lessor, and is enforceable only at his option. Such a covenant is not self enforcing. Craig vs. Thompson, *supra* (8). The right of a lessor to forfeit the lease must be promptly asserted or it will be treated as a waiver. The tendency of the later judicial decisions is to frown on forfeiture where the rights of the parties insisting thereon can otherwise be adequately protected. Bloom vs. Rugh, *supra* (39); Wellsville Oil Co. vs. Miller, 44 Okla. 493, 145 Pac. 344; Pierce Corp. vs. Schaeht, *supra* (50); see, also, Indiana Co. vs. McCrory, *supra* (17). A person entitled to the forfeiture and the consequent right of re-entry may waive such right or he is estopped by his own conduct from asserting the right. And any fact properly evidencing the intention of a lessor to waive any right of forfeiture is admissible in an action by an assignee of the lessor to forfeit the lease. Munsey vs. Marnet Co., *supra* (19). The true rule undoubtedly is that the right to declare a forfeiture must be distinctly reserved; that the proof of the happening of the event on which the right is to be exercised must be clear; that the party entitled to do so must exercise his right promptly; and that the result of enforcing the forfeit must not be unconscionable. Craig vs. Cosgrove, 277 Pa. St. 580, 121 Atl. 408. In Taylor vs. Hamilton, *supra* (1), the court says: "It is a general rule that *forfeitures* are discountenanced in the law; but where, as in the case of the exploration and development of oil territory, the profits to be derived frequently depend upon the exercise of diligent prosecution of the work and continuous operation of the completed plant, the only protection afforded the owner of such

the lessee involves such a course of conduct upon his part as operators of ordinary diligence would pursue, having in mind the securing of the financial benefits sought by both lessor and lessee.[63]

§ 991. What Warrants Forfeiture.

To warrant a forfeiture it must affirmatively appear from all the circumstances that the lack of diligence "is both certain and substantial."[64]

§ 992. Forfeiture Can Not Be Arbitrarily Exercised.

The right of a lessor to forfeit the lease for nondevelopment can not be arbitrarily exercised. The lessor first must demand of the lessee that he develop in good faith the leased lands. If, after notice and demand, the lessee fails to begin the development within a reasonable time the lessor may then have the lease forfeited.[65] A mere discovery of a "dry hole" does not end the lease under a forfeiture clause for failure to drill a well within a stipulated time.[66] The driving of a stake to indi-

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property is the cancellation of the permit where its possessor has been grossly neglectful of mutual interests as between him and such owner, or wilfully has been guilty of dilatory practices because of speculative or selfish interests, or otherwise, which amounts to an abandonment. (Acme Oil & Min. Co. vs. Williams, 140 Cal. 681, 74 Pac. 296.) Having to do with the subject of forfeiture of oil leases, it is said in Risch vs. Burch, 175 Ind. 621, 95 N. E. 123, that, "oil and gas leases or contracts are in a class by themselves, and the ordinary rule that forfeitures are not favored does not apply with full force to them, if at all. The provisions for a forfeiture usually found in them are generally held to be for the benefit of the landowner and clearly enforceable by him where the lessee has done nothing to carry out the purpose of exploration, and has failed to make payments for the right to do so." And in this connection see, also, Gillespie vs. Bobo, 271 Fed. 641; Dill vs. Fraze, 169 Ind. 53, 79 N. E. 971; Bell vs. Kilburn, 192 Ky. 809, 234 S. W. 730; Clutter vs. Wisconsin Oil Co., — Tex. C. A. —, 233 S. W. 322; Gassaway vs. Teichgraeber, 107 Kan. 340, 191 Pac. 282; Jenkins vs. Williams (191 Ky. 165, 229 S. W. 94).

Forfeiture clause in oil leases is for the lessor's benefit and he may declare a forfeiture or allow contract to stand and sue for damages. Julian Corp. vs. Courtney Co., 22 Fed. (2d) 360.

[63] Young vs. Forest Co., *supra* [20]; Priddy vs. Thompson, 204 Fed. 955; Lindlay vs. Raydure, 239 Fed. 928, aff'd. 249 Fed. 675; see Huggins vs. Daley, *supra* [5]; Backer vs. Penn. Co., 162 Fed. 627; Florence vs. Orman, 19 Colo. A. 79, 73 Pac. 628; Rawlings vs. Armel, 70 Kan. 778, 79 Pac. 683; Wagner vs. Mallory, 169 N. Y. 501; Frank Co. vs. Belleview Co., 29 Okla. 719, 119 Pac. 260.

[64] Becker vs. Submarine Oil Co., *supra* [4]. In Blackwell Co. vs. Whitesides, 71 Okla. 41, 174 Pac. 574, it was held: "A court of equity has jurisdiction to decree the forfeiture of an oil and gas lease on account of the breach of an implied covenant to diligently operate and develop the property, when such forfeiture will effectuate justice, and the lessor is not limited to an action for damages, because of such breach where the measure thereof is uncertain, vague and indefinite."

Neither failure to pay royalty nor failure to pay for injuries done will authorize a forfeiture without a special provision giving that right in such a case. Wagoner Co. vs. Marlow, 137 Okla. 116, 278 Pac. 294.

[65] Brewster vs. Lanyon Zinc Co., *supra* [13]; Becker vs. Submarine Oil Co., *supra* [4].

The rule that forfeitures are not favored in law does not apply to oil and gas leases. Forfeitures are usually against conscience and without equity and it is for these reasons that courts of chancery ordinarily refuse relief in such cases, but an exception to the rule must exist where it is against equity to permit the defendant to longer assert his title. The lack of any other remedy and the danger that the oil and gas might be withdrawn through wells on other lands makes a case of this kind appeal to the chancellor and calls upon him to enforce the incurred forfeiture. In general equity abhors a forfeiture but not if it works equity and protects a land owner from the laches of a lessee where lease is of no value until developed. Hall vs. Augur, *supra* [54].

Forfeiture can be predicated only on the grounds specified in the lease, where grounds are specified. U. S. Co. vs. Cole Co., — Tex. C. A. —, 17 S. W. (2d) 839; Grubb vs. McAfee, 109 Tex. C. A. 383, 212 S W 464. See Taylor vs. Hamilton, *supra* [1].

Only one ground of forfeiture being stated in a lease, prevents a forfeiture for other grounds. Bryson vs. Mid. Kansas Co., — Tex. C. A. —, 297 S. W. 1045. Part of land leased as an entirety can not be forfeited for nondevelopment, when the balance is developed. Hughes vs. Cordell, 174 Ark. 757, 296 S. W. 735.

Lessee's assignment is no ground of forfeiture, where lessor knew of the assignment and encouraged the assignee to continue drilling. Peeler vs. Smith, — Tex. C. A. —, 18 S. W. (2d) 938.

[66] Ohio Oil Co. vs. Irvin Co., *supra* [8].

cate the location of a well and the driving of another stake locating a place to set a boiler to drive a drilling machine on the part of the lessee, do not constitute a commencement of operations to drill within the provision of the lease.[67]

§ 993. Forfeiture Avoided.

An oil and gas lease provided that if the lessee did not drill a well within one year a stipulated rental was to be paid for each additional year the beginning of operations was delayed. Where no operations were commenced during the second year the stipulated rental was not due until the end of that year. The tender of the rental for the second year before the end of that year was sufficient to avoid forfeiture.[68]

§ 994. Notice of Forfeiture.

The purpose of the notice of forfeiture is to insure to the lessors a strict and faithful performance of the terms of the lease or, in case of default, to retake the property. Therefore the provision for notice is for the benefit of the lessor and is to be strictly interpreted against him.[69]

§ 995. Notice Essential.

If a lessor desire to declare a forfeiture on the ground that the land has not been fully developed, he must give notice of such intention, and a reasonable time must be given for development.[70]

§ 996. By Whom Notice Must be Given.

The notice must be given by the lessor or one in privity with him,[71] or, it has been said, if there be more than one lessor there must be the joint or concurrent action of all the lessors.[72]

§ 997. To Whom Notice Must be Given.

The notice must be given to the lessee or one in privity with him, or to a duly authorized agent.[73]

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[67] Henning vs. Wichita Co., 100 Kan. 255, 164 Pac. 298.

[68] Hughes vs. Parsons, *supra* (5); see Dix River Co. vs. Pence, — Ky. —, 123 S .W. 263; Warren Co. vs. Gilliam, *supra* (5); McNutt vs. Whitney, 192 Ky. 132, 232 S. W. 386; Union Co. vs. Indian-Tex. Co., 199 Ky. 384, 251 S. W. 1008. Where an oil and gas lease provides for a forfeiture unless a well is drilled through a certain sand within a specified time, the lessee is not required to drill below such sand in search of a new sand, but his contract has been complied with when he has drilled through the specified sand. Papoose Co. vs. Swindler, 95 Okla. 264, 220 Pac. 506.

A lease for oil and gas, providing for forfeiture of the lands it covers for failure to keep agreement to drill three wells upon the land each year is not terminated by such failure, where lessor exercises no option to terminate it by reentry or otherwise. Curry vs. Texas Co., — Tex. C. A. —, 18 S. W. (2d) 256.

[69] Underhill on Landlord and Tenant, p. 625, § 391. See, generally, as to notice, Taylor vs. Hamilton, *supra* (1).

[70] Thornton on Oil and Gas (3d ed.), p. 862. In Herbert vs. Graham, 72 Cal. A. 317, 237 Pac. 58, the court said: "It is true that plaintiff informed one of the appellants that he wanted him to resume or quit, but this falls far short of notice of a determination on his part to declare a forfeiture and can not effectuate any such purpose." See, also, Farmers' Co. vs. Bonneau, 110 Okla. 168, 237 Pac. 83, and cases therein cited.

[71] Baird vs. Atlas Oil Co., 146 La. 1091, 84 So. 366.

[72] Jameson vs. Chanslor-Canfield Co., *supra* (6); dist'g. in Bayside Co. vs. Dabney, 90 Cal. A. 122, 265 Pac. 566.

[73] Unlon Oil Co. vs. Wright, 200 Ky. 791, 255 S. W. 697. See, also, Detlor vs. Holland, 57 Ohio St. 492, 49 N. E. 690. In Young vs. Scott, 86 Kan. 296, 119 Pac. 873, the court said: "A notice to the former manager, while he was not connected with the company, was unavailing. A notice of forfeiture did reach the trustee (in bankruptcy), who was in control," and it was held to be sufficient.

For instances of an insufficient notice see Jameson vs. Chanslor-Canfield Co., *supra* (6); Herbert vs. Graham, *supra* (70).

§ 998. Waiver of Right.

The right of a lessor to forfeit oil and gas leases must be promptly asserted or it will be treated as waived. The tendency of the later judicial decisions is to frown on forfeitures where the rights of the parties insisting thereon can otherwise be adequately protected.[74]

§ 999. Immediate Development Presumed.

From the fact that lessors in oil and gas leases usually receive no consideration except in royalties from oil and gas after their discovery, the presumption always is that such leases are made for the purpose of immediate development, unless the contrary appears from the terms of the lease itself.[75]

§ 1000. Abandonment.

When it is claimed that a right under an oil and gas lease has been lost by abandonment and upon which forfeiture of the lease is sought the issue of intention rarely is, if ever, absent. An intention to abandon is to be found by a jury from a consideration of the nature and extent of the undertaking, the conduct of the parties, and what they did do or failed to do in that respect. The rule does not mean that the jury shall find that a specific mental reservation was reached by the person so charged to so abandon the right, as such a finding never could have a basis in the testimony except by admission or confession.[76]

See § 9.

[74] Bloom vs. Rugh, 98 Kan. 589, 160 Pac. 1136.

[75] Where a lease of oil and gas lands, with royalty to the lessor on the product is the sole and only consideration therefor it necessarily is implied, as of the essence of the contract, that the lessee shall work the wells with reasonable dispatch, for their mutual advantage. Acme Co. vs. Williams, *supra* (4); Daughetee vs. Ohio Oil Co., *supra* (13); Burgan vs. South Penn Co., *supra* (61); Parish Fork Co. vs. Bridgewater Co., 51 W. Va. 583, 42 S. E. 655. There is an implied condition or covenant of every lease of land for the production of oil therefrom that when the existence of oil in paying quantities is made apparent, the lessee shall put down as many wells as may reasonably be necessary to secure the oil for the common advantage of both the lessor and the lessee. Highfield Co. vs. Kirk, *supra* (5). The fluctuating and uncertain character and value of oil and gas lands render it necessary for the protection of the landowners that the properties should be developed as speedily as possible. The lessee for such purpose will not be permitted to hold the land for speculative or other purposes an unreasonable length of time for a mere nominal rent when a royalty on the product is the chief object for the execution of the lease. Hughes vs. Busseyville Co., *supra* (9). See cited case as to the application of the rule to the effect that an oil lease contains an implied covenant on the part of the lessee to develop the leased premises, depends on circumstances and on the intention of the parties. An implied covenant to develop can not be read into a lease of land for oil and gas where the territory had not before been developed and its productive value was not known. Where the object of the operations contemplated by the lease is to obtain a benefit or profit for both lessor and lessee, neither is in the absence of a stipulation to that effect, the arbiter of the extent to which, or the diligence with which, the operation shall proceed, but both are bound by the standard of what in the circumstances, would reasonably be expected of an operator of ordinary prudence, having regard to the interest of both. Indiana Co. vs. McCrory, *supra* (17); Wapa Co. vs. McBride, 84 Okla. 184, 201 Pac. 984; Cotner vs. Munday, *supra* (20).

Where an oil and gas mining lease is executed, which covers one hundred acres of land, consisting of two tracts of eighty and twenty acres, respectively, and the lease on the twenty-acre tract is assigned, and the assignee, completes a producing oil well thereon within the time stipulated in the lease, and said lease is for a term of five years, and as much longer as oil and gas, or either of them, is produced from the leased premises by the lessee or his assigns, separate leases are not created thereby upon the two tracts of land, but there remains the one lease upon the entire one hundred acres as a whole; and, where the requirements of the lease have not been complied with so as to keep the same alive and in force as to the eighty-acre tract, an abandonment of the lease on the twenty-acre tract will operate as an abandonment of the lease as to said eighty-acre tract. Douthitt vs. Wheeler, 110 Okla. 131, 236 Pac. 408. See Gypsy Oil Co. vs. Cover, 78 Okla. 158, 189 Pac. 540.

[76] Munsey vs. Marne Co., *supra* (10).

In Venture Oil Co. vs. Fretts, *supra* (2), it is said: "A vested title can not ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless here is a satisfactory proof of an intention to abandon. An oil lease stands on quite different ground. The title is inchoate, and for purposes of explora-

§ 1001. Intention.

Whether an oil and gas lease had been terminated by abandonment on the part of the lessee and the acceptance of or reentry upon the premises by the lessor is a question of intention. A lease so terminated is said to have come to its end by operation of law, the legal result arising from the act of the parties. The intention on the part of the lessee to abandon and on the part of the lessor to resume possession of the premises on his own account and treat the lease as having been surrendered and as ascertained from their acts and conduct is the test.[77]

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tion, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract"; cited, together with many other cases, in Brookshire Oil Co. vs. Casmalia Co., *supra* [55]. See also, Hall vs. Augur, *supra* [54], *but see* Petroleum Co. vs. Owens, 110 Tex. 568, 222 S. W. 154.

For a modification of the doctrine of Venture Oil Co. vs. Fretts, *supra*, see Lindlay vs. Raydure, *supra* [65].

The distinction between "forfeiture" and "abandonment" as applied to oil and gas conveyances and leases is so shadowy that in discussing the one necessarily the conditions of the other are involved. But one distinction is that "abandonment" rests on the intention of the parties, while "forfeiture" does not rest upon the intent to release the premises, but is an enforced release. A vested title can not ordinarily be lost by abandonment unless there is satisfactory proof of an intention to abandon. The existence of an intent to waive or abandon the right to drill for oil and gas under the lease is a question of fact, and the lessor must show an intention on the part of the lessee to abandon the lease. If the proof would authorize the conclusion that there was no such intention, then a court would not be justified in decreeing a forfeiture of the lease. Fisher vs. Crescent Co., — Tex. C. A. —, 178 S. W. 905; Hall vs. McClesky, — Tex. C. A. —, 228 S. W. 1004; Garrett vs. South Penn. Co., 66 W. Va. 587, 66 S. E. 541; Wisconsin Texas Co. vs. Clutter, — Tex. C. A. —, 258, S. W. 265. Abandonment may be more readily found in cases of oil and gas leases than in most other instances. The rights granted under such leases are for exploration and development. The title and interest are inchoate until oil or gas is found in quantities warranting operation, and accordingly a lessee will not be permitted to fail in development and hold the lease for speculative or other purposes except in strict compliance with his contract, and for a valuable and sufficient consideration other than the development. See Hall vs. Augur, *supra* [5]. Harris vs. Riggs, 63 Ind. 208, 112 N. E. 36. When the lease has been abandoned by the lessee, the lessor has three remedies, any one of which he may pursue. The lessor may go into a court of equity to cancel the lease and recover incidental damages; he may in a separate action at law sue for damages for breach of the contract, or he may treat the lease as rescinded and sue to recover possession of the property. Millar vs. Mauney, 150 Ark. 161, 234 S. W. 498. It may be accepted as a principle of law that even in the case of a lease creating a vested interest in the lessee, the doctrine of abandonment can be legally asserted and proved in the ordinary manner as a defense to the claim of prior lessee. Much stronger would be the ground of recognizing it as a defense if the instrument in a controversy in equity may not have created a vested interest. Burke vs. North, 296 Fed. 259.

When an oil and gas lease is once abandoned by the lessee, he can not thereafter claim or enforce any right thereunder without first securing consent of the lessor or a renewal of the lease. Harris vs. Riggs, *supra*. Hence, the lessee can can not revive the lease after his abandonment by assigning it to third parties. Hall vs. Augur, *supra* [54].

Nonuser alone without an intention to abandon, does not constitute an abandonment. Herbert vs. Graham, *supra* [70]. In this case the court said: "Nor is there any merit in the contention that the evidence shows that the defendants abandoned the property and vacated the same upon receiving plaintiff's complaint as to the progress of the work. Mr. Okell, to whom the notice to resume work was given, seldom visited the property. His absence signified no intention of abandoning the same. He left his machinery upon the ground and his crew in charge, with directions to have the tools repaired so that the operations might be resumed. We have already referred to the fact that the evidence shows that two wells had been started; that the first was abandoned and the second had caved, in consequence of which work was suspended, and the machinery was left upon the property with a man in charge. These acts rebut any inference that the assignees of the lease had abandoned the premises. (People vs. Southern Pac. Co., 172 Cal. 602, 158 Pac. 177)." See, also, Bodcaw Co. vs. Goode, 160 Ark. 48, 254 S. W. 345; Parker vs. Swett, 188 Cal. 480, 205 Pac. 1065; Stoffler vs. Edgewater Co., 198 Ky. 523, 249 S. W. 753; Adams vs. Elkhorn Corp., 199 Ky. 612, 251 S. W. 654; *but see* Lieber vs. Ouachita Co., 153 La. 160, 95 So. 538.

Abandonment can not be predicated on derelictions of the lessee while the lessor brings suit to forfeit the lessee's rights, and maintains the position that they have been forfeited. Transcontinental Co. vs. Thomas, 29 Fed. (2d) 733.

[77] Grubb vs. McAfee, *supra* [6]. Where an oil and gas lease is abandoned by the lessee, he can not thereafter revive the same nor claim nor enforce any rights thereon without first securing the consent of the lessor or procuring a renewal of the lease. Harris vs. Riggs, *supra* [76]; see, also, Ohio Oil Co. vs. Detamore, 165 Ind. 243, 73 N. E. 906.

Unexplained cessation of work after sinking a dry well would be sufficient proof of abandonment.[78]

§ 1002. Cotenants.

Cotenants are owners of the whole of part and of the whole.[79] None of the cotenants has the exclusive right to any determinate part of the property. The owner of an undivided interest in a tract of land, or a majority of such owners, has not the right to exploit such land for oil and gas by making a lease therefor without the consent of all the cotenants. Such right can not be conferred upon such a lessee. Such a lease may be valid as to the lessor but it is voidable as against the other cotenants.[80]

§ 1003. Rights of Cotenant.

Each cotenant may enter upon the premises and operate the same for oil and gas.[81] If his efforts result in a "dry hole" he must sustain the entire loss; but, if successful, he must proportionately share the profits with the excluded cotenants.[81a]

§ 1004. Ratification of Voidable Lease.

The pretermitted cotenants may, if they so elect, permit the lessee to continue operations under the lease and require him to account for such proportion of the royalties as their interest in the oil in place bears to the whole.[82]

§ 1005. Mining Partnerships.

There is no presumption of a partnership from cotenancy.[83] Drilling the well by their joint efforts—this fact of itself alone—whether as cotenants, or in order to become cotenants, does not make them mining partners. Such an arrangement lacks the elements of partnership.[84]

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[78] Foster vs. Elk Fork Co., 90 Fed. 178; Strange vs. Hicks, 78 Okla. 1, 188 Pac. 347.

[79] Gulf Ref. Co. vs. Carroll, 145 La. 299, 82 So. 277; see Gulf Co. vs. Hayne, *supra* (1); Paxton vs. Benedum-Trees Co., 80 W. Va. 187, 94 S. E. 472. A patent issued to two or more persons creates presumptively a tenancy in common as between them and third parties. Frisbie vs. Marques, 39 Cal. 451, aff'd. 101 U. S. 473.

Oil and gas owned by coowners separate from the surface can not be decreed except by sale and division of the proceeds. A judicial partition thereof by assignment of the oil and gas under sections of the surface is void. Hall vs. Vernon, 47 W. Va., 297, 34 S. E. 764.

[80] Id. Zeigler vs. Brenneman, 237 Ill. 15, 86 N. E. 597; see Compton vs. Peoples Co., 75 Kan. 572, 89 Pac. 1039; York vs. Warren Co., 191 Ky. 157, 229 S. W. 116. A lease of an entire tract made by one cotenant is binding on the other tenants when ratified by them. One method of ratification is acceptance of benefits under the lease by the cotenants. Bessho vs. Gen. Pet. Corp., *supra* (33).

[81] Williamson vs. Jones, 43 W. Va. 562, 27 S. E. 411; see, also, McCord vs. Oakland Co., 64 Cal. 134, 27 Pac. 863. Several cotenants of an oil and gas lease assigned the lease to an operator who was to deliver to them a part of the product. One of the joint owners did not join in the assignment, and notified the assignee not to deliver any oil to his cotenants. The court held (1) that the party not joining in the assignment was not entitled to his share of the oil without proving that his cotenants had received more than their share; (2) that if he chose to affirm it, he must take his share with the others upon a distribution of the royalty after deducting all proper charges and expenses; (3) that if he did not affirm the lease, he had no claim to any share of the royalty, and could only look to the lessee as a cotenant who has not acquired his title. Enterprise Co. vs. National Co., 172 Pa. St. 421, 33 Atl. 687; Gillette vs. Mitchell, *supra* (50).

[81a] Id. See Silver King Co. vs. Conkling Co., 255 Fed. 740; Job vs. Potton, L. R. 20 Eq. 84.

[82] Paxton vs. Benedum-Trees Co., *supra* (79).

[83] Neill vs. Shamburg, 158 Pa. St. 263, 27 Atl. 992. Cotenants are not mining partners unless they unite in working the property. Huston vs. Cox, 103 Kan. 73, 172 Pac. 992.

[84] Gillespie vs. Shufflin, 91 Okla. 72, 216 Pac. 132. Ordinary partnerships with personal liability may be formed to develop oil leases. Thompson vs. Crystal Springs Bank, 21 Fed. (2d) 602.

See §§ 888, 913.

Where tenants in common cooperate in developing a lease for oil and gas, each agreeing to pay his part of the expenses and to share in the profits or losses, they constitute a mining partnership.[85]

§ 1006. Life Estates.

Neither a widow owning a dower interest in land nor a life tenant has the power to make a lease of land under which oil or gas or other minerals can be removed from the land as against the remainderman.[86] Oil and gas well drilling by the lessee after the death of the lessor are regarded as open mines at the time of the lessor's death and the life tenant will be entitled to the rents, issues and profits reserved to the lessor accruing from such wells during the life tenancy.[87] An ante nuptial agreement by which after marriage the wife should hold and enjoy her separate estate does not cut the surviving husband out of his curtesy or his inheritance. It does not deprive him nor his legal heirs from the right to moneys received as royalties on oil for well drilled under a contract with and in the lifetime of the wife.[88]

§ 1007. Open Mines.

Mining leases do not constitute a sale of any part of the land, and the mineral derived from the usual operation of open mines constitutes the rents and profits of the land and belong to the tenant for life or years; but this rule does not apply to unopened mines in the absence of a contract for opening and leasing them.[89]

§ 1008. Assignees.

A right of action for a breach of the covenant of an oil and gas lease is assignable. No particular form of words is essential to pass the right of action. Words manifesting a clear intention to assign are sufficient.[90]

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[85] Barrett vs. Buchanan, 95 Okla. 262, 213 Pac. 734; see, also, Gilbert vs. Fontaine, 22 Fed. (2d) 657. Madar vs. Norman, 13 Ida. 585, 92 Pac. 572.

It is well settled that, in order to constitute a mining partnership, the parties must cooperate in developing an oil and gas lease, each agreeing to pay his part of the expenses and share in the profits and losses. Robinson Pet. Co. vs. Black, 138 Okla. 128, 280 Pac. 595: In Callahan vs Danziger, 32 Cal. A. 405, 163 Pac. 65, it was said that a general partnership only existed where parties conjointly expended money in exploring prospective oil property.

In Eagle-Picher Co. vs. Fullerton, 28 Fed. (2d) 472, a sublease or subleases taken at two and one-half per cent advance royalty were held to be a joint adventure, and to create a mining partnership.

[86] Prout vs. Hoy Oil Co., 263 Ill. 54, 105 N. E. 26; see, generally, Campbell vs. Lynch, *supra* [30].

[87] Bramer vs. Bramer, 84 W. Va. 168, 99S. E. 329. A life tenant can not operate for oil unless the mine was opened before the life estate vested. A widow vested with a life estate in one-third of one-sixth of land, leased later with her consent, is entitled to only the income from the one-third of one-sixth, i. e., to the income of or from the fund or proceeds impounded, not to the *corpus* of this share of the royalty. Fourth Co. vs. Woolley, 31 Ohio A. 259, 165 N. E. 742.

[88] Id. See, generally, Cochran vs. Gulf Co., 139 La. 1010, 72 So. 718.

[89] Von Baumbach vs. Sargent Co., *supra* [3]. The lessee in an oil and gas lease after the death of the lessor entered upon the leased premises and drilled and produced oil and gas. Oil and gas wells so drilled are regarded as open mines at the time of the lessor's death. The life tenant will be entitled to the rents, issues and profits reserved to the lessor accruing from such wells during the life tenancy. Bramer vs. Bramer, *supra* [87]. Under a will devising an interest in mineral lands under lease for mining operations, royalties under such a lease earned previous to but payable after the death of the decedent are payable to the life tenant. Poole vs. Union Trust Co., 191 Mich. 162, 167 N. W. 430; see, also, Seager vs. McCabe, 92 Mich. 186, 52 N. W. 299; and see Priddy vs. Griffith, 150 Ill. 562, 37 N. E. 999. The reason of the rule permitting dower in opened mines is that the land had been devoted to mining purposes by the owner of the fee during his life; and the mode of enjoyment and source of profit fixed and determined by him. In such case mining is a mode of enjoyment fixed by the owner and to extract and take the minerals is but to take the accruing profits from the land. Daniels vs. Charles, 172 Ky. 238, 189 S. W. 194.

[90] Millan vs. Bartlett Co., 78 W. Va. 367, 89 S. E. 711.

§ 1009. Assignee's Liability.

An assignee of an oil and gas lease which contains a stipulation to the effect that all covenants and conditions therein shall be binding on the assigns of both parties, is liable for the rental payment prescribed in the lease so long as he retains possession under the lease.[91]

§ 1010. Liability of Assignee for Royalty.

Where a lease of land for oil and gas provides that a certain sum shall be paid each year as royalty on the gas produced from each well and marketed off the premises, and the lessee operates the lease, markets the gas from wells thereon for a portion of the year, and thereafter assigns the lease, the assignee, in the absence of a special contract, is not liable for the royalties accruing on the wells, the product of which was marketed prior to the assignment of the lease, regardless of when these royalties became due and payable but the assignee of the lease is liable for the royalties accruing during the time he markets the product and enjoys the estate.[92]

§ 1011. Action Against Assignee.

Where a lessor in an oil and gas lease brings an action against an assignee to recover damages for failure to drill wells upon the lease lands in order to prevent drainage of the oil in such leased lands through wells drilled upon adjacent land, it is necessary for the lessor to prove (1) the assignment and transfer of the lease to the assignee, the defendant in the suit; (2) that the assignee's operations on the lessor's land were under and by virtue of the lease. This, because the action being based upon a breach of an implied covenant to develop, it can not be maintained against any person not a party to the lease.[93]

§ 1012. Damages—Well Driller.

It has been held that in an action for damages for a breach of the contract the measure of damages which the well driller was entitled to recover was (1) the expense necessarily incurred in hauling his drilling rig and machinery from where they were to the well that he began drilling; (2) the expense necessarily incurred in rigging up and drilling to the point where drilling was stopped; (3) reasonable compensation for services in removing the rigging and drilling machinery; (4) reasonable compensation for the enforced idleness of the rig and machinery; (5) the reasonable value of the well driller's services lost

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[91] Ardizonne vs. Archer, 71 Okla. 289, 177 Pac. 554, 178 Pac. 263; see, also, Oklahoma Co. vs. Winship, 83 Okla. 146, 200 Pac. 849; Texas Co. vs. Bruce, — Tex. C. A —, 233 S. W. 539; see, also, Gibson vs. Texas Co., — Tex. C. A. —, 239 S. W. 671. While an assignee of an oil and gas lease is not liable for the consequences of the failure of his assignor to drill a well on the leased premises before the assignment of the lease, yet if the assignee continues to pay the stipulated delay rental in lieu of drilling after the acceptance of the assignment after he acquires title, he is liable for the consequence of his own failure. Hefner vs. Light Co., *supra* [9]; see Pierce Ass'n vs. Woodrum, *supra* [46].

An assignee failing to drill a test well forfeits his rights to the lessees. Henry vs. Gulf Co., 179 Ark. 138, 15 S. W. (2d) 79; s. c. 2 S. W. (2d) 687.

[92] Columbus Co. vs. Knox Co., 91 Ohio St. 35, 109 N. E. 529.

The assignment of a lease does not release the assignor from his covenant to pay the royalties, unless so provided in the lease. A covenant to pay royalties is a covenant running with the land, and binding the assignees. Curry vs. Texas Co., *supra* [41], citing on latter point Pierce Co. vs. Woodrum, *supra* [41].

[93] Steele vs. American Co., *supra* [32]. Mere breaking of machinery or other misfortune is no excuse for failure of assignee of an oil and gas lease to complete drilling of well as agreed. Julian Corp. vs. Courtney Co., 22 Fed. (2d) 360.

during the time he remained on the premises at the request of the lessee of the land.[94]

§ 1013. Damages—Invalid Lease.

Where a lessee, with no intention to violate any law or do any wrongful act, takes possession of land under a lease owned by him, and in good faith, believing in his title, proceeds to develop the premises for oil and gas purposes and it later develops that his lease was invalid, the measure of damages would be the price of the oil and gas at the surface or in the pipe line or tanks, less the reasonable cost of producing the same.[95]

§ 1014. Measure of Damages—Adverse Interest Established.

Where a lessee in good faith takes peaceable possession of the leased premises, believing that the lessor owned the entire title in the premises, and an action is brought by another person, who establishes an interest in the land, the measure of damages arising in favor of the party establishing a partial interest in the premises is the value of his share of the oil at the surface less the reasonable cost of production.[96]

§ 1015. Damages—Failure to Develop.

A lessor of lands for the production of oil and gas in an action against the lessee for failure to properly develop the leased premises, is entitled only to such damages as he sustained by any failure on the part of the lessee to exercise an honest judgment in proceeding with the necessary explorations on the leased lands and the extraction of oil therefrom, taking into consideration (1) the subject matter of the lease; (2) the character of the mineral products; (3) the nature of the oil-bearing sand, whether dense or soft and porous; (4) developments on contiguous lands, whether by the lessee or different operators; (5) the cost of drilling; (6) proximity to market; (7) facilities for marketing; (8) current prices, whether high or low; (9) location of lands; (10) and such other conditions attendant on the operations as may explain the necessity for prompt, or excuse for delayed action in prosecuting such development. In such case the lessor assumes the burden of showing, and by clear and convincing proof, must, to avail him, show by

[94] Letcher vs. Maloney, 70 Okla. 65, 172 Pac. 972. For cases involving damage to the surface by another's oil operations or negligence, see Duvall vs. White, 46 Cal. A. 305, 189 Pac. 321; Northrup vs. Eakes, 72 Okla. 66, 178 Pac. 266; Walters vs. Prairie Co., 85 Okla. 77, 204 Pac. 906; Kay & Kiowa Co. vs. Moore, 96 Okla. 218, 221 Pac. 511; Avery vs. Wallace, 98 Okla. 156, 224 Pac. 515; Indiana Co. vs. Christensen, 188 Ind. 406, 123 N. E. 789; see, generally, Brennan Co. vs. Cumberland, 29 App. D. C. 554; Kuhn vs. Jewett, 32 N. J. Eq. 647; Texas Co. vs. Bellar, 51 Tex. C. A. 154, 112 S. W. 323; Texas Co. vs. Clark & Co. — Tex. C. A. —, 182 S. W. 351.

In an action to recover on a contract to drill an oil well, the question of the driller's negligence in landing an oil string is for the jury, under an instruction given by the court that in drilling the well plaintiff is bound to exercise that degree of skill which those of his trade or profession ordinarily possess. Todd vs. Meserve, 93 Cal. A. 370, 269 Pac. 710.

The value of the land immediately before the overflow and its value immediately afterwards is a proper way to arrive at the amount of damage to the land. Every vs. Wallace, *supra*. In a suit for damages for the destruction of a growing crop, such damages are to be estimated as of the time of the injury, to be applied as compensation for the value of the crops in the condition in which they were at the time of the destruction. DeArman vs. Oglesby, 49 Okla. 118, 152 Pac. 356; Producers Co. vs. Maple Leaf Co., 82 Okla. 120, 198 Pac. 577.

[95] Barnes vs. Winona Oil Co., 83 Okla. 253, 200 Pac. 985.

[96] Minshall vs. Berryhill, 83 Okla. 100, 295 Pac. 932. Broadway vs. Stone, — Tex. C. A. —, 15 S. W. (2d) mod'f'g. 6 S. W. (2d) 197; Reynolds vs. McMann Co., — Tex. C. A. —, 11 S. W. (2d) 778, and 14 S. W. (2d) 819, reversing 279 S. W. 939.

witnesses having experience, skill, and engaged in similar operations that the lessee, having due regard for the advantage and profit of himself, and the lessor, has not, surrounding circumstances considered, exercised ordinary diligence in conducting such operations.[97]

§ 1016. Liquidated Damages.

A covenant in a lease that the lessee should commence operations by a certain date and on failure to do so he should pay the lessor a stated sum for each and every month in which he fails to commence such operations is not a penalty but liquidated damages. In an action on such a lease to recover the amount of the monthly payments, proof of the amount of damages is unnecessary as the amount is fixed by the terms of the lease. Damages for breaches of contract touching future interests in oil wells of unknown value are of such remote and speculative value as to bring them peculiarly within the rule that the parties should have the right to fix them by mutual agreement. It would be impossible to calculate with any degree of certainty the amount of damage sustained by a lessor by reason of the breach of the covenant of such a lease by the lessee.[98]

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[97] Grass vs. Big Creek Co., 75 W. Va. 719, 84 S. E. 750; see Burroughs vs. Petroleum Dev. Co., 181 Cal. 253, 184 Pac. 5; Clark vs. Cooper, 197 Ky. 530, 247 S. W. 929. It was stipulated in an oil and gas lease that the lessee should develop the land by boring for oil and gas and should drill a well to a certain depth. The lessee failed to drill the well to the specified depth and abandoned the well before reaching such depth. The lessor was entitled to recover as damages for a breach of the lease the reasonable value of the lease, as this must be regarded as the actual value paid by the lessor to have the well drilled as specified. Henry Oil Co. vs. Head, — Tex. —, 163 S. W. 311. In Doehring vs. Gulf Co., — Tex. C. A. —, 8. S. W. (2d) 723, it is held that to sustain recovery of damages for failure to develop land, there must be evidence tending to show that the land could have been made to produce oil, and without this, the case should not go to the jury. The only parties who can bring suit for the negligent breach of a lease are the parties to the lease itself. A party contracting to drill to a depth of fourteen hundred and fifty feet and stops at six hundred and twenty-five feet is liable to plaintiff for the cost and the defendant may not show that there would have been no resulting profit as a defense. Mitchell vs. Dabney, — Tex. C. A. —, 294 S. W. 243.

A lessor in an oil and gas lease may maintain a suit against the lessee to recover damages for injuries sustained by him because of the failure of the lessee to drill off-set wells necessary to save the oil and gas in the leased land and to prevent it from being drained by wells on adjacent lands. The damages sought in such an action is for diminution of the royalties by reason of such drainage. Steele vs. American Co., *supra* [32]. Texas Co. vs. Barker, — Tex. —, 6 S. W. (2d) 1031, aff'g 252 S. W. 809. Expert testimony as to value of oil that could have been produced if well had been completed is admissible as to damages. Julian Corp. vs. Courtney Co., *supra* [93].

[98] Allen vs. Narver, *supra* [42]. A stipulation for liquidated damages is valid in all cases where the damages are indefinite, uncertain and speculative or difficult of proof, regardless of whether they are recoverable at law or not. Julian Corp. vs. Courtney, *supra* [97]; *but see* Kelly vs. McDonald, 98 Cal. A. 121, 276 Pac. 404. A provision in a lease for liquidated damages as to prospective profits will be upheld. Seid Pak Sing vs. Barker, 197 Cal. 363, 240 Pac. 765; Glazer vs. Hanson, 98 Cal. A. 53, 276 Pac. 607. Both of these cases hold that a claim for stipulated damages must be accompanied by appropriate pleading and proof that it is impracticable or extremely difficult under the circumstances to estimate actual damages. See, also, Sun-Maid Co. vs. Moseian, 90 Cal. A. 9, 265 Pac. 828.

In Kothe, Trustee, vs. R. C. Taylor Trust, 280 U. S. 224, it is said: "The courts are 'strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages upon proof of the violation of the contract, and without proof of the damages actually sustained. The question always is, what did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out.' And see United States vs. United Engineering Co., 234 U. S. 236, 241: 'Such contracts for liquidated damages when reasonable in their character are not to be regarded as penalties and may be enforced between the parties.'

"But agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced." See Wright vs. Rodgers, 198 Cal. 137, 243 Pac. 866; Sun-Maid Co. vs. Moseian, *supra*.

Failure to drill oil-wells within a prescribed time is a proper subject authorizing an agreement for the payment of liquidated damages. Kelly vs. McDonald, *supra*. See Rispin vs. Midnight Oil Co., 291 Fed. 484.

There is some conflict in the decisions of the Courts of Civil Appeal of Texas as to whether or not, under any circumstances, a contract can specifically be performed

§ 1017. Unliquidated Damages.

In Freeport Co. vs. American Co.,[99] the court said: "No rule for the measure of unliquidated damages can be applied which will fix with exactness the amount of compensation appellant should receive if the sulphur company had breached its contract, but this fact will not justify denying it any compensation. All that the law requires in such cases is reasonable certainty. It is held that the royalty company should be allowed to recover as the damage suffered by it 'the amount which the jury finds the appellant (the royalty company) would have received in royalties if the mines had been operated during the time they found operation was unreasonably suspended, with interest at 6 per cent, from the date such royalty would have accrued.' This is the just and correct rule, and is supported by the weight of authority.

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when it carries with it a clause providing for "liquidated damages." Most of these courts hold that a contract of this sort is a mere option, where it provides for "liquidated damages" under conditions showing an express or implied agreement on the part of the vendor to accept such damages in lieu of a performance of the contract. Texlouana Co. vs. Wall, — Tex. C. A. —, 257 S. W. 875.

In Starr vs. Lee, 88 Cal. A. 343, 263 Pac. 376, plaintiff sued upon a contract whereby the defendants agreed to pay him the sum of five hundred dollars if they failed to commence drilling of an oil well before a fixed date. The court said: "The case comes within the rule that, if the actual damages are uncertain or are of a purely speculative character, and the contract furnishes no data for their ascertainment, the provision will, as a rule, be held to be one for liquidated damages, 8 R. C. L., p. 569; Escondido Oil Co. vs. Glaser, 144 Cal. 494, 77 Pac. 1040; Huggins vs. Daley, *supra* [5]; 48 L. R. A. 320. In the latter case the court, speaking of the peculiar character of a contract for boring an oil well, said: "There is, perhaps, no other business in which the prompt performance is so essential to the rights of the parties, or delays so likely to prove injurious—no other class of contracts in which time is so much of the essence. There is no other branch of mining where greater damage is done by delay. Coal and precious metals lie either in horizontal veins or in pockets. They remain where they are until removed. Oil and gas are the most uncertain, fluctuating, volatile, and fugitive of all mining properties. They lie far below the surface, beyond the control of human will, and beyond the reach of any legal process, whence they may flow unrestrained if the owner of adjoining land bores a well down to the strata which holds them; and there is no law which can provide adequate, or indeed any, compensation for such results. This is a matter of common knowledge, and courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction. Greenl. Ev. § 6'."

Cresswell vs. Dixie Co., — Tex. C. A., 6 S. W. (2d) 380, was an action on a contract to drill a well to a specified depth or until salt water made further drilling impracticable. The evidence showing an abandonment where the well could have been drilled further, judgment for two thousand dollars liquidated damages was directed on appeal, *non obstante veridicto* (notwithstanding a verdict that further drilling was impracticable, the evidence being to the contrary uncontradicted).

Where an oil lease provided for a payment by lessee of a certain amount in oil, if oil should be produced from the land so leased, on a showing that the lessee refused to recognize the contract and explore for oil, the lessor was entitled to a judgment for such amount. Empire Co. vs. Pendar, — Tex. C. A. —, 244 S. W. 184.

There being no allegations in plaintiff's pleading that the defendant's failure to pay the three thousand dollars out of the oil to be produced was due to the latter's failure to use due diligence in testing and developing the land, the verdict and judgment for plaintiff must be reversed. Moore vs. Jones, — Tex. C. A. —, 278 S. W. 326; see, also, Honaker vs. Guffey Co., — Tex. C. A. —, 291 S. W. 259.

See Speculative Damages.

[99] 117 Tex. 439, 6 S. W. (2d) 1039. In Green vs. Gen. Pet. Corp., 205 Cal. 328, 270 Pac. 952, superseding opinion in 262 Pac. 377, the plaintiffs instituted an action to recover damages for injuries to their property occasioned by the "blowing-out" of an oil well during drilling operations by the defendant. The trial court found that, by reason of the eruption of the plaintiffs' well, the premises of respondents were "rendered wholly uninhabitable and wholly useless for residential purposes, and plaintiffs were compelled to immediately remove themselves and their belongings from their said home, and were thereby evicted, ousted and ejected therefrom," etc. Damages for the eviction was awarded to the plaintiffs. In the course of its opinion the supreme court said: "The amount in money necessary to compensate the plaintiffs in such cases is not to be estimated by witnesses or the 'actual amount' established by testimony or calculated by any arithmetical rule. It must be left to the sound judgment, experience and discretion of court or jury to fix the amount in view of the facts in each particular case. Gempp vs. Bassham, 60 Ill. A. 81, 87; Fox vs. City of Joliet, 150 Ill. A. 491, 495; Judson vs. Los Angeles etc. Gas Co., 157 Cal. 168, 172, 106 Pac. 581; see, also, Fairbank Co. vs. Nicolai, 167 Ill. 242, 247, 47 N. E. 360; Gavigan vs. Atlantic Refining Co., 186 Pa. St. 604, 613, 40 Atl. 834; Berger vs. Minneapolis Gaslight Co., 60 Minn. 296, 62 N. W. 336."

See *supra*, notes 17 and 35.

Texas vs. Baker, 6 S. W. (2d) 1031, opinion of this court delivered today, and authorities therein cited."

§ 1018. Speculative Damages.

As a general rule, remote, uncertain, and speculative damages are not recoverable; but the diffienlty lies in the application of the rule, not in the rule itself, and it seems to be firmly established in all the oil and gas producing states that damages for the breach of the provision in an oil and gas lease, which binds the lessees to drill a well on a property to a certain depth within a specified time, the damages for a breach of such provision is necessarily indefinite, uncertain and speculative.[100]

§ 1019. Speculative Damages Recoverable.

Speculative damages are recoverable and are provable by experts, or by the opinions of well-informed persons upon the subject under investigation.[101]

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[100] Julian Corp. vs. Courtney Co., *supra* (97); Starr vs. Lee, *supra* (98). A measure of damages should not be applied, which would permit recovery for *possible* damages. Sussex Co. vs. Midwest Co., 294 Fed. 597; Issenhuth vs. Robert Marsh Co., 95 Cal. A. 798, 273 Pac. 628.

"A reasonable basis for computation, and the best evidence which is obtainable, under the circumstances of the case and which will enable the jury to arrive at an approximate estimate of the loss, is sufficient. In such a case, the amount may be fixed by the jury, under proper instructions from the court." Hoffer Oil Corp. vs. Carpenter, 34 Fed (2d) 592, and cases therein cited.

[101] 40 Cor. Jur. 1095; White on Mines and Mining Remedies, 235; Blair vs. Clear Creek Co., 148 Ark. 301, 230 S. W. 286; Wheeland vs. Fredonia Co., 92 Kan. 50, 139 Pac. 1010; Daughetee vs. Ohio Oil Co., 263 Ill. 518, 105 N. E. 308; aff'g. 151 Ill. A. 102; Junction Co. vs. Pratt, 99 Okla. 14, 225 Pac. 717; Bradford vs. Blair, 113 Pa. St. 83, 4 Atl. 218; Dempsey Oil Co. vs. Torrans, — Tex. C. A. —, 244 S. W. 855; Texas Co. vs. Barker, — Tex. C. A. —, 6 S. W. 1031, rev'g. 252 S. W. 809; Texas Co. vs. Ramsower, — Tex. C. A. —, 255 S. W. 466; South Chester Co. vs. Texhoma Co., — Tex. C. A. —, 264 S. W. 108; Sinclair Co. vs. Bryan, — Tex. C. A. —, 291 S. W. 692.

In Texas Co. vs. Barker, *supra*, it is said: "The rule which permits a lessor to recover damages for a lessee's breach of covenant to protect or develop oil or gas land rests on the assumption that it can be shown with reasonable certainty that the lessor has been deprived of the value of his portion of at least a certain quantity of oil or gas, worth a certain amount, which the lessee would have reduced had he exercised proper diligence. Summer's Oil and Gas, § 139, p. 449. The following cases announced the correct doctrine which requires the lessee to pay the lessor the amount he actually loses by awarding him, without deduction, the full amount of royalty lost to him through the lessee's failure to exercise ordinary care to either develop the minerals in the leased premises or to protect the same from drainage by nearby wells" (citing cases).

The above case contains a very full discussion with quotations from numerous authorities on the question of damages allowable in such cases, where the proof is difficult, and it is only possible to ascertain with reasonable certainty what amount of gas or oil has been lost to the plaintiff. The opinion of experienced persons familiar with the territory is received, and it is said by the court: "The rule is that while the law will not permit witnesses to speculate or conjecture as to possible or probable damages, still the best evidence of which the subject will admit is reasonable, and there is nothing better, often, than the opinion of well-informed persons upon the subject under investigation. 3 Chamberlain on Mod. Evidence, 2331, 2332, and St. L. I. M. Co. vs. Brooksher, 86 Ark. 91, 109 S. W. 1169. The fact that damages can not be ascertained with exactness is no reason for denying relief."

In Wheeland vs. Fredonia Co., *supra*, the court said: "This action was brought for failure to develop the land, a trial was had, and evidence was produced. Under these conditions, it was impossible for the appellees, there being no further development of the land, to prove the actual amount of damages they had suffered. The nature of the case is such that it is impossible to tell what a well will develop until it is sunk, and yet experts in oil territory are able to furnish reasonably accurate estimates of what a certain territory will produce, estimating from producing wells in the locality. This the appellants did in this case. See Blodgett vs. Columbia Co., 164 Fed. 305, where it is held that damages for breach of such a contract are necessarily indefinite, uncertain, and speculative, and for that reason it was competent for the parties to fix the amount of such damages by mutual agreement. But a stipulation for liquidated damages is valid in all cases where the damages are indefinite, uncertain, and speculative, or difficult of proof, regardless of whether they are recoverable at law or not, and a decision upholding a stipulation for liquidated damages has no bearing upon the question now before the court.

§ 1020. Californian Rule.

A different rule to that above stated seems to obtain within California. It is not the law, however, that speculative damages never can be recovered. The general rule is that, where the cause and existence of damages has been established with requisite certainty, recovery will not be denied because such damages are difficult of ascertainment.[102]

§ 1021. Damages Without Negligence.

A party drilling an oil well undertakes the burden and responsibility of controlling and confining whatever force or power he uncovers; and he is liable for an injury resulting as a direct and proximate cause of such act, without proof of negligence in the boring of such well.[103] So, where an oil mining company uses every known method and device to prevent the escape of oil but such loss does occur to the injury of adjacent lands, damages should be awarded.[104] Where a pipe line company transports crude oil and allows it to escape and devastate adjoining lands it will be held liable, regardless of negligence.[105]

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[102] Hoffer Oil Corp. vs. Carpenter, *supra* (100); Shoemaker vs. Acker, 116 Cal. 239, 48 Pac. 62; Escondido Oil Co. vs. Glaser, *supra* (97); McClomber vs. Kellerman, 162 Cal. 749, 124 Pac. 431; Burroughs vs. Petroleum Dev. Co., *supra* (95); California Press Co. vs. Stafford Co., 192 Cal. 479, 221 Pac. 345; see 32 A. L. R. 114, citing numerous authorities confirming the principles set forth in that case; see, also, 32 A. L. R. 115; Sobelman vs. Maier, 203 Cal. 11, 262 Pac. 1087; Robinson vs. Rispen, 33 Cal. A. 536, 165 Pac. 579; Gibson vs. Hercules Co., 80 Cal. A. 702, 252 Pac. 780; Starr vs. Lee, *supra* (99). See, generally, Sanzenbacker vs. Howard Co., 283 Fed. 16; Artwein vs. Link, 108 Kan. 293, 195 Pac. 877; Childers vs. Tobin, 111 Kan. 347, 206 Pac. 876; Bond vs. Patrick, 195 Ky. 37, 240 S. W. 342.

In Shoemaker vs. Acker, *supra*, the court said: "An examination of the authorities will show that the cases in which future profits were rejected as 'speculative' or 'too remote' were cases where the asserted future profits were entirely collateral to the subject matter of the contract, and not consequences flowing in a direct line from the breach of such contract.

* * * But where the prospective profits are the natural and direct consequences of the breach of the contract they may be recovered; and he who breaks the contract can not wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages"

To the same effect see Hoffer Oil Corp. vs. Carpenter, *supra*; Sobelman vs. Maier, *supra*.

In Fallis vs. Julian Pet. Co., — Cal. A. —, 285 Pac. 1077, the court said: "When profits are wholly prospective and speculative or conjectural, and the success or failure of such an experiment is of mutual interest, neither party is the arbiter of the extent of which or the diligence with which operations shall proceed (Brewster vs. Lanyon Zinc. Co., 140 Fed. 801, 72 C. C. A. 213). Hence, if the compensation or penalty be not specified by the parties, or if it be impracticable or extremely difficult of estimation, they are relegated to proper proceedings in equity for relief. (Hanlon Dry Dock Co. vs. McNear, 70 Cal. App. 204, 232 Pac. 1002; Brewster vs. Lanyon Zinc Co., *supra*; Craig vs. Wade, 159 Cal. 172, 112 Pac. 891.) 'No damages can be recovered for breach of a contract which are not clearly ascertainable in both their nature and origin.' (Civ. Code, § 3301.) The principles above announced are aptly applied in the case last cited (Craig vs. Wade, *supra*), wherein the plaintiff sought to recover upon alleged misrepresentations as to the value of certain oil properties. * * * There are other decisions in this state of like import. (Escondido Oil Co. vs. Glaser, 144 Cal. 494, 77 Pac. 1040; Burrows vs. Petroleum Dec. Co., 181 Cal. 253, 184 Pac. 5; Sledge vs. Stolz, 41 Cal. App. 209, 182 Pac. 340.)"

In Todd vs. Meserve, *supra* (94) it is held that damages to the owners on account of loss of oil by reason of delay in completing the drilling of an oil well are too remotive and speculative to justify recovery thereof.

See Liquidated Damages.

[103] Green vs. General Petroleum Corp., *supra* (89).

[104] Sussex Co. vs. Midwest Refining Co., *supra* (100); Empire Co. vs. Denning, 128 Okla. 145, 261 Pac. 929; see, also, McFarlain vs. Jennings-Hayward Co., 118 La. 537, 43 So. 155. For an instance of liability for damages caused by escaping gas *in transitu*, without regard to negligence, see Gas Fuel Co. vs. Andrews, 50 Ohio St. 695, 35 N. E. 1059.

[105] In Behle vs. Shell Oil Pipe Line Corp., — Mo. A. —, 17 S. W. (2d) 656, judgment was given for damages by escaping oil. The court said: "The ground on which defendant bases its insistence that its demurrer to the evidence should have been sustained is that no specific negligence was shown.

"It is by no means certain that a pipe line company, which transports a deleterious foreign substance, such as crude oil, through agricultural lands and allows it

It is no defense that the cause of the pollution of water was a user of land in a careful manner.[106]

§ 1022. Recurring Damages.

For recurring damages recurring suits may be maintained.[107]

§ 1023. Escaping Oil-Liabilty.

The negligent escape of oil into a stream was regarded as the proximate cause of fire resulting therefrom, rendering the owner of the oil liable in damages to the injured person. The liability exists, according

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to pour over and devastate lands adjacent, ought not to be held liable, regardless of negligence, under the rule in Fletcher vs. Rylands L. R., 1 Exch. 265 (the leading case on the subject), (quoting from that case)—continuing as follows:

"It appears that the rule in that case has been followed, with or without modification, by many of the courts of this country. Brennan Co. vs. Cumberland, 29 App. Dec. 554, 15 L. R. A. (N. S.) 535, 10 Ann. Cas. 865; Berger vs. Minneapolis Gaslight Co., *supra* [99]; Ottawa Co. vs. Graham, 28 Ill. 73, 81 A. D. 263; Kinnaird vs. Standard O. Co., 89 Ky. 468, 12 S. W. 938, 7 L. R. A. 451; Shipley vs. Fifty Associates, 106 Mass. 194; Gorham vs. Gross, 125 Mass. 232; Lawson vs. Price, 45 Md. 123; Pottstown Co. vs. Murphy, 39 Pa. 257; Columbus Co. vs. Freeland, 12 Ohio St. 392. If this rule was not approved in McCord Co. vs. St. Joseph Co., 181 Mo. 678, 81 S. W. 189, it certainly was not disapproved. But whether that rule is applicable in the instant case, we need not and do not decide; for we entertain no doubt that the plaintiffs were entitled to go to the jury on presumptive or inferential negligence. Taylor vs. St. Joseph Co., 185 Mo. App. 537, 172 S. W. 624; Sipple vs. Laclede Co., 125 Mo. App. 8k-90, 102 S. W. 608. The defendant's pipe line crossed plaintiff's premises under ground. The evidence of specific negligence or the want of it was peculiarly, if not exclusively, within the knowledge and power of defendant."

See Northrup vs. Eakes, 76 Okla. 66, 178 Pac. 266. Where copperas water from defendant's mine was carried by a river to plaintiff's land, the plaintiff is entitled to recover the resulting damage and need not show negligence on the part of defendant, as pollution of the stream is not justified by any degree of care, 27 R. C. L. 132. But each defendant guilty of such pollution is liable only for the damage it or its acts have caused. There is no joint liability. Beaver Dam Co. vs. Daniel, — Ky. —, 13 S. W. (2d) 254, citing Watson vs. Pyramid Co., 198 Ky. 135, 248 S. W. 227. See, also, Boyle vs. Pure Oil Co., — Tex. C. A. —, 16 S. W. (2d) 146, *but see* Kay & Kiowa Oil Co. vs. Moore, 96 Okla. 247, 221 Pac. 511.

[106] Sussex Co. vs. Midwest Refining Co., *supra* [100] in which case there is a list of mining cases illustrating rule; Owen-Osage Co. vs. Long, 104 Okla. 242, 231 Pac. 296. See Ohio Oil Co. vs. Westfall, 43 Ind. A. 661, 88 N. E. 354; Empire Co. vs. Denning, *supra* [101]; Pfeiffer vs. Brown, 165 Pa. St. 267.

Norum vs. Queen City Oil Co., 81 Mont. 527, 264 Pac. 122, where a complaint was filed to recover damages from an oil and gas lessee of the government on patented land of plaintiff, by reason of the construction and maintenance of a reservoir which it was alleged allowed polluted water to escape, thereby polluting the water of plaintiff's reservoir, and also destroying the usefulness of the surface of the land, the court, in affirming a judgment of non-suit, said: "Plaintiff having alleged the reservoir was an unreasonable use and that it was unnecessary and tht it was the cause of his damages, and it being a proper and essential allegation, it devolved upon him to offer evidence thereof. The gravamen of plaintiff's cause of action in each count of his complaint is, not only that defendant did the acts complained of—that is not enough—but that they were unnecessary or were done in an unreasonable way. Clearly without that qualification, plaintiff had no grievance against defendant. If everything defendant did was necessary to its occupations and reasonable, plaintiff had no cause of action. Plaintiff was required to plead and prove everything necessary to his cause of action. * * *

In the case at bar, defendant owed the plaintiff the duty to do only what was necessary to its operations, and to do it in a reasonable way. 'A lessee of land for oil and gas purposes is under a duty not to cause unnecessary injury to the surface of the land and is liable in damages for a breach of that duty.' Summers on Oil and Gas, 674. * * * It is certainly an implied covenant of defendant's lease from the government, that in the conduct of its operations it will do only such things as are necessary thereto, and will do them in a reasonable way and that it will not do any unreasonable damage to the surface of the land. The government could hold the defendant thereto, if title to the land were still in the government. Plaintiff is the government's grantee as to his ownership of the land, and the beneficiary of that covenant, and is entitled to enjoy in the premises all the rights of his grantor, the government. Therefore, if the government, defendant's lessor, could hold defendant accountable for a breach of the implied covenant of his lease, plaintiff can, but only in the same way. Mills and Willingham on Law of Oil and Gas, 163, say: 'The burden of proof is on the lessor to establish a breach of the implied covenants of the lease.' Plaintiff being the lessor's successor as to ownership of the land, had on him likewise, that burden."

See, also, Carter Oil Co. vs. Pacific Wyoming Oil Co., 38 Wyo. 361, 263 Pac. 960, aff'g. and revsg. in part 228 Pac. 284.

See, generally, Flooding of Mines.

[107] Freeport Co. vs. American Oil Co., *supra* [13].

to a majority of the cases, although the fire was started by the independent or careless act of a stranger.[108]

§ 1024. Partition.

A lessee in an oil and gas lease can not contest the title of his lessor as an owner in indivision with others and compel him and his co-owners to make a judicial partition in kind of the leased property.[109]

§ 1025. Widow's Rights.

The owner of land leased the same for oil and gas purposes and died before any wells were drilled. Partition was had of the leased land and dower lands were assigned to the widow and to the other heirs, respectively. Subsequently drilling operations were commenced and numerous producing wells drilled. In such case the wells drilled by the lessee on the portion of the land assigned to the widow as and for her dower are not mines nor wells worked by her, since the working right is held by the lessee even though they may be deemed mines opened in her husband's life. She is not entitled to the entire royalties and rents accruing from such wells nor is her dower right limited to such royalty and rents as subjects thereof. She is entitled to dower to whatever its extent may be when the royalties and rents accrue from all the wells drilled on the entire tract of land covered by the lease.[110]

§ 1026. Lessee's Rights.

On the death of a lessor of an oil and gas lease the leased lands descend to the lessor's heirs burdened by the right of the lessee. The latter is the complete master of the situation *quoad* the oil and gas, having right to drill wherever he chooses on the leased premises. A partition of the land among the heirs in no way affects the lessee's right or liberty in that respect. A lease on a single tract of land subsequently broken into several subdivisions by a partition or by conveyances is not segregated and converted into as many distinct leases as there are subdivisions. That could be done only with the consent and cooperation of the lessee. As to him the lease and its subject, the tract of land, are entireties. After, as well as before, the division, there is one lease of one tract, yielding, when productive, one royalty or rental in the aggregate. The rent or royalty is an entire thing arising out of the whole tract of land. Though the royalty oil or gas rental comes from a certain well or wells, it is not legally the rent or return of the wells or the severed tract of land on which they are located. It is rent of the whole tract covered by the lease. In legal contemplation the wells are

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[108] Northrup vs. Eakes, 72 Okla. 66, 178 Pac. 269; see Santa Rita, 176 Fed. 890; Brennan Co. vs. Cumberland, 29 App. D. C. 554; Rock Oil Co. vs. Brumbaugh, 59 Ind. A. 640, 108 N. E. 260; Kuhn vs. Jewett, 32 N. J. Eq. 647; Texas Co. vs. Clark & Co., — Tex. C. A. —, 182 S. W. 351.

See Damages Without Negligence.

[109] Gulf Co. vs. Hayne, *supra* (1); see Campbell vs. Lynch, *supra* (36), as to partition between copartners. Known oil lands, like mines, can not be judicially partitioned in kind at the suit of one of the coowners or by a creditor of a coowner. A suit for partition usually results in a decree for the sale of the property. Royston vs. Miller, 76 Fed. 50; Mitchell vs. Cline, 84 Cal. 409, 24 Pac. 164. This particularly as to oil and gas lands. Hall vs. Vernon, 47 W. Va. 295, 34 S. E. 764; but see Dangerfield vs. Caldwell, 151 Fed. 554. The partition may be voluntary. Dunlap vs. Jackson, 92 Okla. 246, 219 Pac. 314; see Tonopah Co. vs. Tonopah Co., 125 Fed. 400; Empire State Co. vs. Bunker Hill Co., 131 Fed. 591; Mullins vs. Butte H. Co., 25 Mont. 525, 65 Pac. 1004.

See § 1027.

[110] Campbell vs. Lynch, *supra* (36).

not drilled on the several portions as under the lease on that portion, but they are drilled under the lease as made, which binds and holds all the parties after the division as it did before.[111]

§ 1027. Purchaser's Rights.

A tract of land covered by an oil and gas lease was subdivided in a proceeding in bankruptcy. Each subdivision was sold separately by the trustee to different purchasers. The purchasers of these respective parcels of land from the trustee bought all of the estate therein subject only to the right of the oil and gas lessee to explore for and produce the oil and gas. This right conferred upon the lessee is the same as would have existed in the different purchasers had there been no lease. From this it follows that the purchaser of each subdivision is entitled to the royalties on all of the oil produced from wells drilled on his subdivision and royalties from the oil or gas must be paid to the owner of the subdivision upon which the wells are drilled from which the production is had.[112]

§ 1028. Cancellation and Rescission.

A lessor of an oil and gas lease, invoking the jurisdiction of a court of equity to cancel and rescind the lease for the breach of an implied covenant, must come into court with clean hands. He must act with reasonable diligence after the discovery of his right to a forfeiture of the lease on account of its breach.[113]

§ 1029. Laches.

The doctrine is well settled, both in the English courts and the courts of this country, as to the relentless enforcement of the doctrine of laches where the subject of controversy is mining and oil property purely

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[111] Id. The lessee's rights terminate on his failure to develop the property properly. Where there is an absolute promise to begin drilling within a certain number of days, this is a condition of the continuance of the lease, and the lessee's rights terminate where there is no indication (even after a warning) of a *bona fide* intention to develop the property, and inaction of months. Habermel vs. Mong, 31 Fed. (2d) 822.

[112] Pittsburgh Co. vs. Ankrom, *supra* [36]; see Osborn vs. Arkansas Co., 103 Ark. 175, 146 S. W. 122; Fairbanks vs. Warrum, *supra* [37]; Ohio Co. vs. Ullrey, 65 Ohio St. 259, 67 N. E. 494; Pierce Oil Co. vs. Schacht, *supra* [38]; Wettengel vs. Gormley, *supra* [39]; a case containing an extensive review of cases bearing upon this principle; see, also, Gillette vs. Mitchell, *supra* [40].

[113] Pierce Corp. vs. Schacht, *supra* [38]; see Michigan Pipe Line Co., 111 Fed. 284; Washburn vs. Gillespie, 261 Fed. 41; Indiana Co. vs. McCrory, *supra* [41]; Wellsville Co. vs. Miller, *supra* [42]. In case of a breach of an implied covenant to properly develop an oil and gas lease the lessor must notify the lessee and demand that the lessee comply with the implied covenants before a court will grant a forfeiture. Papoose Oil Co. vs. Rainey, 89 Okla. 110, 213 Pac. 882. Mere inadequacy of consideration or other inequality in the terms of a lease does not of itself constitute a ground to avoid it in equity. See Smith vs. McCullough, 285 Fed. 629. In a suit to cancel an oil and gas lease for failure to operate an existing well and for other reasons, that lessor had received royalties from the well could not operate as an estoppel, nor affect his right to sue for cancellation for failure to comply with other obligations of the lease. Louisiana Co. vs. Kendall, 155 La. 1, 98 So. 862.

Rescission of an assignment of a lease can not be had for a breach of contract to drill a well, though that be the sole consideration of the assignment. Tripplehorn vs. Ladd-Hannon Corp., — Tex. C. A. —, 8 S. W. (2d) 217. In many of the cases it is pointed out that where the conditions of the instrument giving a right to explore for oil provide for the cancellation thereof at a fixed time unless a certain rent be paid for an extension of the time within which to commence operations, such extension becomes entirely optional with the licensee, and that equity will not relieve against his failure to exercise the option in strict accordance with its terms. Taylor vs. Hamilton, *supra* [43].

speculative in value.[114] Inexcusable delay for a period short of the time provided by the statute of limitations may constitute laches, and is an equitable defense wholly independent and outside of such statute, whenever the relief sought is wholly equitable.[115] Delay can not be excused except by some actual hindrance or impediment caused by the fraud or concealment of the party in possession.[116] Mere lapse of time never constitutes laches, but in addition the court must find that it would be inequitable to grant the relief prayed for.[117] The mere institution of a suit does not relieve the plaintiff of the charge of laches.

Because of his failure to prosecute the suit, the consequences are the same as if no suit had been begun.[118] In other words, a party is as much open to the charge of laches for the failure to prosecute a suit diligently as if he had unduly delayed its institution.[119]

§ 1030. Injunction.

An injunction to prevent an alleged trespasser from drilling oil wells and appropriating and removing oil from the premises in controversy in effect permits the complainant to drill for, remove and market the oil from the land in dispute. If the complainant has no legal title to the land as claimed by the defendant and the defendant has in fact a duly approved oil lease from the rightful owner, the injunction might work an injustice to such lessee and the owner, but for the fact that

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[114] Twin Lick Co. vs. Marbury, 91 U. S. 587; Johnson vs. Standard Co., 148 U. S. 360; Gaines vs. Chew, 167 Fed. 630; Taylor vs. Salt Creek Oil Co., 255 Fed. 532; Hodson vs. Federal Oil Co., 255 Fed. 552; Beck vs. Finley, 77 Okla. 213, 187 Pac. 488; see Hazzard vs. Johnson, 45 Cal. A. 19, 187 Pac. 121. In some cases the diligence required is measured by months rather than by years. And in some others a delay of two, three or four years has been held to be fatal. Patterson vs. Hewitt, 195 U. S. 309; Starkweather vs. Jenner, 216 U. S. 524; Bacon vs. Neill, 253 Fed. 717. Under the general equity principles, not the time when the fraud is committed, but when it is discovered, or might have been discovered by the exercise of ordinary diligence, fixes the time when the cause of action accrues. Tilden vs. Barber, 168 Fed. 581; Taylor vs. Salt Creek Oil Co., *supra*. In Jackson vs. Jackson, 175 Fed. 712, a delay of three years in asserting an interest in oil lands was held laches.

[115] Jewell vs. Trilby Mines, 229 Fed. 295; Scruggs vs. Decatur Co., 56 Ala. 173, 5 So. 440; Great West Co. vs. Woodmas Co., 14 Colo. 90, 23 Pac. 905; Morrow vs. Mathew, 10 Ida. 423, 79 Pac. 186. When a suit is brought within the time limited by the statute of limitations the burden is upon the defendant to show, by demurrer or answer, that unusual conditions or extraordinary circumstances exist which require the application of the doctrine of laches. When suit is brought after the statutory time has elapsed, the burden is upon the plaintiff to show by suitable allegations in the complaint that it would be inequitable to apply it to his case. Stevens vs. Grand Central Co., 133 Fed. 28; Steinbeck vs. Bon Homme Co., 152 Fed. 333; Morse vs. Smythe, 255 Fed. 951; Allen vs. Blanche Co., 46 Colo. 199, 102 Pac. 1072.

Laches is not only a delay, but a delay which works a disadvantage to another. Hence, the failure or delay of a plaintiff in asserting his claim may work no detriment to the defendant. Kirkpatrick vs. Baker, 135 Okla. 142, 276 Pac. 192.

[116] Wagner vs. Baird, 7 How. 234; Landsdale vs. Smith, 106 U. S. 391; Westerman vs. Dinsmore, 68 W. Va. 591, 71 S. E. 230. While the law imposes the requirement of reasonable promptness in all cases to avoid laches, it requires greater diligence and activity in seeking to rescind transactions with reference to oil values affected by extraordinary uncertainty and fluctuations as they are, than with reference to ordinary dealings. Minchew vs. Morris, — Tex. C. A. —, 241 S. W. 215. For instances of excusable delay, see Mexico-Wyoming Co. vs. Valentine, 237 Fed. 150; Stone vs. Marshall Co., 188 Pa. St. 602, 41 Atl. 745, 1119.

[117] O'Brien vs. Wheelock, 184 U. S. 492; Stevens vs. Grand Central Co., *supra* [115]; Mexico-Wyoming Co. vs. Valentine, *supra* [116]; Minnesota Co. vs. McGirr, 263 Fed. 482.

[118] Northrup vs. Browne, 204 Fed. 122; U. S. vs. Fletcher, 231 Fed. 822; Taylor vs. Salt Creek Co., *supra* [114]; Grand Lodge vs. Graham, 86 Iowa 613, 53 N. W. 342; see, also, Mackall vs. Casilear, 137 U. S. 556; Willard vs. Wood, 164 U. S. 525; O'Brien vs. Wheelock, *supra* [117].

[119] U. S. vs. Fletcher, 242 Fed. 818. Where the defendant has not been prejudiced and there is a reasonable excuse for the delay, the suit is not barred. Central Co. vs. Jersey City, 199 Fed. 245; see Porto Rico Co. vs. Conklin, 271 Fed. 870. Where a party interposing a defense of laches has contributed to or caused the delay, he can not take advantage of it. N. P. R. Co. vs. Boyd, 177 Fed. 804.

the courts have ample authority to safeguard their interest if in a proper proceeding a probability of recovery is shown.[120]

§ 1031. Removal of Machinery and Fixtures.

The parties to an oil and gas lease may by their contract stipulate what machinery and fixtures may be removed upon the termination of the lease. Such a stipulation is controlling.[121]

§ 1032. Sale Under Foreclosure Proceedings.

An oil and gas lease executed subsequent to a mortgage will terminate upon the foreclosure of the mortgage, and a sale of the premises under the decree of foreclosure.[122]

§ 1033. Deeds.

Independent estates may be carved out of the same land as where the owner of the surface grants only the right to the underlying minerals.[123]

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[120] Collier vs. Bartlett, 71 Okla. 133, 175 Pac. 247; see Washburn vs. Gillespie, 261 Fed. 41; Advance Oil Co. vs. Hunt, *supra* (9). A preliminary injunction should only be granted where injury to the property of plaintiff is imminent and, if committed, irreparable. And it generally will not be awarded where the plaintiff's right is not clear or, to turn the proposition around, where the wrong is not manifest. Courts of equity invariably, on a hearing for preliminary injunction, endeavor so far as possible to make such decree, however it may be framed, as will maintain the *status quo* until final hearing or judgment. Hicks vs. American Co., 207 Pa. St. 570, 57 Atl. 55; see, also, Pellissier vs. Whittier Co., 59 Cal. A. 1, 209 Pac. 593. The unlawful extraction of petroleum oil or gas from land, they being a part of the land, is an act of irreparable injury. Bettman vs. Harness, 42 W. Va. 433, 26 S. E. 271; Moore vs. Jennings, 47 W. Va. 181, 34 S. E. 793; see, also, U. S. Dominion Oil Co., 241 Fed. 426.

[121] In re American Fork Co., 291 Fed. 746; see, also, Collins vs. Mt. Pleasant Co., 85 Kan. 483, 118 Pac. 54; see Wisconsin-Texas Co. vs. Clutter, *supra* (76) for a case in which no right was given to remove casing from the well. Personal property attached to the land to be removed on payment of rent, etc., becomes real estate upon the failure of the lessee to make the payments due from him. Greasy Creek Co. vs. Greasy Creek Co., 225 Ky. 77, 7 S. W. (2d) 853.

[122] Mercantile Trust Co. vs. Sunset Road Co., 176 Cal. 461, 195 Pac. 466.

[123] Catron vs. South Butte Co., 181 Fed. 941; Stinchfield vs. Gillis, 96 Cal. 33, 30 Pac. 839; Caulk vs. Miller, — Tex. C. A.—, 18 S. W. (2d) 195; Smith vs. Jones, 21 Utah 270, 60 Pac. 1104. For rights of owner of surface as against owner of minerals thereunder, see West Pratt Co. vs. Dorman, and monographic note, 135 Am. St. Reps. 127. See, also, Vance vs Clark, 252 Fed. 498; Midkiff vs. Colton, 252 Fed. 424, rev'g. 242 Fed. 373, *certiorari* denied 248 U. S. 563; Bibb vs. Nolan, —Tex. C. A. —, 6 S. W. (2d) 156. The carving out of a separate estate in the oil and gas in land is a common occurrence in oil- and gas-producing fields. A reservation or exception of the minerals in a tract of land is a separation of the estate in the minerals from the lease of the surface, and it makes no difference whether the word used is "excepted" or "reserved." DeMoss vs. Sample, *supra* (1); Mandle vs. Gharing, 256 Pa. St. 121, 100 Atl. 535.

A deed conveying land, stating therein to "be subject to mineral rights being conveyed" to another than the grantee of the land, vests in such other title to the minerals with the rights incident to their removal. Babb vs. Dowdy, 229 Ky. 419, 17 S. W. (2d) 1014.

A deed to A. of land subject to "mineral rights conveyed" to B.—held sufficient to vest in B. title to minerals and all surface rights incident to their removal. Babb vs. Dowdy, — Ky. —, 17 S. W. (2d) 1014. A deed conveying minerals, reserving one-eighth, divides the land into two parts, giving title to the minerals to grantee, leaving title to the remainder in grantor. Caulk vs. Miller, — Tex. C. A. —, 18 S. W. (2d) 195.

A deed conveying one-sixteenth of the minerals, but agreeing that in case the existing lease becomes void, that grantor and grantee shall own the minerals equally vests one-half interest in the grantee upon the cancellation of the lease. Citizens' Co. vs. Armer, — Ark. —, 16 S. W. (2d) 15. A deed of surface alone in Texas passes the minerals in public school lands bought from the state, even in despite of an express reservation in the deed attempting to reserve the minerals. McDonald vs. Dees, — Tex. C. A. —, 15 S. W. (2d) 1075.

See §§ 581-590.

§ 1034. Construction of Deed.

A deed must be determined by the laws of the state in which the lands it conveys are situate, irrespective of where it may have been executed, or the grantors reside.[124]

§ 1035. Abstract of Title.

A contract for the purchase of an oil and gas lease required the lessor to submit to a certain named attorney a complete abstract of title to the land and that the lease should take effect and the obligations of the parties accrue "only in case such attorney should approve the title to the land." The contract provided that the lessee should deposit in a bank fifteen hundred dollars as earnest money and on the failure of the lessee to comply with the contract in beginning work, as agreed, the money should be paid to the lessor as liquidated damages. Upon the submission of the abstract of the title the attorney disapproved of the title. The reasonable conclusion from the language of the contract is that in the event of the approval of the abstract the contract should be effectual and binding but in the event of the disapproval of the title should not take effect. The mutual obligations of the parties should accrue only in case of the approval of the title. A bank was not authorized to pay the deposit to the lessor after the disapproval of the title and the lessee was entitled to recover from the bank and the lessor. In an action by the lessor to enforce the sale after the title has been rejected by the attorney, the burden was upon the lessor to prove that the lessee or the attorney acted in bad faith in rejecting the title.[125]

§ 1036. Income.

In legal effect the bonus, rentals, and royalty accruing under oil and gas leases are income from mineral resources. The Supreme Court of the United States has held that the bonus or down payment received by landowners at the time of making a lease is to be treated as a royalty,

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[124] Plattner vs. Vincent, 187 Cal. 451, 202 Pac. 216; see, also, Rose's Notes to McGoon vs. Scales, 76 U. S. 23. For construction of deed and agreement to develop mining property, see White vs. Hendley, 185 Cal. 614, 198 Pac. 22. For an elaborate discussion of the effect of a deed reserving a part of the royalty of all gas or oil or the proceeds therefrom, which may be produced from the deeded premises, see Dunlap vs. Jackson, *supra* (109); see, also, Dill vs. Rockwell, 94 Okla. 25, 220 Pac. 620. It may be stated as a general proposition that if the deed or written instrument furnishes other sufficient means of identifying the property conveyed, the failure to state the town, county or state where the same is situated will not make the deed or instrument void nor inoperative. Miller vs. Hodges, — Tex. C. A. —, 260 S. W. 170. Where there is uncertainty in specific description, the quantity named may be of decisive weight. Ainsa vs. U. S., 161 U. S. 220; Producers Co. vs. Hanzen, 238 U. S. 338. If the property has a known descriptive name, it may be sufficiently described by such name. Glacier vs. Willis, 127 U. S. 471; Reed vs. Munn, 148 Fed. 737; Carter vs. Bacigalupi, 83 Cal. 187, 23 Pac. 361; Berquist vs. W. Virginia Co., 18 Wyo. 234, 106 Pac. 673. That a property is known by several names and only one of them is given is immaterial. Lebanon Co. vs. Con. Republican Co., 6 Colo. 371; Collins vs. McKay, 36 Mont. 123, 92 Pac. 295; see Shoshone Co. vs. Rutter, 87 Fed. 801.

A lessor's quitclaim deed of land and royalties accrued and to accrue passes an after-acquired title. Dillard vs. Stone, 137, Okla. 30, 277 Pac. 661.

[125] First Nat. Bank vs. Clay, 74 Okla. 112, 177 Pac. 115; see, also, Merrill vs. Rocky Mt. Co., 26 Wyo. 219, 181 Pac. 972; St. Louis Co. vs. Nix, 101 Okla. 197, 224 Pac. 982.

A lessor having promised an "abstract of title" can not present evidence of title outside of the abstract. Miller vs. Scott, 134 Okla. 278, 273 Pac. 363.

for the reason that it is income from the use of the mineral resources of the land.[126]

§ 1037. Taxation.

Mining rights and privileges under an oil lease are subject to taxation from and in addition to the interest or estate of the lessor, [127] whether the title be in the United States or in the state.[128]

§ 1038. Insurance.

An insurance policy covering oil in tanks provided that the company should not be liable beyond the actual cash value of the property at the time of the loss and the loss shall be ascertained according to such actual cash value, with proper deductions for depreciation. On the loss of the oil insured the actual cash value was to be the measure of damages, but it could not exceed what it would cost the insured to replace it. The cash value of an article is the amount of cash for which it will exchange in fact; and the cash value is the market value for which an article will sell for in cash on the market. Where a state had a state corporation which fixed the price of oil and no one had a legal right to sell oil in the state for less than the price so established, this is sufficient to establish the cash value of the oil, especially in the absence of contervailing evidence.[129]

§ 1039. State Inspection Laws.

A state may pass proper inspection laws for oils brought into its borders in interstate commerce. But a state may not impose burdens upon interstate commerce in the matter of oil inspection.[130]

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[126] Wright vs. Carter Oil Co., 97 Okla. 46, 223 Pac. 835; and see Von Baumbach vs. Sargent Co., *supra* (3); U. S. vs. Biwabik Co., 247 U. S. 124; Work vs. U. S., 261 U. S. 352.

That in computing net income there shall be allowed as deductions in the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion according to the peculiar conditions in each case, based upon cost, including cost of development not otherwise deducted, see Reinecke vs. Spalding, 280 U. S. 227.

[127] Each of separate layers of strata becomes a subject of taxation, levy and sale, precisely like the surface. Murray vs. Allred, 100 Tenn. 100, 43 S. W. 355; see, also, McGraw vs. Lakin, 67 W. Va., 385, 68 S. E. 27; Appeal of Colby, 184 Iowa 1104, 169 N. W. 443. There may be several estates in the same land owned by different persons, one owning the surface, another the timber, and a third the minerals underground, each being a separate estate and each may be separately taxed. N. P. R. Co. vs. Mjelde, 48 Mont. 287, 137 Pac. 386; Cobban Co. vs. Donlan, 51 Mont. 58, 149 Pac. 487; see, also, Stephens Co. vs. Mid-Kansas Co., — Tex. —, 254 S. W. 290; *but see* Indian Co., 43 Okla. 307, 142 Pac. 997.

See next note.

[128] Graciosa Oil Co. vs. Santa Barbara Co., 155 Cal. 140, 99 Pac. 483; dist'g. in Mohawk Oil Co. vs. Hopkins, 196 Cal. 140, 236 Pac. 133; San Pedro Co. vs. Los Angeles, 180 Cal. 23, 179 Pac. 393; State Land Board vs. Henderson, 197 Cal. 481, 241 Pac. 560; see Barnes vs. Bee, 138 Fed. 476; Con. Coal Co. vs. Baker, 135 Ill. 545, 26 N. E. 651. A sale for taxes while the title still is in the United States is void, the land not being subject to taxation by the state. Secret Valley Co. vs. Perry, 187 Cal. 423, 202 Pac. 449. While unpatented, mining claim is not subject to taxation; Doyle vs. Austin, 47 Cal. 353, the possessory right thereto and the product from the location may be taxed and the lien enforced by a sale of the right of possession. The right of possession means the claim itself, that is, the right of possession of the land for mining purposes. The tax deed conveys merely such right without affecting the interest of the United States. Elder vs. Wood, 208 U. S. 226. An oil and gas lease by which the lessee is granted the privilege of drilling for and producing oil, if it can be found on the premises, is property and is regarded as a thing of value and is subject to taxation. Raydue vs. Board, 183 Ky. 84, 209 S. W. 19; see, generally, Large Oil Co. vs. Howard, 63 Okla. 143, 163 Pac. 537.

For oil rights as subject to taxation, see 24 Cal. Jur. 76; 16 A. L. R. 513; 29 A. L. R. 606.

See § 17.

[129] Globe & Rutgers vs. Prairie Oil Co., 248 Fed. 458.

[130] Standard Oil Co. vs. Graves, 249 U. S. 389; see Pure Oil Co. vs. Minnesota, 248 U. S. 158; Bartels-Northern Oil Co. vs. Kackman, 29 N. Dak. 236, 150 N. W. 576; Castle vs. Mason, 91 Ohio St. 296, 110 N. E. 463. For a review of state inspection laws, see Red "C" Co. vs. Board, 222 U. S. 380.

§ 1040. Pipe Lines.

A pipe line company is a common carrier,[131] may exercise the right of eminent domain,[132] is subject to control, and its rates to regulation, by the state.[133]

Such a company may be mulcted in damages, regardless of negligence, if it permits deleterious foreign substances, for instance, crude oil, to escape during transportation and cover and devastate adjacent lands.[134]

§ 1041. Period and Termination.

An oil and gas lease which stipulates that it is to continue during the time that gas or oil are found in paying quantities is at an end and may be annulled when the time during which the lessee has the right to exploit the land has expired and no oil or gas has been found.[135]

§ 1042. Waste of Oil and Gas.

The police power of a state extends to the conservation of natural resources, and in the oil-bearing states, generally, the extravagant or wasteful or disproportional use of oil and gas is prohibited by statute.[136] Such a statute is constitutional.[137]

§ 1043. Waste Defined.

A comprehensive definition of "waste" is found in the "Oil and Gas Conservation Law" of the state of Texas.[138]

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[131] Prairie Co. vs. U. S., 204 Fed. 798. That a pipe line company may be a common carrier though it transports oil only for a corporation owning its capital stock, see Meischke-Smith vs. Wardell, 286 Fed. 785; see The Pipe Line Cases, 234 U. S. 562; and see Producers Co. vs. R. R. Comm., 251 U. S. 228, aff'g. 176 Cal. 499, 169 Pac. 59.

[132] Producers Co. vs. R. R. Comm., *supra* [131]; Consumers Co. vs. Harless, 131 Ind. 446, 129 N. E. 1062.

[133] Producers Co. vs. R. R. Comm., *supra* [131].

[134] Behle vs. Shell Pipe Line Corp., *supra* [105], and cases therein cited.

See Flooding of Mines.

[135] Union Co. vs. Adkins, 278 Fed. 854; Cooke vs. Gulf Ref. Co., 135 La. 609, 65 So. 759.

In Brown vs. Fowler, 65 Ohio St. 507, 63 N. E. 76, the court said "This clause means that the term of the lease is limited to two years, but that, if within the two years oil or gas shall be found, then the lease shall run as much longer thereafter as oil or gas shall be found in paying quantities; but if no oil or gas shall be found within the two years, the lease shall, at the end of the two years, terminate, not by forfeiture, but by expiration of the term." See, also, Thomas vs. Hukill, 34 W. Va. 385, 12 S. E. 522.

[136] See Ohio Oil Co. vs. Indiana, 177 U. S. 190, aff'g. 150 Ind. 21, 49 N. E. 809; Lindsley vs. Carbonic Gas Co., 220 U. S. 61; Commonwealth vs. Trent, 117 Ky. 34, 77 S. W. 390; Quinton vs. Corporation Commr's, 101 Okla. 164, 224 Pac. 156.

See § 1045.

[137] Ohio Oil Co. vs. Indiana, *supra* [136]; Lindsley vs. Carbonic Gas Co., *supra* [136]; Walls vs. Midland Carbon Co., 254 U. S. 300; Townsend vs. State, 147 Ind. 624, 47 N. E. 19.

It is within the police power of a state to preserve the supply of gas within its borders not prohibitive of intrastate commerce. West vs. Kansas Co., 221 U. S. 229, aff'g. 172 Fed. 545; Penn. Gas Co. vs. Public Service Comm., 225 N. Y. 397, 122 N. E. 260.

[138] "The term 'waste' in addition to its ordinary meaning shall include (a) escape of natural gas in commercial quantities into the open air from a stratum recognized as a natural gas stratum; but this is not intended to have application to gas pockets in high points in strata recognized as oil strata; (b) drowning with water of a gas stratum capable of producing gas in commercial quantities; (c) underground waste; (d) the permitting of any gas well to wastefully burn; (e) the wasteful utilization of such gas; (f) burning flambeau lights, except when casing head gas is used in same; provided, not more than four may be used in or near the derrick of a drilling well, and (g) the burning of gas for illuminating purposes between 8 o'clock a.m. and 5 o'clock p.m., unless the use is regulated by meter." 36th Legis. Chap. 155, Art. I.

Oil and Gas Circular No. 11, Rule 2. In Rule 15 of that circular it is provided that "No wells shall be permitted to produce both oil and gas from different strata unless it shall be in such manner as to prevent waste of any character ot either product and in accordance with Rule 3."

§ 1044. Lessor's Right to Prevent Waste.

In Head vs. Nichols[139] it was said that the lessor may plug one gas well to stop waste, without excusing the lessee's failure to obtain production in another.

§ 1045. Californian Provision.

The California laws for the conservation of petroleum and gas[140] provide in cases of the unreasonable waste of gas, for proceedings to enjoin[141] and enjoining of unreasonable waste of gas.[142] In addition to these provisions the act of Mareh 25, 1911,[143] prohibits the unnecessary wasting of natural gas into the atmosphere.

§ 1046. Interstate Commerce.

The transportation of oil or gas from state to state through the medium of pipe lines is interstate commerce.[144] It is not the usual practice of railway companies to furnish tank cars for shippers of oil.[145]

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[139] —Tex. Com. A. —, 293 S. W. 805, rev'g. 282 S. W. 831.

[140] Stat. 1929, p. 623, amending Stat. 1915, p. 1404. "Sec. 8*b*. The unreasonable waste of natural gas by the act, omission, sufferance or insistence of the lessor, lessee or operator of any land containing oil or gas, or both, whether before or after the removal of gasoline from such natural gas, is hereby declared to be opposed to the public interest and is hereby prohibited and declared to be unlawful. The blowing, release or escape of natural gas into the air shall be prima facie evidence of unreasonable waste." The foregoing section is construed in People vs. Associated Oil Co., 80 C. D. 607.

See Ambassador Pet. Co. vs. Superior Court, 208 Cal. 667, 284 Pac. 445.

[141] See People vs. Associated Oil Co., *supra.*[(140)]

[142] See Id.

[143] Stats. 1911, p. 499. This act reads, in part, as follows:

"Sec. 2. All persons, firms, corporations or associations digging, drilling, excavating, constructing or owning or controlling any well from which natural gas flows shall upon the abandonment of such well, cap or otherwise close the mouth of or entrance to the same in such a manner as to prevent the unnecessary or wasteful escape into the atmosphere of such natural gas. And no person, firm, corporation or association owning or controlling land in which such well or wells are situated shall wilfully permit natural gas flowing from such well or wells, wastefully or unnecessarily to escape into the atmosphere.

Sec. 3. Any person, firm, corporation or association who shall wilfully violate any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

Sec. 4. For the purposes of this act each day during which natural gas shall be wilfully allowed wastefully or unnecessarily to escape into the atmposphere shall be deemed a separate and distinct violation of this act."

[144] Public Utilities Comm. vs. Landon, 249 U. S. 245; see West vs. Kansas Co., 221 U. S. 229. The question whether particular commerce is interstate or intrastate is ordinarily determined by what is actually done and not by any mere billing or plurality of carriers. Whre cars or tanks are in fact destined from one state to another, rebilling or reshipping en route does not of itself break the continuity of the movement nor require that any part be classified differently from the remainder. It is the essential character of the commerce, not the extent of local or other bill of lading. Western Oil Co. vs. Lipscomb, 244 U. S. 349; see, also, Landon vs. Public Utilities Comm., 242 Fed. 683; and see State vs. Landon, 100 Kan. 593, 165 Pac. 1112.

[145] Chicago Co. vs. Lawton Co., 253 Fed. 708; *compare* Illinois Co. vs. Mulberry Co., 238 U. S. 282; see Penn. Co. vs. Pritan Co., 237 U. S. 127.

NOTE.—For related chapters see Conditional Sales; Corporations; Costs; Deeds; Fixtures; Mining Leases; Mining Partnerships; Options; Oil Shale Lands; Possession; Severance; Surveys; Taxation; Tenancy in Common; Trespass.

For synopsis of "Leasing Act," collation of authorities applicable to the several sections thereof and governmental forms, see Report XX of the (California) State Mineralogist, p. 208 *et seq.*

For California "State Oil Leasing Act" and Rules and Regulations thereunder and governmental forms, see Id., p. 381 *et seq.*

For Miscellaneous Californian Legislation on Oil and Gas, see Id., p. 415.

Legislation subsequent to the above compilation is: Merger of Department of Petroleum and Gas and State Oil and Gas Supervisor with Department of Natural Resources. (New section added April 13, 1927; Stats. 1927, p. 237.) Municipal Property—Authority to lease oil property. (Amendment approved April 27, 1929; Stats. 1929, p. 322.) Lease of county lands for the production of oil, gas and other

hydrocarbons or for the mining of any other minerals. (New section added May 18, 1929; Stats. 1929, p. 632.) Misrepresentation of oil or gas offered for sale. (Approved June 5, 1929; Stats. 1929.) Depletions of minerals and timber. (Approved March 1, 1929; Stats. 1929, p. 19. Amended Stats. 1929, p. 1555.) Reserving all minerals in state lands, granting of permits and leases, etc. (Approved May 25, 1921; Stats. 1921, p. 404. Amended 1923, p. 593; 1929, pp. 11, 944.)

CHAPTER LI.

OIL-SHALE LANDS.

§ 1047. Oil-Shale Deposits.

The oil-shale deposits of the United States have been well known for a number of years, and have been the subject of much exploration, study and investigation. They have been recognized by congress and the land department as a very valuable natural mineral resource. While at the present time there has been no considerable production of oil from shales, due to the fact that abundant quantities of oil have been produced more cheaply from oil wells, there is no possible doubt of its value and of the fact that it constitutes an enormously valuable resource for future use by the American people.[1]

§ 1048. Placer Land.

Oil-shale lands fell within the category of placer lands and were subject to entry and patent under the circumstances and conditions or upon similar proceedings as are provided for lode claims.[2] The Leasing Act, however, repealed as to shale deposits the general provisions of the mining law and withdrew them from location and disposition thereunder, except as specifically provided in § 37 of that act.[3] It forbids the perfection of any such location or entry except valid claims existent at the date of its passage (February 25, 1920) and thereafter maintained in compliance with the laws under which initiated, and prescribes that oil-shale deposits shall be disposed of only in the manner provided in the act, except claims existing and maintained as above stated.[4]

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[1] Freeman vs. Summers, 52 L. D. 205. Oil-shale has been defined as "a compact laminated rock of sedimentary origin, yielding over thirty-three per cent of ash and containing organic matter that yields oil when distilled, but not appreciably when extracted with the ordinary solvents for petroleum." Oil-Shale, by Martin J. Gavin, Bulletin 210, U. S. Bureau of Mines, 1924.

[2] Freeman vs. Summers, *supra* [1]. See Webb vs. American Co., 157 Fed. 203; Morrison's Oil and Gas Rights, 222.

[3] 41 Stats., p. 437, § 21; Krushnic (on rehearing), 52 L. D. 303.

41 Stats. 437, § 21. "Oil-shale having been thus recognized by the department and by congress as a mineral deposit and a source of petroleum, and having been demonstrated elsewhere to be a material of economic importance, lands valuable on account thereof must be held to have been subject to valid location and appropriation under the placer mining laws, to the same extent and subject to the same provisions and condition as if valuable on account of oil or gas. Entries and applications for patent for oil shale placer will, therefore, be adjudicated by your office in accordance with the same legal provisions and with reference to the same requirements and limitation as are applicable to oil and gas placers." Reed, 50 L. D. 687. See U. S. vs. West, 30 Fed. (2d) 742; aff'd. and mod. 280 U. S. 307; Freeman vs. Summers, *supra* [1]; Smallhorn Co., 52 L. D. 329.

[4] U. S. vs. West, *supra* [3]. See Work vs. Braffet, 276 U. S. 566. In this case the court said: "The reference in § 37 to valid claims 'thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery' at least suggests that they embrace only such substantial claims as would on compliance with the form or law ripen into ownership; such claims as might be acquired under the mining laws by location, possession and development, which, if continued to discovery and entry, would entitle the claimant to a patent. That such was the purpose is established by the congressional debates. 58 Cong. Rec., pt. 5, pp. 477"4585, 66th Cong., 1st Sess."

For sufficiency of discovery see Freeman vs. Summers, *supra* [1].

§ 1049. Leases.

Section 21 of the Leasing Act [5] provides for the leasing of oil-shale deposits subject to regulations prescribed by the Secretary of the Interior. Only one lease of a maximum area of five thousand one hundred and twenty acres is granted to one person, association or corporation.

§ 1050. Indeterminate Periods.

Leases may be for indeterminate periods with such royalties as may be specified in a lease together with a rental of fifty cents an acre. Royalties to be subject to readjustment at the end of each twenty-year period. The payment of royalty and rental may be waived during the first five years of any oil-shale lease.[5]

§ 1051. Assessment Work.

Assessment work upon oil-shale claims is governed by the rules of the general mining [6] law and the claimant of a valid location prior in time to the passage of the Leasing Act is not subject to any forefeiture that did not apply to such law.[7] In other words, fulfillment of the annual assessment work each year is not a prerequisite to continuing ownership as against the government of the United States, and, in the absence of an adverse relocation, work may be resumed at any time.[8]

§ 1052. Patents.

In the Smallhorn case [9] the land department said: "In all probability congress did not, at the time of the passage of the act of July 17, 1914,[10] have its attention called to the value of oil-shale as a source of petroleum, and nitrogen and phosphate. Presumably the question

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[5] U. S. Code, p. 972, § 241.

[6] U. S. vs. West, *supra* (3).

Work of a strictly exploratory nature performed on a group of oil-shale claims, such as work that has value in determining the oil-bearing character of the shale on a continuous group of claims is available as assessment work under § 2324, Revised Statutes, an antecedent discovery being shown.

Where development work has actually been done upon a group of oil-shale claims in good faith and is reasonably adapted to the purpose for which it was designed, although it may not have been the best possible mode of development, the land department will not substitute its judgment as to its wisdom or expediency for that of the owner.

The "Five Claims Act" is not applicable to oil-shale claims. Standard Shales Co., 52 L. D. 522. For instance of insufficiency of group development work on oil-shale lands, see Krushnic, *supra* (3). *Id.* on rehearing, 52 L. D. 295. See, also, assessment work on oil-shale claims, 52 L. D. 334.

[7] U. S. vs. West, *supra* (3); Wilbur vs. Krushnic, 280 U. S. 306, aff'g. 30 Fed. (2d) 742.

[8] *Id.* But it has been said that § 37 of the Leasing Act at one blow destroyed the right of relocation of the minerals therein named and with it fell the right of resumption. It is contrary to the declared purpose and object of the act to assume that in doing away with the system of a free grant of the minerals and the grant of a fee title it was intended to preserve all the rights of a mining locator and at the same time relieve him of his duties, for that is the consequence if neither the government nor an individual can now take advantage of his default. The fair and obvious meaning of § 37 is that if the annual work is not done, all the rights of a claimant are gone. Krushnic, *supra* (3); Standard Shale Co., *supra* (6); U. S. vs. McCutchen, 234 Fed. 711. Ordinarily, and in the absence of any withdrawal, the locator would have the right to relocate, equally only, however, to any other person qualified to locate. Hodgson vs. Midwest Oil Co., 17 Fed. (2d) 71, dist. in U. S. vs. West, *supra* (3).

[9] *Supra* (3).

[10] 38 Stats. 509.

whether lands containing oil-shale could be located and patented under the mining laws had not been raised. At any rate, oil as such was not included in the list of minerals in said act.[11] But as we have seen, the land department has construed the act to include oil-shale, and under such construction surface entries of oil shale lands have been allowed and patented.''

[11] Smallhorn Co., *supra* (3).

CHAPTER LII.

OPTIONS.

§ 1053. Characteristics of Options.

An option is a right acquired by contract to accept or reject a present offer within a limited or a reasonable time in the future.[1] Unless based upon a sufficient consideration it merely is a continuous offer of sale which may be withdrawn at any time before acceptance.[2] Time is of the essence of the option [3] whether so expressly stated therein or not.[4]

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[1] Johnson vs. Clark, 174 Cal. 582, 163 Pac. 1004; Flickinger vs. Heck, 187 Cal. 112, 200 Pac. 1045; Menzel vs. Primm, 6 Cal. A. 204, 91 Pac. 754; Kramer vs. Schmidt, 62 Mont. 568, 206 Pac. 620; Hunter vs. Sutton, 45 Nev. 430, 205 Pac. 785; Cline vs. Hall, 107 Okla. 218, 232 Pac. 31; see, also, Richardson vs. Hardwick, 108 U. S. 252; Marthinson vs. King, 150 Fed. 48; see, generally, Pollard vs. Sayre, 45 Colo. 195, 98 Pac. 816; Snider vs. Yarbrough, 43 Mont. 203, 115 Pac. 411; Anderson vs. Phegley, 71 Or. 331, 142 Pac. 593. The distinction between a contract to purchase or sell real estate and an option to purchase is that the contract to purchase or sell creates a mutual obligation on the one party to sell and on the other to purchase; while an option gives merely the right to purchase within a limited time without imposing any obligation to purchase. Brickell vs. Atlas Co., 10 Cal. A. 17, 101 Pac. 16; see, also, Pritchard vs. McCloud, 205 Fed. 24; Davis vs. Riddle, 25 Colo. A. 162, 136 Pac. 551; Virginia Co. vs. Haeder, 32 Ida. 240, 181 Pac. 141; Pittsburg Co. vs. Bailey, 76 Kan. 42, 90 Pac. 803. In Clarno vs. Grayson, 30 Or. 111, 46 Pac. 426, the court points out the distinction between instruments granting the privilege of acquiring upon certain terms a vested equitable right and one granting the vested equitable right itself to the property. See, also, Acme Oil Co. vs. Williams, 140 Cal. 681, 74 Pac. 296; North Confidence Co. vs. Morrice, 56 Cal. A. 145, 204 Pac. 851. What is termed an option, although unilateral in form, may, in effect, be an agreement to sell; and when possession is taken and payments made thereunder, such acts are an acceptance of its terms. The option holder is bound as a purchaser, and in case of default, the vendor has the right to reenter and recover unpaid installments. Reed vs. Hickey, 13 Cal. A. 136, 109 Pac. 38; Braselton vs. Vokal, 53 Cal. A. 582, 200 Pac. 670; Feisthamel vs. Campbell, 55 Cal. A. 780, 205 Pac. 25. See, also, Sandoval vs. Randolph, 222 U. S. 161, aff'g. 11 Ariz. 371, 95 Pac 119; Johnson vs. Clark, *supra*; Virginia Co. vs. Haeder, *supra*.

[2] Milwaukee Co. vs. Shea, 123 Fed. 9; Brown vs. Savings Union, 134 Cal. 448, 66 Pac. 592; Hobbs vs. Davis, 168 Cal. 556, 143 Pac. 733; North Confidence Co. vs. Morrice, *supra* (1); Cortelyou vs. Barnsdall, 236 Ill. 138, 86 N. E. 200; see Worlds Fair Co. vs. Powers, 224 U. S. 173; Snow vs. Nelson, 113 Fed. 353; Skookum Oil Co. vs. Thomas, 162 Cal. 539, 123 Pac. 363; Champion Co. vs. Champion Mines, 164 Cal. 205, 128 Pac. 315; Mitchell vs. Gray, 8 Cal. A. 423, 97 Pac. 160; Gordon vs. Darnell, 5 Colo. 302; Penn. Co. vs. Smith, 207 Pa. St. 210, 56 Atl. 426; see, generally, Armstrong vs. Maryland Co., 67 W. Va. 589, 69 S. E. 195. An offer which in its terms limits the time of acceptance is withdrawn by the expiration of the time. Waterman vs. Banks, 144 U. S. 394. After acceptance of the terms by the holder of the option the parties are mutually bound and either one may compel specific performance by the other. Hoogendorn vs. Daniel, 178 Fed. 765; see, also, Marthinson vs. King, *supra* (2); Heyward vs. Bradley, 179 Fed. 325; Pittsburg Co. vs. Bailey, *supra* (1). That an accounting may be had see S. P. Mines vs. Court, 33 Nev. 97, 110 Pac. 503. A sufficient consideration is the making of expenditures upon the property, as, for instance, an agreement to drill a well thereon. Starr vs. Crenshaw, 279 Mo. 344, 213 S. W. 811; see, also, Clarno vs. Grayson, *supra* (1), holding that making expenditures upon the property is sufficient consideration to sustain an option as irrevocable within the time accorded; *but see* Gordon vs. Darnell, *supra*. On performance of the annual assessment work, see Ferguson vs. McGuire, 17 Ida. 141, 104 Pac. 1028. It is essential that the owner of the property shall ascertain, in due time, whether the option holder has performed the annual assessment work upon an unpatented claim should he have agreed to do so, and if not so done by the latter to himself cause the same to be performed in time sufficient to save the claim from forfeiture. Stamey vs. Hemple, 173 Fed. 61. A consideration of one dollar, in the absence of fraud or bad faith is sufficient. Pittsburg Co. vs. Bailey, *supra* (1). Emde vs. Johnson, ___ Tex. C. A. ___, 214 S. W. 575.

[3] Gaines vs. Chew, 167 Fed. 630, and cases therein cited; Mackey Wall Plaster Co. vs. U. S. Gypsum Co., 244 Fed. 275, aff'd. 252 Fed. 39; Harper vs. Independence Co., 13 Ariz. 176, 108 Pac. 701; Champion Co. vs. Champion Mines, *supra* (2); Bashaw Co. vs. Pinkham Co., 77 Cal. A. 591, 246 Pac. 1064; Montrozona Co. vs. Thatcher, 19 Colo. A. 371, 75 Pac. 595; Settle vs. Winters, 2 Ida. 215, 10 Pac. 216; Smith vs. Beebe, 31 Ida. 469, 174 Pac. 608; Merk vs. Bowery Co., 31 Mont. 298, 78 Pac. 519; Snider vs. Yarbrough, *supra* (1). In options time is the essence even in equity, as there is no contract till the option is accepted or exercised. Rice Co. vs. Blevins, 61 Cal. A. 536, 215 Pac. 402. The condition as to time in equity may be waived or relieved

The option may be coupled with a lease and form one instrument.[5] It may be a license.[6] It may contain a provision for the purchase of the property embraced therein, payment to be made out of the product

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against in equity. Wheeling Co. vs. Elder, 54 West Va. 335, 46 S. E. 357. See 1 Pomeroy's Eq. Juris. (3d ed.), § 455.

When the subject matter of the contract is mines or other subjects of fluctuating and changing value, time is of the essence of the contract. Pom. Cont., §§ 384, 385; 2 Whart. Cont., § 887; Doloret vs. Rothschild, 1 Sim. & Su. 598; Gale vs. Archer, 42 Barb. 321; Prendergast vs. Turton, 1 Younge and C. C. C. 110. When time is of the essence it is, so to speak, jurisdictional, and lies at the very foundation of the right of action. Pom. Cont., § 401; Pom. Spec. Perf., §§ 387, 58, 60, 62, 65, 67; Boston Co. vs. Bartlett, 3 Cush. 224; 2 Lead. Cas. in Eq. Hare & Wallace, notes (4th ed.), part 2, pp. 1085, 1132; Kerr vs. Day, 14 Pa. St. 112. Hare & Wallace's notes to Seton vs. Slade, part 2, 2 Lead. Cases in Eq. (4th ed.), p. 1132; 2 Whart. Cont., § 888. Story's Eq. Jur. (11th ed.) 777a; Potts vs. Whitehead, 20 N. J. Eq. 55; Westerman vs. Means, 12 Pa. St. 99; Magoffin vs. Holt, 1 Duv. 95; Ranelagh vs. Melton, 2 Drew & S. 278; Brooke vs. Garrod, 2 De G. & J. 62; Austin vs. Tawmney, L. R. 2 Ch. App. Cas. 143.

Although time is not of the essence of a contract for the sale of real property unless it clearly appears from the terms of the agreement that the parties so intended, such intention need not be expressly declared, but may be inferred from the provisions of the contract, where the benefit to accrue from the consideration to be paid materially depends upon strict performance in point of time, or the relations and situation of the parties render such performance necessary for the protection of the vendor. Lindsey vs. Wright, 84 Cal. A. 499, 258 Pac. 438.

In every case of delay, a reasonable excuse for that delay must be given. 3 Pom. Eq. Jur., § 1408; McDermid vs. McGregor, 21 Minn. 112. Where there are any facts and circumstances which would excuse a want of punctuality in the seeking specific performance, those facts and circumstances must be pleaded. Green vs. Couvillaud, 10 Cal. 317. The burden is on one of showing any valid legal excuse that may exist for default in the performance of a contract. Copper River P. Co. vs. Alaska S. S. Co., 22 Fed. (2d), 15.

[4] Waterman vs. Banks, *supra* [2]; Mackey Co. vs. U. S. Co., *supra* [3]; Huckaby vs. Northam, 68 Cal. A. 88, 228 Pac. 719; Rice Co. vs. Blevins, *supra* [3]; Skookum Oil Co. vs. Thomas, *supra* [2]; Idaho Co. vs. Union Co., 5 Ida. 107, 47 Pac. 95; Merk vs. Bowery Co., *supra* [3]. In Huckaby vs. Northam, *supra*, it is said where an option to purchase a mining claim expressly made time of its essence and provided that upon the failure of the optionee to make the payments therein provided, the option agreement should terminate and be at an end and all rights were to be forfeited, the failure by the assignee of the optionee to make the required payments forfeited all its rights under the option.

In Williams vs. Long, 139 Cal. 186, 72 Pac. 912, the court said: "The rule is, that no particular form of words is necessary to make time the essence of a contract, but any stipulation will have that effect when it clearly appears that the contract is to be void if not performed in the agreed time. (Gray vs. Tubbs, 43 Cal. 303; Martin vs. Morgan, 87 Cal. 208.) Whether time is of the essence of a contract is to be determined from the terms of the contract and the subject matter concerning which the contract is made. And it is usually regarded as of the essence of the contract when the character of the property renders it subject to fluctuations; and this is especially true of mining property (Settle vs. Winters, 2 Ida. 215; Fry Spec. Perf., § 716)." See, also, Clark vs. American &c. Co., 28 Mont. 468, 72 Pac. 981; McKenzie vs. Murphy, 31 Colo. 274, 72 Pac. 1076; Green Ridge Co. vs. Littlejohn, 141 Iowa 221, 119 N. W. 700. In Waterman vs. Banks, *supra*, the court cites Taylor vs. Longworth, 39 U. S. 172, as follows: "In Taylor vs. Longworth, 39 U. S. 14 Pet. 172, 174, the principle was recognized that time may become the essence of a contract for the sale of property not only by the express stipulation of the parties, but from the very nature of the property itself.

"This principle is peculiarly applicable where the property is of such a character that it will undergo sudden, frequent, or great fluctuations in value. In respect to mineral property it has been said that it requires, and of all properties, perhaps, the most requires the parties interested in it to be diligent and active in asserting their rights. Prendergast vs. Turton, 1 Younge and C. C. C. 110; Doloret vs. Rothschild, 1 Sim. & Su. 590, 598; Fry Spec. Perf., §§ 714, 715; Pom. Cont., §§ 384, 385; Brown vs. Covillaud, 6 Cal. 566, 572; Green vs. Covillaud, 10 Cal. 317; Magoffin vs. Holt, 1 Duv. 95."

[5] Matthews Co. vs. New Empire Co., 122 Fed. 972; Pollard vs. Sayre, *supra* [1]; Settle vs. Winters, *supra* [3]; Snider vs. Yarbrough, *supra* [1]; see Mitchell vs. Probst, 52 Okla. 10, 152 Pac. 597; and see Gordon vs. Dufresne, 205 Cal. 512, 271 Pac. 1066.

In Hammon Fields vs. Powell, 40 Fed. (2d) it is said: "It is well known that in dealing with mining properties an option to purchase is generally accompanied with the privilege to the optionee of possession and the right to develop or operate the mining claims; otherwise he would be unable to secure the information requisite to an intelligent exercise of his option. And, as a consideration therefor, the owner receives a payment in bulk or a stipulated sum periodically, or a percentage of the recoveries realized from operation—one or more. The estate thus created relating to possession is not unlike that of a leasehold, and the consideration may not improperly be referred to as rental."

[6] Seward Co., 242 Fed. 225. See Mitchell vs. Probst, *supra* [5]; Reed vs. Hickey, *supra* [1]; Smith vs. Jones, 21 Utah 270, 60 Pac. 1104.

thereof, or otherwise.[7]. Such provision does not constitute a covenant running with the land,[8] unless by agreement of the parties.[9]

§ 1054. Default.

If it is provided in the option agreement that in case of default in making any of the payments the property involved shall revert back to the grantor of the option it is not necessary to rescind nor offer to return the payments made, nor wait until final payment is due and in default before bringing suit in ejectment.[10]

§ 1055. Enlargement of Time.

A further consideration is not necessarily incidental to the mere extension of time for performance of the conditions of the option.[11]

§ 1056. Actions.

One who is in possession under an agreement to convey giving him the right of possession, may maintain an action against a stranger to the title for a trespass which consists of the removal and conversion of the substance of the estate. He may even recover of his vendor for injuries amounting to waste, committed upon the premises after delivery of possession.[12]

§ 1057. Escrows.

A deed may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depositary, it will take effect. While in possession of the third person, and subject to conditions, it is called an escrow.[13] Once a valid deposit in escrow has been made, the escrow holder becomes the agent of both parties,[14] but when the escrow is completed he becomes the agent for

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[7] Wheeling vs. Elder, *supra* (8); see Mackey Co. vs. U. S. Co., *supra* (3); Pittsburg Co. vs. Bailey, *supra* (2).

[8] Smith vs. Jones, *supra* (6).

[9] See Settle vs. Winters, *supra* (3). Such a covenant is personal merely and does not create an equitable charge on the property. A purchaser with notice of the agreement is not bound to operate the property and pay the vendor the stated percentage of the proceeds. Con. Arizona Co. vs. Hinchman, 212 Fed. 817.

[10] Williams vs. Long, *supra* (4); see, also, Mitchell vs. Probst, *supra* (5); Hazzard vs. Johnson, 45 Cal. A. 19, 187 Pac. 121. For repossession of property and fixtures see Smith vs. Beebe, *supra* (3); see, generally, Worlds Fair Co. vs. Powers, *supra* (2); Skookum Co. vs. Thomas, *supra* (2); Champion Co. vs. Champion Mines, *supra* (2); Arizona Co. vs. Bolman, 15 Ariz. 504, 140 Pac. 490. A written agreement between the owner of an undivided interest in a mining claim and a prospective purchaser by which the owner agreed to transfer his interest to the purchaser on the payment of a stated sum, does not of itself deprive the owner of his interest in the claim. Mohr vs. North Rawhide Co., 177 Cal. 264, 170 Pac. 600.

[11] See Russell vs. Lambert, 14 Ida. 284, 94 Pac. 54; L. R. A. 1915 B, p. 20; Kiler vs. Wohletz, 79 Kan. 716, 101 Pac. 474, L. R. A. 1915B, 11 and note b, alterations p. 17. That a verbal promise to extend the time is sufficient, see Stamey vs. Hemple, *supra* (2), and see Downey vs. Gooch, 240 Fed. 527. A written agreement, for a valuable consideration, extending the time within which payments upon an option contract may be made to a definite date, does not operate as a waiver of the provision in the contract making time of the essence thereof. Virginia Co. vs. Haeder, *supra* (1). See Starr vs. Crenshaw, *supra* (2).

[12] Downey vs. Gooch, *supra* (11); Lightner Co. vs. Lane, 161 Cal. 689, 120 Pac. 771; see, generally, Francis vs. West Virginia Co., 174 Cal. 168, 162 Pac. 394.

[13] § 1057 Cal. C. C.; Bailey vs. Security Co., 179 Cal. 548 and 815, 177 Pac. 444 and 449.

A grantor can not recall the deed after the delivery as an escrow; and when the condition is complied with by the grantee, he is absolutely entitled to it. Cannon vs. Handley, 72 Cal. 140, 13 Pac. 315; Moore vs. Inott, 156 Cal. 353, 104 Pac. 578.

[14] Shreeves vs. Pearson, 194 Cal. 707, 230 Pac. 448; Security Bank vs. Carlsen, 205 Cal. 318, 271 Pac. 100. Feisthamel vs. Campbell, 55 Cal. A. 780, 205 Pac. 25; Wilson vs. Coffey, 92 Cal. A. 343, 268 Pac. 408.

each of the parties to the transaction in respect to those things placed in escrow to which each has thus become completely entitled.[15]

§ 1058. Performance.

It is one of the cardinal principles of law applicable to escrows that the terms and conditions of their fulfillment must be strictly performed.[16]

§ 1059. Lien.

A person working a mining property under an option to purchase will be considered as the owner's statutory agent under the Californian lien law,[17] but not under that of Arizona.[18]

§ 1060. Construction of Agreement and Escrow.

Where the agreement and the escrow agreement show by their terms that they relate to the same sale and the instructions refer to the agreement they must be considered and construed together to ascertain the whole contract between the parties.[19]

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[15] McDonald vs. Huff, 77 Cal. 279, 19 Pac. 499; Shreeves vs. Pearson, *supra* (14). See *supra*, Note 14.

[16] *Id.*; see Williams vs. Long, *supra* (4), and notes 3 and 4, *supra*.

An escrow deed delivered without the performance of the conditions authorizing delivery is simply void. Simmons vs. Howard, 136 Okla. 118, 276 Pac. 718; see Doran vs. Bunker Hill Oil Co., 23 Cal. A. 644, 139 Pac. 93.

Where a deed is placed in the hands of a third person as an escrow-holder with an agreement between the grantor and the grantee that it shall not be delivered to the grantee until he shall have complied with certain conditions, the grantee does not acquire any title to the land nor is he entitled to a delivery of the deed until he has strictly complied with the conditions, and delivery of the deed by the escrow-holder to the grantee in the absence of the performance of such conditions is not a valid delivery of the deed, nor does such delivery pass the title to the property. Promis vs. Duke, 208 Cal. 420, 281 Pac. 613.

[17] McClung vs. Paradise Co., 164 Cal. 517, 129 Pac. 774. In Beard vs. Lancaster Midway Oil Co., 72 Cal. A. 149, 236 Pac. 970, it is held that the establishment of a lien upon the owner's property, under the stated conditions, does not extend to the point of imposing personal liability upon the owner as a party to the contract; dist'g. Higgins vs. Carlotta Co., 148 Cal. 700, 84 Pac. 758; McClung vs. Paradise Co., *supra*.

[18] Foltz vs. Noon, 16 Ariz. 410, 146 Pac. 510; Harper vs. Independence Co., *supra* (3). In Callender vs. Crossfield, 84 Mont. 263, 275 Pac. 273, it is said that a lien will be enforced as against one having only an equitable interest in a leasehold for materials and labor supplied—and he having an interest in the property will be treated as an "owner" under the local statute. But the liens in this case are held not to affect the holder of the record title to the leasehold. The so-called "equitable interest" was under a contract for the purchase of the leasehold for $1,700,000, of which $10,000 had been paid; but default made on the later payments due. It was at the instance of holder of the equitable interest that the supplies were furnished and labor done.

[19] Neher vs. Kauffman, 197 Cal. 674, 242 Pac. 713; Hudson vs. Slonaker, 89 Cal. A. 620, 265 Pac. 346; Pigg vs. Kelley, 92 Cal. A. 332, 268 Pac. 463. See § 1642 Cal. C. C. Before a proposed escrow may have any validity there must be a binding contract in existence between the parties to such escrow. Elliott vs. Title Co., 64 Cal. A. 508, 222 Pac. 175.

CHAPTER LIII.

PATENT PROCEEDINGS.

§ 1061. Necessary Documents.

Any authorized person, association or corporation which has complied with the terms of the mining law and having and claiming a lode mining claim, or claims in common, may obtain a patent therefor [1] by filing in the proper land office the following instruments, viz: (1) An affidavit of at least two persons that a copy of the plat made by or under the direction of the office cadastral engineer, at the request of the applicant, showing accurately the boundaries of the premises applied for, together with a notice of the application for patent, has been duly posted upon the property. (2) Application for patent, under oath, showing compliance with the mining law, together with a copy of said official plat and the field notes of such survey. (3) Appointment of agent by nonresident of, or absentee from, local land district. (4) A certified copy of the location notice under which the applicant claims and the survey was made. (5) Proof of citizenship of the applicant. (6) Agreement of the publisher of the newspaper in which the notice of the application is to be published.[2] (7) At least three copies of the notice of application. (8) The applicant for patent for a lode claim must furnish in duplicate a statement showing the kind and character of the vein or lode, etc. (9) If application is for a placer claim upon surveyed lands a statement, in duplicate, showing workings, in detail, mineralization, etc. (10) Ordinarily an abstract of title must be filed which has been brought down to a day including the date of the filing of the application and shows full title in the applicant. The order for publication will not be made by the register until after the receipt of the abstract. If the right to patent is based upon the statute of limitations the application must be accompanied by a duly certified copy of the statute of limitations affecting mining claims for the state or territory and by secondary evidence of title which may consist of the affidavit of the claimant supported by those of other parties cognizant of the facts relative to the location, etc.[3]

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[1] 5 U. S. Comp. St., p. 5587, § 4622; Blackburn vs. Portland Co., 175 U. S. 571; Silver King Co. vs. Conkling Co., 255 U. S. 151; s. c. 256 U. S. 18; rev'g. 230 Fed. 553; Hough Co. vs. Empire Co., 42 L. D. 99; Golden Crown Lode, 32 L. D. 217; Bunker Hill Co. vs. Shoshone Co., 33 L. D. 142; Lackawanna Placer, 36 L. D. 36, rev'g. Teller, 26 L. D. 484 and Auerbach, 29 L. D. 208. See South Carolina Claims, 29 L. D. 602; Extra Lode Claims, 34 L. D. 590. The manner of obtaining a patent for either a lode or placer claim, whether for a single or for a consolidated claim of contiguous lode or placer claims, Mayflower Co., 29 L. D. 7; Hidden Treasure Mines, 35 L. D. 485; see Mt. Chief Claims, 36 L. D. 100; Alderbaran Co., 36 L. D. 551, that is, those that touch sides, lie alongside of, adjacent or adjoin, Hidden Treasure, *supra*, with or without a mill site, or for a mill site alone, is substantially similar. Min. Regs., pars. 58–59.

[2] Min. Regs., par. 42. The plat, with all its notes, lines, descriptions and landmarks, becomes as such a part of the patent by which they are conveyed, as if such descriptive features were written out in the patent. Alaska United Co. vs. Cincinnati-Alaska Co., 45 L. D. 336.

[3] Min. Regs., pars. 43–75 *et seq.*; see Cole vs. Ralph, 252 U. S. 286; rev'g. 249 Fed. 81; Humphreys vs. Idaho Co., 21 Ida. 140, 120 Pac. 823.

See § 1075.

§ 1062. Posting of Plat and Notice.

Prior to the filing of the application for patent the applicant is required to post a copy of the plat of survey together with a notice of his intention to apply for a patent in a conspicuous place upon the claim sought to be patented.[4]

§ 1063. Contents of Notice.

The notice posted must give the date of posting, the name of the claimant, the name of the claim, the number of the survey, the mining district and county, and the names of adjoining and conflicting claims as shown by the plat of survey.[5]

§ 1064. Proof of Posting.

The fact of such posting must be shown by the affidavit of at least two persons that such plat and notice are posted conspicuously upon the claim, giving the date and place of such posting; a copy of the notice so posted, to be attached to and form a part of said affidavit.[6]

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[4] 5 U S. Comp. St., p. 5587, § 4622; Mojave Co. vs. Karma Co., 34 L. D. 583. The posting of the plat and notice is required to be upon only one of the locations within a group of claims held in common, Phoenix Co., 40 L. D. 314, unless a mill site is included in the application. In such case the posting must be upon both. Min. Regs., par. 63. The term "conspicuous," as used in the mining law means open to the view, or obvious to the eye, and easy to be seen, or plainly visible, or otherwise advertised in poster or placard form and so attached to something upon the land in the position that they conveniently can be read by the public without being removed. Moore Co. vs. Nesmith, 36 L. D. 199, overruling Lonergan vs. Shockley, 33 L. D. 238. A shaft house is a conspicuous object upon a mining claim. It is immaterial upon which particular side or part of the shaft house the notice is posted. Gowdy vs. Kismet Co., 22 L. D. 624; *Id.* 24 L. D. 191; *Id.* 25 L. D. 216. A discovery shaft, or a box placed at an elevation above the level of the ground so that it can be seen by those going over the land, or that it may not be obscured by snow, is a conspicuous place. Ferguson vs. Hanson, 21 L. D. 336; see, also, Gowdy vs. Kismet Co., *supra*, 22 L. D. 624.

Where a mineral entry is allowed, and it is shown at a hearing that the plat and the notice of application for patent were hidden upon the claim instead of being posted in a conspicuous place thereon, the entry will be canceled without prejudice to claimant's right to begin proceedings *de novo* to acquire patent. Pratt vs. Avery, 7 L. D. 554.

[5] Too much care can not be exercised in the preparation of this notice, inasmuch as the data therein are to be repeated in the other notices required by the statute, and upon the accuracy and completeness of these notices will depend, in a great measure, the regularity and validity of the proceedings for patent. Min. Regs., pars. 38, 39, 149. These notices will be fatally defective if they show no connection with a mineral monument or the corner of the public survey. Juno Claims, 37 L. D. 368; see Wax, 29 L. D. 592, or fail to state the adjoining claims, or to give the official survey number. Gowdy vs. Connell, 27 L. D. 56; see Whitman vs. Haltenhoff, 19 L. D. 245; or misstates the county. Wright vs. Sioux Co., on review, 29 L. D. 289; but they need not contain a description of the lode line. Beik vs. Nickerson, 29 L. D. 662.

This notice, as well as that published, and also the application for patent, must state in express terms the portions to be excluded, if any, as, for instance, land previously certified or patented to a state or a railroad company, although such conflict may not be shown upon said plat. Min. Regs., par. 40.

The exclusion by an applicant for patent of conflict with a conflicting claim is no recognition of a superior right of the owner of the conflicting claim nor of its validity. Van Zandt vs. Argentine Co., 8 Fed. 728, aff'd. 122 U. S. 478.

A formal exclusion from an application for patent of conflict with another claim will not have any effect if it is shown that, as a matter of fact, no such conflict exists. Steamboat Lode, 13 L. D. 163.

A mineral claimant may exclude part of his claim from his application to purchase without waiving his right thereto, if such exclusion be caused by the assertion of adverse rights. Aspen Co., 22 L. D. 8, *but see* Adams Lode, 16 L. D. 233.

[6] 5 U. S. Comp. St., p. 5587, § 4622; Min. Regs., par. 40. The statutory requirement that the fact of posting shall be shown by an affidavit of at least two persons is mandatory and is one against which the land department is without authority to grant relief, and until such affidavit is filed a register is without authority to proceed upon the application. Mojave Co. vs. Karma Co., *supra* [4]. The making of the affidavit of posting outside of the land district does not defeat the application. It is a mere irregularity which may be cured by the subsequent filng of a properly verified statement. El Paso Co. vs. McKnight, 233 U. S. 250; rev'g. 16 N. M. 721, 120 Pac. 694; *but see* Equity Co., 43 L. D. 396, holding that posting plat and notice outside of the claim and 800 feet from it is not a compliance with the law. See El Paso Co., 37 L. D. 155.

After the expiration of the sixty days period of newspaper publication the claimant, or his duly authorized agent, must file his affidavit showing that the plat and notice have been posted in a conspicuous place upon the claim during said sixty days of publication, giving the dates.[7]

§ 1065. Statutory Expenditure.

The claimant at the time of filing the application for a lode patent, or at any time thereafter, within the sixty days of publication, must file with the register a certificate of the assistant cadastral engineer that five hundred dollars worth of labor has been expended or improvements made upon the claim by himself or his grantors.[8] If the application is for a placer claim upon surveyed land and conforms to legal subdivisions, an affidavit executed by at least two disinterested witnesses, as to such labor and improvements must be filed in lieu of such certificate.[9] Said certificate usually forms a part of the official plat and is conclusive evidence of the facts stated therein.[10]

§ 1066. Final Proofs.

After the expiration of the newspaper period of publication, the following papers should be filed, viz: (1) Proof of continuous posting of the plat and notice during said period; (2) proof of publication; (3) a verified statement of fees and charges paid; (4) certificate of the clerk of the federal court for the judicial district and also of the county clerk of the county wherein the property is situate to the effect that no adverse suit is pending; (5) application to purchase the property embraced in the patent proceedings.

The said statement (3) certificates (4) and application (5) can not properly be filed during the pendency of adverse proceedings.[11]

§ 1067. The Application for Patent.

The application for patent must be under the oath of the applicant, or his agent or attorney thereunto duly authorized, where said agent

[7] 5 U. S. Comp. St., p. 5587, § 4622; Min. Regs., par. 51.

[8] See note 1, *supra*; see, also, U. S. vs. Iron Co., 128 U. S. 673; U. S. vs. King, 83 Fed. 188. A mineral claimant in an application for patent is entitled to exclude any portion of the area included within a mining claim for any reason that may seem fit without affecting his right to the other portions of the area, provided, the excluded portion does not contain essential parts of the improvements relied upon to support the application or the discovery upon which the location is based. Eyrad, 45 L. D. 212; see Waskey vs. Hammer, 170 Fed. 31, aff'd. 223 U. S. 85; International Co., 45 L. D. 158.

[9] Min. Regs., pars. 25–60. See *infra*, note 14.

[10] U. S. vs. Iron Co., *supra* (8).

[11] 5 U. S. Comp. St., p. 5587, §§ 51-52. Where an adverse claim has been filed and suit thereon commenced within the statutory period and final judgment rendered determining the right of possession, it will be sufficient to file with the register a certificate of the clerk of the court setting forth the facts as to such judgment, but the successful party must, before he is allowed to make entry, file a certified copy of the judgment roll together with other evidence required by section 2326, Rev. Stats., 5 U. S. Comp. St., p. 5622, § 4623, and a certificate of the clerk of the court under the seal of the court showing, in accord with the record facts of the case, that the judgment mentioned and described in the judgment roll aforesaid is a final judgment; that the time for appeal therefrom has under the law expired, and that no such appeal has been filed, or that the defeated party has waived the right of appeal. Other evidence showing such waiver or an abandonment of the litigation may be filed. Min. Regs., par. 85. Where such suit has been dismissed, a certificate of the clerk of the court to that effect or a certified copy of the order of dismissal will be sufficient. *Id.* par. 86. After an adverse claim has been filed and suit commenced, a relinquishment or other evidence of abandonment of the adverse claim will not be accepted, but the case must be terminated and proof thereof furnished as required by the last two paragraphs. *Id.* par. 87. Where an adverse claim has been filed but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the state court having jurisdiction in the case, and also by the clerk of the district court of the United States for the district in which the claim is situated, will be required. *Id.* par. 88.

or attorney is conversant with the facts sought to be established.[12] The application must show the applicant's compliance with the law by himself and by his grantors, if he claims by purchase, his possessory right to the premises, the origin thereof and the basis of his claim for a patent. The application, if for a lode claim, should contain a full description of the kind and character of the vein or lode and should state whether ore has been extracted therefrom, and, if so, in what amount, and of what value. It should also show the precise place within the limits of each of the locations embraced in the application where the vein or lode has been exposed or discovered and the width thereof.[13]

§ 1068. Placer Application.

If the application be for a placer claim, in addition to the recitals necessary in and to both lode and placer applications the placer application should contain, in detail, such data as will support the claim that the land applied for is placer ground containing valuable mineral deposits not in vein or lode formation, and that the title is sought, not to control water courses, or to obtain valuable timber, but in good faith because of the mineral therein. This statement, of course, must depend upon the character of the deposit and the natural features of the ground.[14]

§ 1069. Gold Placer.

If the application be for a gold placer claim it must be shown that the claim is valuable for its deposits of placer gold. If for a placer deposit, other than gold, there must be a full description of the kind, nature and extent of the deposit, stating the reasons why the same is regarded as a valuable mineral claim.[15]

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[12] 5 U. S. Comp. St., p. 5587, § 4622; Blackburn Co. vs. Portland Co., *supra* (1); Min. Regs., par. 41.

The affidavits required of an applicant for patent may not, under the act of January 22, 1880, U. S. Code Title 30, p. 955, § 29, be made by an agent if the applicant is a resident of or at the date of making proof within the land district, even if the agent is the only one personally cognizant of the facts constituting compliance with the law. Rico Lode, 8 L. D. 223; see, also, Stock Oil Co., 40 L. D. 198; Coalinga Co., 40 L. D. 401.

See § 1061.

[13] 5 U. S. Comp. St., p. 5587, § 4622; Doe vs. Waterloo Co., 43 Fed. 219; Mojave Co. vs. Karma Co., *supra* (9); Min. Regs., par. 41; 49 L. D. 15; see Wolfley vs. Lebanon Co., 4 Colo. 112; Mining Claims, 52 L. D. 190.

[14] Min. Regs., par. 41; East Tintic Claim, 40 L. D. 271; Interstate Oil Corp., 50 L. D. 262; American Co., 39 L. D. 300.

Since no report of a mineral surveyor is required where the placer claim is described by legal subdivisions, the claimant should in his application for patent describe in detail the shafts, cuts, tunnels, or other workings claimed as improvements, giving their dimensions, value, and the courses and distance thereof to the nearest corner of the public surveys. The precise point of discovery on the placer claim should be given along with the points on the claim where cuts or other work has been done by the placer claimant as patent expenditure. Unless full showing under paragraphs 41 and 60 of the Mining Regulations is made in the application for patent it will be held for rejection, subject to amendment or appeal within thirty days from notice of the register's action. This statement must be furnished in duplicate. Instructions, 51 L. D. 265; see U. S. Laws, 49 L. D. 15.

[15] Min. Regs., par. 60; see Multnomah Co. vs. U. S., 211 Fed. 100; see, also, U. S. vs. Iron Co., *supra* (8); Snyder vs. Colorado Co., 181 Fed. 68; U. S. vs. Lavenson, 206 Fed. 763; Lennig, 5 L. D. 191; Cyprus Mill Site, 6 L. D. 708; American Co., *supra* (14).

If the claim be for a deposit of placer gold, there must be stated the yield per pan, or cubic yard, as shown by prospecting and development work, distance to bedrock, formation and extent of the deposit, and all other facts upon which he bases his allegation that the claim is valuable for its deposits of placer gold. If it be a building stone or other deposit than gold claimed under the placer laws, he must describe fully the kind, nature and extent of the deposit, stating the reasons why same is by him regarded as a valuable mineral claim. He will also be required to

§ 1070. Placers and Lodes.

If the claim be all placer ground, that fact must be stated in the application and corroborated by accompanying proofs. If of mixed placers and lodes, that fact should be so set out, with a description of all known lodes situate within the boundaries of the claim. A specific declaration must be furnished as to each lode intended to be claimed. All other known lodes are, by the silence of the applicant, excluded by law from all claim by him, of whatsoever nature, possessory or otherwise.[16]

§ 1071. Proof of Workings and Improvements.

If the placer application is made for surveyed lands the applicant must further furnish data, corroborated by the affidavit of at least two disinterested witnesses of the workings and improvements upon the claim and the value thereof.[17]

§ 1072. Salines.

If the application covers saline lands there must be a statement to the effect that the applicant never has, either as an individual or as a member of an association applied for nor held other saline lands.[18]

§ 1073. Consolidated Application for Patent.

The owner of any number of contiguous mining locations may present a single application for patent covering the group of claims, together with one official plat, and upon proof of the work required by the mining act upon the consolidated claim, is entitled to a patent therefor.[19]

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describe fully the natural features of the claim; streams, if any, must be fully described as to their course, amount of water carried, fall within the claim; and he must state kind and amount of timber and other vegetation thereon and adaptability to mining or other uses. Min. Regs., par. 60. See *supra*, note 14.

[16] 5 U. S. Comp. St. p. 5587, § 4622; Min. Regs., par. 60; Sullivan vs. Iron Co., 109 U. S. 552; Clipper Co. vs. Eli Co., 194 U. S. 225. For definition of known veins or lodes see U. S. vs. Iron Co., *supra* [8]; Iron Co. vs. Mike & Starr Co., 143 U. S. 394; Thomas vs. South Butte Co., 211 Fed. 107; Mason vs Washington-Butte Co., 214 Fed. 32; Clark-Montana Co. vs. Ferguson, 218 Fed. 959. After the issuance of a patent for a placer mining claim a third person asserting the existence of a known lode within the patented area has the burden of proving that such lode was known to exist when the placer patent was applied for and the proof must be clear and convincing in quality and quantity that inspires confidence and produces conviction. Clark-Montana Co. vs. Ferguson, *supra*. Where the existence of a vein or lode within a placer claim is not known at the time of application for patent, title will be acquired under such patent to all veins or lodes thereafter found within the boundaries of the patented ground. Reynolds vs. Iron Co., 116 U. S. 696; Noyes vs. Mantle, 127 U. S. 352; U. S. vs. Iron Co., *supra* [8]; Migeon vs. Montana Co., 77 Fed. 257; Mason vs. Washington-Butte Co., *supra*; Dennis vs. Utah, 51 L. D. 229.

Whether a lode or vein exists within the boundaries of a placer claim at the time of making the application for a patent is a question of fact which the claimant has a right to have tried as such. Iron Co. vs. Campbell, 135 U. S. 293; N. P. R. Co. vs. Cannon, 54 Fed. 259; Brownfield vs. Bier, 15 Mont. 410, 39 Pac. 461. A lode claim within the limits of a placer location, previously patented by a person other than the owner of the placer claim, is limited to twenty-five feet of the surface on each side of the middle of the vein. Mt. Rosa Co. vs. Palmer, 26 Colo. 56, 56 Pac. 176.

[17] Min. Regs, pars. 25–60.

[18] 5 U. S. Comp. St., p. 5684, § 4641. The applicant is limited to one claim. Min. Regs., par. 31; see Leonard vs. Lennox, 181 Fed. 760.

The procedure stated in the text is applicable only to valid claims initiated prior to the "Leasing Act" of February 25, 1920, 41 Stats. 447, excepting lands in San Bernardino County, California, to which the provisions of that act do not apply.

[19] St. Louis Co. vs. Kemp, 104 U. S. 663; Hidden Treasure Mines, *supra* [1]; Mt. Chief Claims, *supra* [1].

The rule announced in the departmental decision of William Dawson, 40 L. D. 17, that where a number of valid lode locations forming upon the ground a contiguous group are embraced in a single application for patent upon which due publication and posting of notice has been had, and the application is rejected as to one of the

§ 1074. Group Claims.

Where the right to a patent for an entire group of claims is in fact earned by the construction of a common improvement of a character and value sufficient for that purpose, then it can make no difference that patent for all the locations is not applied for at one time, or that a part may be patented and disposed of before patent for the remainder is applied for, and a change of ownership in any of the claims will not defeat this right.[20]

§ 1075. Mill-Site Application.

A mill site may be included in an application for a patent for a lode claim, or the application may be made by the owner of a quartz mill or other reduction works, not owning a mine in connection therewith.[21] Where the application includes a mill site, or the latter is applied for separately, it must appear by the affidavit of at least two witnesses that the land is nonmineral in character.[22] The mill site must be noncontiguous to the lode claim and must be used and occupied by the applicant for mining or milling purposes. It must not exceed five acres in extent.[23] What constitutes the use of land for such purposes is a mixed question of law[24] and fact. If more than one mill site is applied for in connection with a group of lode claims, a satisfactory and sufficient reason therefor must be shown. The law does not contemplate that a mill site may be patented to each group of contiguous lode claims held and worked in common.[25]

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claims because of insufficient improvements, the remainder of the claims, though not in themselves contiguous, may be retained and embraced in a single entry and patent, is equally applicable to placer claims. U. S. vs. The Millfork Co., 52 L. D. 610. See, also, U. S. vs. Bunker Hill Co., 48 L. D. 598.

[20] Mt. Chief Claims, *supra* (1).

[21] Ebner Co. vs. Hallum, 47 L. D. 34; Min. Regs., par. 64; see Hamburg vs. Stephenson, 17 Nev. 460, 30 Pac. 1088; see, also, Grand Canyon Co. vs. Bass, 36 L. D. 70; Cleary vs. Skiffich, 28 Colo. 362, 65 Pac. 59. In Pacific Company, 51 L. D. 459, it is said "that a quartz mill or reduction works is the only kind of improvement contemplated by the last clause of said section (2337 Rev. St.), is clearly manifested by these improvements being distinctly named, and there being no mention of any other kind of improvements whatever in said clause. Le Neve Mill Site, 9 L. D. 460. It is obvious that none of these improvements named is a quartz mill. The appellant company, however, contends that the crusher which reduces the gypsum to a smaller size is a 'reduction works.' The words 'reduction works' have a reasonably definite and well understood meaning in the mining and milling industry, and it is believed that the congress employed them in the mineral laws in the sense commonly understood in that connection among mining men. These words have been defined as 'works for reducing metals from their ores, as a smelting works, cyanide plant, etc.' and the word 'reduction' as (1) the act of removing oxygen, and (2) the process of separating metals from their ores. Glossary of Mining and Mineral Industry, Geological Survey Bulletin 95."

[22] Min. Regs., par. 65; see Burns vs. Clark, 133 Cal. 634, 66 Pac. 12; Burns vs. Schonfeld, 1 Cal. A. 124, 81 Pac. 713.

[23] 5 U. S. Comp. St., p. 5691, § 4645; see Brick Pomeroy Mill Site, 34 L. D. 324; see, also, Valcalda vs. S. P. Mines, 86 Fed. 91; Yankee Mill Site, 37 L. D. 675; Montana-Illinois Co., 42 L. D. 434; Alaska Gold Co., 42 L. D. 255; modifying Alaska Copper Co., 32 L. D. 128; Burns vs. Clark, *supra* (22); Watterson vs. Cruse, 179 Cal. 379, 176 Pac. 871; Shafer vs. Constans, 3 Mont. 372. A mill-site claim adjoining the end of a lode mining claim may be patented as noncontiguous land, within the meaning of the mining law, provided, it clearly be shown that the lode or vein along which the mining location is laid either terminates before the end abutting upon the mill-site claim will be reached, or that it departs from the side line of the mining claim, and where the ground embraced in such adjoining mill site is shown to be nonmineral in character. Montana-Illinois Co., *supra*; see Dillon, 40 L. D. 84. The law requires that a mill site must be used distinctly and explicitly for mining and milling purposes. Alaska Copper Co., *supra*.

[24] Valcalda vs. S. P. Mines, *supra* (23); Hartman vs. Smith, 7 Mont. 19, 14 Pac. 648.

[25] Hard Cash Claims, 34 L. D. 327; see Alaska Copper Co., *supra* (23); Helena Co. vs. Dailey, 36 L. D. 150.

§ 1076. Application by Trustee.

Any party applying for patent as trustee must disclose fully the nature of the trust and the name of the *cestui qui trust*; and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship. The names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.[26]

§ 1077. Citizenship.

The proof necessary to establish the citizenship of applicants for mining patents must be made in the following manner: In case of a corporation by a certified copy of its articles of incorporation.[27] In case of an association of persons unincorporated by their agent, duly authorized in writing, to make such affidavit upon his own knowledge or upon information and belief.[28] He must state in the affidavit the place of residence of each of the said persons. In case of an individual or an association of individuals who do not appear by such agent the affidavit of each applicant showing whether he is a native or naturalized citizen, when and where born, and his place of residence must be given. In case the applicant has declared his intention to become a citizen, or has been naturalized, his affidavit must show the date, place and the court before which he declared his intention, or from which his certificate of citizenship issued, and present residence.[29]

§ 1078. Appointment of Attorney in Fact.

All affidavits in patent proceedings, except those of citizenship and verification of adverse claims where the adverse claimant is a nonresident, must be executed within the land district wherein the land sought to be patented may be situate. If the applicant for patent is not a resident nor within such district at the time of filing the application, the required affidavits may be made by a duly authorized agent, where said agent is conversant with the facts sought to be established

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[26] Min. Regs., par. 54; see Capricorn Placer, 10 L. D. 641; Latham, 20 L. D. 379.

[27] 5 U. S. Comp. St., p. 5465, § 4616; Min. Regs., par. 66; U. S. vs. North Western Co., 164 U. S. 686; Doe vs. Waterloo Co., 70 Fed. 455.

[28] O'Reilly vs. Campbell, 116 U. S. 418; North Noonday Co. vs. Orient Co., 1 Fed. 538, Min. Regs., par. 66.

[29] Min. Regs., par. 66. Instructions, 51 L. D. 134. The affidavit of the claimant as to his citizenship may be taken before the register or any other officer authorized to administer oaths within the land districts; or if the claimant is residing beyond the limits of the district, the affidavit may be taken before the clerk of any court of record or before any notary public of any state or territory. Min. Regs., par. 69.

If citizenship is established by the testimony of two disinterested persons, such testimony may be taken at any place before any person authorized to administer oaths, and whose official character is duly verified. Min. Regs., par. 70.

The issuance of certified copies of naturalization papers for land office purposes has been discontinued, and in lieu thereof the Bureau of Naturalization will in appropriate cases and upon request of the land department furnish statements as to the facts of the naturalization of applicants for public lands. In cases where it is inconvenient or impossible for an applicant to furnish evidence of citizenship or declaration of intention in the form required by Instructions of May 1, 1925, 51 L. D. 134, the land office will accept a sworn statement of the applicant, giving the facts as to his citizenship status, which statement should include the date of the alleged naturalization or declaration of intention, the title and location of the court in which instituted, and, when available, the number of the document in question, if the proceeding has been had since September 26, 1906. In addition, in cases of naturalization prior to September 27, 1906, there should be given the date and place of the applicant's birth and the foreign country of which he was a citizen or subject. The citizenship showing may be incorporated in any of the forms prescribed for use in connection with the entry of the public lands. Where the necessary data are given it will be accepted by the local land office subject to verification by the land department. Instructions, 52 L. D. 728.

by said affidavits.[30] In the case of an individual applicant his agent's authority should be evidenced by letter of attorney. In the case of a corporation a copy of the resolution of the board of directors so appointing him should be certified to by its secretary under the seal of the corporation and made a part of the application for patent.

§ 1079. Abstract of Title.

In addition to a duly certified copy of the location notice the applicant must furnish a duly certified abstract of title of each claim certified by the legal custodian of the record of transfers, or by a duly authorized abstracter of titles. The certificate must state that no conveyances affecting, or purporting to affect the title to the claim or claims appear of record other than those set forth. It must show full title in the applicant. No certificate of an abstracter will be accepted until approved by the Commissioner of the General Land Office.[31] This abstract should be brought down to and include the date of filing. After filing of the abstract the order for publication is made by the register. Transfers made subsequent to the filing of the application for patent are not considered by the land department.[32] In the event of the death of the applicant, certificate and patent will nevertheless issue in his name.[33]

§ 1080. Posting and Publication of Notice of Application.

The notice of application for patent must be posted in a conspicuous place upon the land and also be published in the newspaper designated by the register as nearest to the claim,[34] for a period of sixty days.[35]

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[30] 5 U. S. Comp. St., p. 5587, § 4622; see Crosby Lodes, 35 L. D. 434. An affidavit made before an officer residing out of the district within which the claim applied for is situate is a mere irregularity which may be cured by the subsequent filing of a properly verified affidavit. El Paso Co. vs. McKnight, 233 U. S. 250; see Hough Co. vs. Empire Co., *supra* (1). Verification by an attorney in fact when his principal is a resident of and physically within the land district is insufficient. Grescher, 41 L. D. 614; Robbins, 42 L. D. 481.

[31] Min. Regs., par. 42. The statute contemplates that applicants for mineral patents under its provisions shall at the date of the filing of the application have the full possessory right or title to the claim for which patent is sought. Lackawanna Claim, *supra* (1). See, also, Cameron, 4 L. D. 516. For supplemental abstract see Min. Regs., par. 42.

In the event of the mining records in any case having been destroyed by fire or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, etc.; and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession and tend to establish his claim, should be filed. Min. Regs., par. 43. See Hawkeye Placer vs. Gray Eagle Placer, 15 L. D. 45.

Where the applicant for patent claims under a location duly made pursuant to law and adversely held for the statutory period there is no necessity to furnish an abstract of title. Cole vs. Ralph, *supra* (3); Humphreys vs. Idaho Co., *supra* (3); Min. Regs., par. 74.

See *supra*, §§ 326, 327, 330.

[32] Min. Regs., par. 71; Woodman vs. McGilvary, 39 L. D. 574; see Lackawanna Claim, *supra* (1).

[33] Tripp vs. Dunphy, 28 L. D. 14; Graham, 40 L. D. 128; Whitten vs. Read, 50 L. D. 10; 5 U. S. Comp. Stats, p. 6057, § 5098; *but see* Heirs of Durbin, 51 L. D. 244, a special case.

[34] § 2325, Rev. St. Min. Regs., par. 47. In Strode vs. Wende, 29 Ariz. 463, 242 Pac. 868, it is held that "the word 'nearest' in the statute means in the nearest community to the mining claim, and that if there be in the community which is actually nearest two or more newspapers, a publication in any of them satisfies the statute." The posting and advertising of notice is jurisdictional and a patent can convey only the claim as to which the notice is given. Conkling Co. vs. Silver King Co., *supra* (1). The published notice must be signed by the register, not by the attorney for the applicant for patent. A notice that an application "is about to be filed" is not the equivalent of a notice that an application has been filed. An adverse claimant would be bound by publication and posting of a proper notice, whereas a

If the notice be insufficient the application for patent is defective,[36] and, from that point, the proceedings must be commenced anew.[37] The applicant is required to furnish the land office with three copies of this notice.[37a]

§ 1081. Publication of Notice.

The notice must be published in a newspaper designated by the register.[38] This newspaper must be one of established character and of general circulation.[39] The action of the register is subject to review.[40] During the time of publication the register is required to post a similar notice in his office.[41] When the notice is published in a weekly newspaper, nine consecutive insertions are necessary; when in a daily newspaper, the notice must appear in each issue for sixty-one consecutive issues.[42] The time commences to run from the date of the first publication, and it will not be presumed that the first publication was made upon the same date as the filing of the application.[43] Proper notice published for the prescribed period is due process of law.[44]

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notice that an application is about to be filed would require no action by him. The defect may be cured by the register issuing the notice properly worded.

[35] 5 U. S. Comp. St., p. 5587, § 4622.

[36] Gross vs. Hughes, 29 L. D. 467; Southern Cross Co. vs. Sexton, 31 L. D. 415; see Reed vs. Bowron, 32 L. D. 383.

This notice must embrace all the data given in the notice posted upon the claim. Lonergan vs. Shockley, 32 L. D. 238; see Juno Claim, 37 L. D. 365.

[37] Pikes Peak, 34 L. D. 285; see Southern Cross Co. vs. Sexton, 147 Cal. 758, 82 Pac. 423.

[37a] Min. Regs., par. 60.

[38] Min. Regs., par. 47; Condon vs. Mammoth Co., 14 L. D. 138, on review 15 *id.* 330. The newspaper must be the one published nearest to the claim. Min. Regs., par. 45. In land office practice this means the nearest newspaper by the most usually traveled route and not necessarily the nearest in a direct line.

[39] Rates for advertising, 2 L. D. 205; Erie Lode vs. Cameron Lode, 10 L. D. 655; Instructions, 26 L. D. 145.

[40] Tough Nut Claims, 32 L. D. 359; see also, Condon vs. Mammoth Co., *supra* [38].

[41] St. Louis Co. vs. Kemp, *supra* [39]; Min. Regs., par. 73.

In Morrison's Mining Rights (15th ed.) 574, it is said: "The Land Office holds that it is essential that the three notices, to wit: By newspaper, by posting and by the bulletin, should be concurrent, and in a case where the bulletin was not posted till the third day of advertisement they allowed an adverse on the sixty-third day, holding that the double and contemporaneous publication was not until such day complete. The bulletin must be posted sixty days, and the *newspaper notice does not begin to run* until the bulletin is posted. 5 L. D. 510, 17 L. D. 282. If any one of the three notices is insufficient they are all rendered valueless." Gross vs. Hughes, *supra* [36].

[42] Min. Regs., par. 45.

[43] Helbert vs. Tatem, 34 Mont. 5, 85 Pac. 733.

[44] Golden Reward Co., vs. Buxton Co., 79 Fed. 875. The proceedings before the land department are judicial, or *quasi* judicial at least. The publication is process. It brings all adverse claimants into court, and failing to assert their claims, they stand at the expiration of the notice in default. True, no adverse claimant nor supposed adverse claimant may be named in the notice, no process may be served personally upon him; but that does not void the notice, nor weaken its sufficiency to bring such party into court. Wight vs. Dubois, 21 Fed. 693; Hamilton vs. Southern Nevada Co., 33 Fed. 565; see Kannaugh vs. Quartette Co., 16 Colo. 341, 27 Pac. 245; Healey vs. Rupp, 37 Colo. 25, 86 Pac. 1015.

"Appellant claims that no notice was given personally to it. The law does not require any such notice to be given. The notice required by § 2325, 5 U. S. Comp. St., p. 5587, § 4622, is a general notice to all persons who might have from any cause claimed any interest in the land." N. P. R. Co. vs. Cannon, 54 Fed. 252. A failure to appear and file an adverse claim constitutes in law an admission of the truth of every fact covered by the application for patent; and the issuance of the patent in pursuance of such application is, in the absence of any adverse claim, quite as conclusive of the patentee's rights as if a contest in respect to the application had been initiated in the land office, and adjudicated by a competent court in favor of the applicant. In either case it is absolutely conclusive against all adverse claimants. Gwillim vs. Donnellan, 115 U. S. 45; Last Chance Co. vs. Tyler Co., 157 U. S. 683; Bunker Hill Co. vs. Empire State Co., 109 Fed 545. Cases may arise in which equity will interfere thereafter, if there be equitable grounds for interference, as where, by the acts of the applicant, those who might have adversed have been prevented, deceived, or misled; but unless such equitable reasons exist, he who fails to adverse before the expiration of publication absolutely is cut off, and can not be

The publication is made at the expense of the applicant and he must furnish an agreement of the publisher to hold the applicant alone responsible for the charges of such publication.[45]

§ 1082. Proof of Publication and Continuous Posting.

After the sixty days' period of newspaper publication has expired, the claimant must furnish from the office of publication a sworn statement that the notice was published for the statutory period, giving the first and last days of such publication, and his own affidavit showing that the plat and notice remained conspicuously posted upon the claim sought to be patented during said sixty days' publication, giving the dates.[46]

§ 1083. Statement of Fees and Charges.

In the absence of an adverse claim the applicant may immediately after or at the time of filing proof of publication and of posting, as aforesaid, file a verified statement showing the charges and fees paid by him to the office cadastral engineer, the mineral surveyor, land office fees, the newspaper charge and for the land embraced in the claim [47] ; which is five dollars per acre and each fractional part of an acre for a lode claim [48] and mill site [49] ; and two dollars and fifty cents per acre, and a like amount for each fractional part of an acre in a placer claim.[50] If the placer application includes a vein or lode the same together with twenty-five feet of surface on each side thereof, must be paid for at the rate fixed for a lode claim.[51]

§ 1084. Prosecution of Application.

An applicant for patent should proceed with diligence to complete his application [52] unless prevented from so doing by the pendency of

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heard to say that he had prior right. Wight vs. Dubois, *supra*. See Poncia vs. Eagle, 28 Ida. 60, 152 Pac. 208, which was an action to quiet title after an adverse suit had been dismissed; and therein the court said: "Counsel for defendants also contend that the amended complaint shows that this action was not commenced in the time required by the laws of the United States. They are right in that contention, but they are entirely wrong in their contention that this is a suit on an adverse claim, and that it must be brought within the time provided by the laws of the United States. A person who is entitled under the laws of the United States to the possession of mining ground by reason of his having complied with the statute may defend his possession and have it protected in an action to quiet such right in him. He may not be in a position to acquire a patent from the United States for such ground. He may protect his possession and right from the attempt of others to procure a patent from the United States for land which he legally is possessed and make no application for a patent himself in such proceedings." See Ginaca vs. Peterson, 262 Fed. 904; Altoona Co. vs. Integral Co., 114 Cal. 100, 45 Pac. 1047.

The decision of the Secretary of the Interior that publication of the application for a mining patent was made in proper newspaper is one of fact or of mixed law and fact and is binding on court in a suit to quiet title brought by a plaintiff who had not filed an adverse claim as required by the mining act. Murphy vs. Howard Co., 28 Ariz. 42, 235 Pac. 147.

[45] Min. Regs., par. 45.

[46] Min. Regs., par. 51. If the newspaper designated as "nearest the claim" is published outside of the land district within which the claim is situate the affidavit of publication may be made at the place of publication. Instructions, etc., 38 L. D. 131 and 140. Personal observations at various times and such information as a reasonably cautious man would accept are sufficient knowledge to justify the claimant or his agent in making the affidavit of continuous posting of the plat and notice. Bright vs. Elkhorn Co., 9 L. D. 503.

[47] 5 U. S. Comp. St., p. 5525, § 4620.

[48] *Id.*, p. 5691, § 4645; Min. Regs., par. 52.

[49] *Id.*, p. 5691, § 4645; *Id.*, pars. 63–64.

[50] *Id.*, p. 5587, § 4622; *Id.*, par. 59.

[51] *Id.*, p. 5691, § 4645.

[52] Copper Bullion Claim, 35 L. D. 27; Woodman vs. McGilvary, *supra* [32]; see Lucky Find Claim, 32 L. D. 200.

adverse proceedings.[53] A failure to do so constitutes a waiver of all rights obtained by the proceedings upon the application.[54] But, as a general rule, the abandonment of an application leaves the title to the land, and of the right to possess the same, and take mineral therefrom, the same as if no application had been made.[55] Where, however, an applicant has permitted his land to lie dormant without payment for the land for several years after publication of notice, and where valid adverse rights under a relocation have been established by judicial decree, the land department can not ignore nor disregard such decision.[56]

§ 1085. Entry Within Calendar Year.

Where no obstacle prevents the completion of the patent proceedings within the calendar year in which publication of notice was completed, and no valid reason is given as an excuse for the delay, an entry made after the expiration of such year may be canceled.[57]

§ 1086. Excuse for Delay.

An applicant for a patent can not be said to delay his proceedings unnecessarily where such delay has been occasioned by the filing of an adverse claim and the institution of a suit thereon, or by the filing of a protest with the land department[58] or the foreclosure of a mortgage or a suit to quiet title[59] as the law does not impute laches to a party because he has not done or offered to do something which he would not have been permitted to do had he made the offer.[60]

§ 1087. Application to Purchase.

A written, unverified application to purchase the land covered by the application for patent, describing the same by name, survey number, and *locale* of the ground subscribed by the applicant, his agent or attorney must accompany the purchase price of such land.[61]

§ 1088. Entry.

After paying the register for the land embraced in the claim, and no objection appearing, that officer issues his certificate of final entry to the applicant for patent.[62] This certificate is *prima facie* evidence of title. Upon the issuance of the patent the patentee, or his transferee, becomes the owner in fee.[63]

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[53] Cain vs. Addenda Co., 29 L. D. 62; Marburg Lode, 30 L. D. 202; Lucky Find Claim, *supra* (52).

[54] *Id.*

[55] Coleman vs. McKensie, 29 L. D. 359. In South End Co. vs. Tinney, 22 Nev. 19, rev'g. 221, 35 Pac. 89, 38 Pac. 401, it is held that where a person abandons his application for a patent for a mining claim, and ceases work upon it, without having obtained a certificate of purchase, the claim may be relocated under Rev. St. U. S., § 2324. See dissenting opinion by Murphy, C. J.

[56] Cain vs. Addenda Co., *supra* (53); see Enterprise Co. vs. Rico-Aspen Co., 167 U. S. 108, aff'g. 66 Fed. 200; Wight vs. Dubois, *supra* (44). See South End Co. vs. Tinney, *supra* (55).

[57] Woodman vs. McGilvary, *supra* (32); see Copper Bullion Claim, *supra* (52).

[58] Marburg Claim, *supra* (53); see Ring vs. Montana Co., 33 L. D. 132.

[59] White Extension Lode, 22 L. D. 677.

[60] Marburg Claim, *supra* (53); see Ring vs. Montana Co., *supra* (58).

[61] Manual of Procedure, Min. Dig. 497; 3 Lindl. Mines, [3d ed.], p. 1733, § 694.

[62] Min. Regs., par. 52. See El Paso Co. vs. McKnight, *supra* (6).

[63] Benson Co. vs. Alta Co., 145 U. S. 428; Brown vs. Gurney, 201 U. S. 184; People vs. Shearer, 30 Cal. 648; Cranes Gulch Co. vs. Scherrer, 134 Cal. 350, 66 Pac. 487; Sacre vs. Chalupnik, 188 Cal. 386, 205 Pac. 449; Omaha Co. vs. Tabor, 13 Colo. 41, 21

§ 1089. Transmission of Record.

After the issuance of the register's receipt the local land officers forward the entire record to the General Land Office at Washington and a patent is issued thereon if the proceedings are found to be regular.[64]

§ 1090. Suspended Proceedings.

The land department may in its discretion suspend proceedings on an application for patent pending the determination of a suit, though such suit is not based strictly upon an adverse claim. Ordinarily it should not exercise this power unless an adjudication by the court of the questions involved in the suit would aid in the disposal of a protest filed in the land department against the application.[65]

§ 1091. Protest.

At any time prior to the actual issuance of the patent a protest may be filed by any person against the patenting of the claim, as applied for upon any ground tending to show that the applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings.[66]

§ 1092. Cancellation of Entry.

The land department is empowered, after proper notice, upon direct hearing to determine whether a location for which application for patent is made is valid or not; and, if found invalid to declare it void.[67]

§ 1093. Correction of Patent.

A patent, until recorded, is subject to correction by the land department. If, thereafter, authority should be assumed by the department

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Pac. 925; Deno vs. Griffin, 20 Nev. 249, 20 Pac. 308; Gourley vs. Countryman, 18 Okla. 220, 90 Pac. 430; Rader vs. Allen, 27 Or. 344, 41 Pac. 154. The final receipt fixes the rights of the owner of a mining claim as to the land included therein. Silver King Co. vs. Conkling Co., *supra* (1). See Bash vs. Cascade Co., 29 Wash. 50, 69 Pac. 402, 70 Pac. 48; see, also, 256 U. S. 18, *supra* (1). The owner of the final receipt is in a position to initiate and maintain an action in ejectment. Sacre vs. Chalupnik, *supra*.

[64] Min. Regs., par. 52; Perego vs. Dodge, 163 U. S. 165; Mineral Farms Co. vs. Barrick, 33 Colo. 410, 80 Pac. 1055.

[65] Northwestern Co., 8 L. D. 437; Thomas vs. Elling, 26 L. D. 220; Selma Claim, 33 L. D. 187; see Ginaca vs. Peterson, *supra* (44); see, also, Plested vs. Abbey, 228 U. S. 42.

[66] Min. Regs., par. 53; Wight vs. Dubois, *supra* (44); see Lane vs. Hoglund, 244 U. S. 179; Crown Point Co. vs. Buck, 97 Fed. 462; see, also, Contests and Protests, 39 L. D. 150.

If the land described in the patent is claimed adversely the adverse claimant should file an adverse claim and bring suit thereon, and not merely protest. Elda Co. vs. Mayflower Co., 26 L. D. 573.

See Adverse Claims, in which the subject of "protests" is more extensively treated.

[67] Cameron vs. U. S., 252 U. S. 451, aff'g. 250 Fed. 943; see Cameron vs. Bass, 19 Ariz. 646, 168 Pac. 645; see Shank vs. Holmes, 15 Ariz. 229, 137 Pac. 871; Rebecca Co. vs. Bryant, 31 Colo. 119, 71 Pac. 1110; Mineral Farm Co. vs. Barrick, *supra* (64); Peoria Co. vs. Turner, 20 Colo. A. 474, 79 Pac. 915; South End Co. vs. Tinney, *supra* (55). When a mineral entry is canceled the land from that date becomes subject to adverse location. Adams vs. Polglase, 32 L. D. 477, 33 L. D. 31; see Noonan vs. Caledonia Co., 121 U. S. 393; Kendall vs. San Juan Co., 144 U. S. 658; Cameron vs. U. S., 250 Fed. 946, aff'd. 252 U. S. 451; *but see* Shank vs. Holmes, *supra*.

to make the same it would not affect the right and interests of anyone holding under such title without his consent.[68]

§ 1094. Fictitious Person.

A patent issued to a fictitious person is, in legal effect, no more than a declaration that the government thereby conveys the property to no one.[69]

§ 1095. Effect of Patent in Case of Surface Conflict.

The patent confers upon the patentee and his successors in interest the entire surface of the claim, as against every one whose surface lines conflict with that of those described in the patent, together with the extralateral rights conferred by law. But conflicts in respect to extralateral rights growing out of locations whose surface lines do not conflict and which, therefore, are beyond the purview of the proceedings in the land department, are matters solely for the determination of the courts when subsequently arising.[70]

§ 1096. Conclusiveness of Patent.

A patent for a mining claim is conclusive evidence that all antecedent steps necessary to its issuance have been properly and legally taken. It likewise is conclusive evidence of the citizenship and qualifications of the patentee and that the matters which might have been the subject of an adverse claim have been conclusively adjudicated in favor of the patentee.[71]

§ 1097. Alaskan Provisions.

The act of August 1, 1912,[72] applies exclusively to placer claims located in Alaska on or before said date. It does not in any manner

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[68] Wright-Blodgett Co., 36 L. D. 239. With the title passes away all authority of control of the executive department over the land and over the title which it has conveyed. If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. Moore vs. Robbins, 96 U. S. 533; Iron Co. vs. Campbell, 135 U. S. 301; U. S. vs. Rumsey, 22 L. D. 101; Lightner Co. vs. Court, 14 Cal. A. 648, 112 Pac. 909. But a defective patent may be recalled with the consent of the patentee. Simmons, 7 L. D. 286; see U S. vs. Schurz, 102 U. S. 378.

[69] Moffat vs. U. S., 112 U. S. 31; Hyde vs. Shine, 199 U. S. 62. While a conveyance to a fictitious person is void, any real person may be a grantee under a fictitious name and may make a valid conveyance under his real name or under any name he may choose to assume. Wright-Blodgett Co., *supra* [68]. Where the patent is issued to a fictitious person there is no room for the application of the doctrine that a subsequent bona fide purchaser is protected. Moffat vs. U. S., *supra*; Hyde vs. Shine, *supra*.

[70] Round Mt. Co. vs. Round Mt. Co., 36 Nev. 543, 138 Pac. 71, rev'g. 35 Nev. 392, 129 Pac. 308; see, also, Calhoun Co. vs. Ajax Co., 182 U. S. 499, aff'g. 27 Colo. 1, 59 Pac. 607; Empire Co. vs. Bunker Hill Co., 114 Fed. 420; Grand Central Co. vs. Mammoth Co., 29 Utah 490, 83 Pac. 668. The land department now issues patents for noncontiguous pieces of ground embraced within the same mining claim, though separated by a prior location. The granting of such a patent does not necessarily determine the invalidity of such intervening location. Round Mt. Co. vs. Round Mt. Co., *supra*.

[71] Lawson vs. U. S. Co., 207 U. S. 1 aff'g. 134 Fed. 769; El Paso Co. vs. McKnight, *supra* [69]; Work Co. vs. Dr. Jack Pot Co., 194 Fed. 624; Southern Dev. Co. vs. Endereen, 200 Fed. 272; Clark-Montana Co. vs. Butte & S. Co. 233 Fed. 556; Los Angeles Co. vs. Thompson, 117 Cal. 601, 49 Pac. 716; Galbraith vs. Shasta Co., 143 Cal. 94, 76 Pac. 901; Round Mt. Co. vs. Round Mt. Co., *supra* [70]; *but see* Tonopah Co. vs. Fellanbaum, 32 Nev. 278, 107 Pac. 882; Sharkey vs. Candiani, 48 Or. 112, 85 Pac. 219, 7 L. R. A., N. S. 791.

[72] 44 U. S. Code, p. 1590, §§ 387 to 391.

relate to lode claims, nor to placer claims located prior to said date. In administering this act the Mining Regulations in general are followed in so far as they are applicable, and also the additional instructions found in paragraph 60 thereof.

§ 1098. Application for Patent for Alaskan Lands.

In addition to the data necessarily included in all applications for a placer mining patent [73] an application for a patent for that character of ground within Alaska if located on or after August 1, 1912, must contain or be accompanied by a specific statement, under oath, as to each locator who had an interest therein, showing specifically and in detail all placer locations made by him, or in which he was associated, either directly or through any agent or attorney, during the calendar month in which the claim applied for was located. If no locations in excess of those permitted by law (that is, two locations in any calendar month) were made during such calendar month a specific statement, under oath, to that effect, should be submitted. This showing must be made in addition to the sworn statement of the agent or attorney setting forth specifically the names of all placer mining claims, together with the date of location and names of the locators, which were located or attempted to be located by him under powers of attorney during the calendar month in which the placer claim applied for was located. The application for patent must be accompanied by a certified copy of such power of attorney which must show the recordation thereof; but it will be sufficient if such certified copy is attached to and made a part of the abstract of title.[74]

[73] See *supra*, notes 14, 15.

[74] Min. Regs., par. 60.

All notices of applications for patent for lands in the Territory of Alaska, where the survey on which the application is based is not tied to a corner of the public survey, shall, in addition to the description required to be given by existing regulations, describe the monument to which the claim is tied by giving its latitude and longitude and a reference by approximate course and distance to a town, mining camp, river, creek, mountain, mountain peak, or other natural object appearing on the map of Alaska, and any other facts shown by the field notes of survey which shall aid in determining the exact location of such claim without an examination of the record or a reference to other sources. The registers will exercise discretion in the matter of such descriptions in the published notices, bearing in mind the object to be attained, of so describing the land embraced in the claim as to enable its location to be ascertained from the notice of application. U. S. Laws, 50 L. D. 27.

CHAPTER LIV.

POSSESSION.

§ 1099. Possession May Be Actual or Constructive.

A valid location of a lode mining claim carries with it the right of exclusive possession.[1] Location does not follow from possession,[2] but possession follows from location.[3] The possession may be either actual or constructive.[4]

§ 1100. Actual Possession.

Actual possession means a subjection to the will and dominion of the claimant.[5]

§ 1101. When Actual Possession Necessary.

Where possession alone is relied upon it must be actual and connected with active diligent work of exploration.[6]

[1] Wolverton vs. Nichols, 119 U. S. 485, rev'g. 5 Mont. 89, 2 Pac. 306; Malone vs. Jackson, 137 Fed. 878; McLemore vs. Express Co., 158 Cal. 559, 112 Pac. 59; see, also, Belk vs. Meagher, 104 U. S. 279, aff'g. 3 Mont. 80; Del Monte Co. vs. Last Chance Co., 171 U. S. 77. Clipper Co. vs. E i Co., 194 U. S. 226, aff'g. 29 Colo. 377, 68 Pac. 286; Elder vs. Wood, 208 U. S. 226, aff'g. 37 Colo. 174, 86 Pac. 319; Jones vs. Wild Goose Co., 177 Fed. 97; Borgwardt vs. McKittrick Oil Co., 164 Cal. 650, 130 Pac. 417; Batt vs. Stedman, 36 Cal. A. 608, 173 Pac. 99; Hickey vs. Anaconda Co., 33 Mont. 64, 81 Pac. 811; Nash vs. McNamara, 30 Nev. 114, 93 Pac. 405; Berquist vs. W. Virginia Co., 18 Wyo. 234, 106 Pac. 673. Exclusive right of possession can be acquired only by a compliance with the mining laws of the United States and the local laws not inconsistent therewith, requiring discovery and location. Mere naked possession must yield to the higher right obtained by one who has connected himself with the government. U. S. vs. Hurliman, 51 L. D. 258, and cases therein cited. Ferris vs. McNally, 45 Mont. 20, 121 Pac. 890. The locator has the exclusive right of possession of all the surface included within the exterior limits of his claim so long as he makes the improvements or does the annual assessment work required by law. El Paso Co. vs. McKnight, 233 U. S. 256, rev'g. 16 N. M. 721, 120 Pac. 694; Cole vs. Ralph, 252 U. S. 286, rev'g. 249 Fed. 81. In the absence of a specific agreement, one coowner is not entitled to exclusive possession as against the other of the property owned by them. State vs. Roby, 43 Ida. 724, 254 Pac. 211, 33 C. J. 909. When a valid location of a mining claim is once made it vests in the locator and his grantee the right of possession thereto. This right can not be divested by the obliteration or removal without the fault of the locator or his grantees of the stakes and monuments marking its boundaries or the obliteration or removal from the claim of the location notice posted thereon. Tonopah Co. vs. Tonopah Co., 125 Fed. 389.

[2] Belk vs. Meagher, *supra* [1]; see Cole vs. Ralph, *supra* [1].

[3] U. S. vs. Sherman, 288 Fed. 497; Nelson vs. Smith, 42 Nev. 302, 176 Pac. 264, 178 Pac. 625. The right to the possession comes only from a valid location. Consequently, if there is no location, there can be no possession under it. Belk vs. Meagher, *supra* [1]; the controlling force of the doctrine of that case has been abundantly recognized by the courts since its promulgation. See Farrell vs. Lockhart, 210 U. S. 147; rev'g. 31 Utah 155, 86 Pac. 1077; Swanson vs. Sears, 224 U. S. 180; aff'g. 17 Ida. 321, 105 Pac. 1059; Cole vs. Ralph, *supra* [1]; Thallman vs. Thomas, 111 Fed. 277; Zeiger vs. Dowdy, 13 Ariz. 331, 114 Pac. 565.

[4] See North Noonday Co. vs. Orient Co., 1 Fed. 529.

[5] New Jersey Co. vs. Gardner Co., 178 Fed. 772; Coryell vs. Cain, 16 Cal. 567; Attwood vs. Fricot, 17 Cal. 37; English vs. Johnson, 17 Cal. 117; Willows Co. vs. Connell, 25 Ariz. 592; 220 Pac. 1082; Webber vs. Clarke, 74 Cal. 11, 15 Pac. 431; Scadden Flat Co. vs. Scadden, 121 Cal. 33, 53 Pac. 440; Allaire vs. Ketcham, 55 N. J. Eq. 168, 35 Atl. 900. Where a mining location has been properly located and marked out upon the ground and its claimant, personally or by agent, is present thereon, working and developing it, and keeping up the boundary stakes and marks thereof, he is in actual possession of the whole claim. North Noonday Co. vs. Orient Co., *supra* [4]; Dwinnell vs. Dyer, 145 Cal. 20, 78 Pac. 247, 7 L. R. A., N. S. 763. See, also, Lange vs. Robinson, 148 Fed. 799.

[6] See Union Oil Co. vs. Smith, 249 U. S. 348, aff'g. 166 Cal. 217, 135 Pac. 966; Cole vs. Ralph, *supra* [1]; Whiting vs. Straup, 17 Wyo. 1, 95 Pac. 849; Sparks vs. Mount, 29 Wyo. 1, 207 Pac. 1099. A mineral claimant in actual possession of a mining claim is entitled to hold the same against all the world except the government of the United States. Harris vs. Kellogg, 117 Cal. 484, 49 Pac. 708; New

§ 1102. When Actual Possession Unnecessary.

Actual possession is not necessary to protect the title acquired by a valid location.[7] But, until patent issues, the claimant must continue substantially to comply with the laws of congress and with the valid laws of the state and the valid rules established by the miners of the district within which the claim is situate.[8]

§ 1103. Constructive Possession.

Actual possession is not essential to the validity of the title obtained by a valid location; and, until such location is terminated by abandonment or forfeiture, no right nor claim can be acquired by adverse entry.[9]

England Oil Co. vs. Congdon, 152 Cal. 211, 92 Pac. 180; Hullinger vs. Big Sespe Co., 28 Cal. A. 69, 151 Pac. 369. The posting of a notice upon the public land and claiming a certain designated portion thereof as a mining claim, recording the notice and doing the so-called assessment work without a discovery of mineral, is a speculative proceeding conferring no rights upon the pretended locator as against the government, although so long as such locator remains in possession and with due diligence prosecutes work toward discovery he is entitled to protection against all forcible surreptitious, or clandestine entry and intrusion upon such possession by a stranger. U. S. vs. Midway Oil Co., 232 Fed. 624. See, also, Nevada Sierra Oil Co. vs. Home Oil Co., 98 Fed. 674; Johanson vs. White, 160 Fed. 902; Redden vs. Harlan, 2 Alaska 402; Weed vs. Snook, 144 Cal. 439, 77 Pac. 1023; Borgwardt vs. McKittrick Co., *supra* (1). See Cook vs. Johnson, 3 Alaska, 541.

If a party goes upon the mineral lands of the United States and works thereon without complying with the requirements of the mining laws, and relies exclusively on his possession or work, and a second party locates peaceably a mining claim covering the same ground, and in all respects complies with the requirements of the federal and state laws and local regulations, then such party is entitled to the possession of such mineral ground as against the party in prior possession, who is, from the time said second party has perfected his location and complied with the law, a transgressor. Horswell vs. Ruiz, 67 Cal. 111, 7 Pac. 197. See, also, Farrell vs. Lockhart, *supra* (3); Swanson vs. Sears, *supra* (5); New England Co. vs. Congdon, 152 Cal. 213, 92 Pac. 180; Nelson vs. Smith, *supra*.(3) In other words, possession without location carries no title. Hopkins vs. Noyes, 4 Mont. 550, 2 Pac. 281. So, mere possession not based upon a valid location would not prevent a valid location under the law. Belk vs. Meagher, 3 Mont. 65, aff'd. 104 U. S. 279.

If in possession of the property he may prevent trespass upon his claim, by force sufficient to repel the same, but if he himself has been dispossessed he has no right to recover possession by force and by a breach of the peace. The law provides a more peaceable way for doing it. Hickey vs. U. S., 168 Fed. 536, citing State vs. Bradbury, 67 Kan. 808; 74 Pac. 231.

A temporary suspension of work for a few days for the purpose of procuring tools and necessary supplies to continue the diligent and bona fide prosecution of work does not constitute a break in the claimant's actual possession, and he is entitled to protection against an intruder under such circumstances. Hanson vs. Craig, 161 Fed. 863, rev'd. on rehearing, 170 Fed. 62. So, as against a trespasser without color of title prior possession will support an action in ejectment. Aurora Hill Co. vs. Eighty Five Co., 34 Fed. 515; see Little Sespe Co. vs. Baeigalupi, 167 Cal. 381, 139 Pac. 202; see, also, Sparks vs. Pierce, 115 U. S. 411; Con. Mutual Oil Co. vs. U. S., 245 Fed. 525. In the absence of physical markings upon the surface of a mining claim the right of the mineral claimant does not extend beyond the *possessio pedis*. Hanson vs. Craig, *supra*; Hess vs. Winder, 30 Cal. 358; Roberts vs. Wilson, 1 Utah 296; see Dower vs. Richards, 151 U. S. 658; aff'g. 81 Cal. 44, 22 Pac. 304, s. c. 73 Cal. 477, 15 Pac. 105; Johanson vs. White, *supra*; New England Co. vs. Congdon, *supra*; Copper Globe Co. vs. Allman, 23 Utah 410, 64 Pac. 1019. For instances of what will not be sufficient to constitute "actual possession" see Whiting vs. Straup, *supra*; Granlick vs. Johnston, 29 Wyo. 349, 213 Pac. 98.

[7] Belk vs. Meagher, *supra* (1); Union Oil Co. vs. Smith, *supra* (6); Holdt vs. Hazzard, 10 Cal. A. 440, 102 Pac. 540; Kirk vs. Meldrum, 28 Colo. 453, 65 Pac. 634.

[8] Zerres vs. Vanina, 134 Fed. 617, aff'd. 150 Fed. 564; Sisson vs. Sommers, 24 Nev. 387, 55 Pac. 829. A discovery of mineral by a qualified locator upon unappropriated public lands initiates substantial rights as against the United States and all the world. If the locator makes a record of his claim in accordance with § 2324 of the Rev. Stats., 5 U. S. Comp. St., p. 5525, § 4620, and the pertinent local laws and regulations, he has, by the terms of § 2322, 5 U. S. Comp. St., p. 5466, § 4617, an exclusive right of possession to the extent of his claim as located, with the right to extract the minerals, even to exhaust them without paying any royalty to the United States as owner and without ever applying for a patent or seeking to obtain title in fee. The continued possessory right is subject to the performance of the annual labor as provided in § 2324, for upon the failure to do this the claim is open to relocation by others at any time before resumption of work, or relocation by the original locator. Union Oil Co. vs. Smith, *supra* (6); Rohn vs. Iron Chief Co., 186 Cal. 703, 200 Pac. 644.

[9] Mason vs. Washington-Butte Co., 214 Fed. 35; Betsch vs. Umphrey, 252 Fed. 574. A location based upon discovery gives an exclusive right of possession and

§ 1104. Possession While Completing Location.

Whenever preliminary work is required to define and describe the claim located, the original locator is protected in the possession of the claim until sufficient excavations and development can be made so as to justify the necessary work to extract the metal. Otherwise the purpose of allowing free exploration would be defeated, and force and violence in the struggle for possession would determine the rights of the claimants.[10]

§ 1105. Possession Within Boundaries.

Possession of a part of a mining claim carries the right of possession to the whole.[11]

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enjoyment and so long as it is kept alive by performance of the required annual assessment work prevents any adverse location of the land. Cole vs. Ralph, *supra* (1); see, also, Swanson vs. Sears, *supra* (3). A person having a valid location may remain out of the actual possession without the doing of the annual assessment work thereon with no risk other than being dispossessed by the government or by some adverse relocator. See U. S. vs. McCutchen, 238 Fed. 579; Lancaster vs. Coale, 27 Colo. A. 495, 150 Pac. 821, as there can be no complete forfeiture until a third person, or the government, acquires title to the claim; Interstate Oil Corp., 50 L. D. 262; Worthen vs. Sidway, 72 Ark. 226, 79 S. W. 777; McDonald vs. McDonald, 16 Ariz. 103, 141 Pac. 750; see, also, Union Oil Co. vs. Smith, *supra* (6), in which case the court losing sight of the distinction between forfeiture and abandonment in mining cases said: that the possessory right of the locator "is lost by abandonment as by the nonperformance of the annual labor." In Alaska there can be no "resumption of labor." This is contrary to provisions of the general mining law (5 U. S. Comp St., p. 5525, § 4620) which expressly gives the right to resume work upon the claim after failure to perform it, provided no other location has been made in the meantime. See, Thatcher vs. Brown, 190 Fed. 708; Ebner Co. vs. Alaska Co., 210 Fed. 599; Chichagoff Co., vs. Alaska Handy Co., 45 Fed. (2d.) 553.

[10] Erhardt vs. Boaro, 113 U. S. 535; Doe vs. Waterloo Co., 55 Fed. 15, aff'd. 70 Fed. 455. During the period of time prescribed by the local statute for the completion of the location the claimant is protected in his possession. Such possession, as is shown in the text, is regarded as a necessity and is equivalent to actual possession during the time for the making of the formal location. Union Oil Co. vs. Smith, *supra* (6); Cole vs. Ralph, *supra* (1); Sanders vs. Noble, 22 Mont. 110, 55 Pac. 1037. In Rooney vs. Barnette, 200 Fed. 700, it is held that the location of mineral ground gives to the locator before discovery, and while he complies with the federal statutes and the state and local rules and regulations, the valuable right of possession against all intruders, and this right he can convey to another.

When a locator's exclusive right to the possession of his claim with its appurtenances ceases either by reason of his failure to perform all the acts requisite to a completed mining location, or his failure to discover mineral within the statutory period after his location was initiated, then his exclusive right to the possession based upon a mining location is at an end and he is thereafter holding possession of the public lands by the sufferance of the sovereign owners. McKenzie vs. Moore, 20 Ariz. 1, 176 Pac. 568.

[11] Bulette vs. Dodge, 2 Alaska 431; Roberts vs. Wilson, *supra* (6); see Campbell vs. Rankin, 99 U. S. 261; English vs. Johnson, *supra* (5). Constructive possession extends to the entire location if its boundaries are clearly defined although there may be an absence of discovery therein, provided that the discovery is being sought by actual exploitation of the ground. Nevada Sierra Co. vs. Home Oil Co., *supra* (3); Hess vs. Winder, *supra* (6); Miller vs. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 414, affi'd. 197 U. S. 313; *but see* Hanson vs. Craig, *supra* (3). The unquestionable right of a locator of a mining claim to the area within the boundaries of the claim marked upon the ground by the requisite monuments as described in the location notice posted at the location monument carries the right of possession to every appurtenant belonging to the realty including timber, soil, country rock, percolating waters, natural springs, except certain mineral springs, and some other matter. McKenzie vs. Moore, *supra* (10); *but see* Campbell vs. Goldfield Co., 36 Nev. 458, 136 Pac. 976, in which it is said that the locator of a mining claim is not entitled to the water flowing from a spring in a natural channel merely because the spring is within the exterior boundaries of his mining claim, in the absence of a proper appropriation of the water flowing from such spring; *compare* Schwab vs. Beam, 86 Fed. 43, and Snyder vs. Colorado Co., 181 Fed. 62; and, in case of a lode location, of all veins, lodes and ledges throughout their entire depth the top or apex of which lies inside the surface lines thereof extended downward vertically beneath the surface or within the extralateral rights conferred by the mining statutes, that is not in the actual possession of an adverse holder. Golden Cycle Co. vs. Christmas Co., 204 Fed. 940; see, also, U. S. Co. vs. Dawson, 134 Fed. 769, aff'd. 207 U. S. 1; Bradford vs. Morrison, 212 U. S. 394; aff'g. 10 Ariz. 214, 86 Pac. 6; Original Co. vs. Abbott, 167 Fed. 683; Dwinnell vs. Dyer, *supra* (5); Peoria Co. vs. Turner, 20 Colo. A. 478, 79 Pac. 915; see, also, Tom Reed Co. vs. United Eastern Co., 24 Ariz. 269, 209 Pac. 283; *but see*, Twenty-One Co. vs. Original Sixteen Mine, 255 Fed. 658, aff'd. 265 Fed. 547; *compare* St. Louis Co. vs. Montana Co, 113 Fed. 900; aff'd. 194 U. S. 235. It

§ 1106. Evidence of Possession.

Working the property,[12] and building a cabin, living in a tent thereon,[13] and working the claim, or the presence of a watchman is evidence of possession.[14]

§ 1107. Notice of Possession.

The unequivocal possession of a mining claim is notice to all the world of the possessor's rights thereunder.[15]

§ 1108. Possession of Coowners.

Cotenants of a mining claim hold by unity of possession and the possession of one is presumed to be for the benefit of all.[16] The failure of one of the cotenants to perform the annual assessment work does not thereby forfeit his possession.[17] But his interest may become the property of his coowners when they make the required expenditure[18] and "advertise" him out.[19]

§ 1109. Possession Under Statute of Limitations.

The holding and working of a mining claim for the period of time prescribed by the local statute of limitations do not operate to confer title to the claim in the absence of discovery therein during such time.[20]

§ 1110. Mining Claim as Property.

A valid mining claim is property in the fullest sense of the word, distinct from the land itself, vendable, mortgagable, inheritable, and taxable without infringing the title of the United States.[21]

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is well established law that the owner of a mining claim has the exclusive right of possession and enjoyment of the surface within the limits of his location without regard to the width or extent of the vein or lode therein. Calhoun Co. vs. Ajax Co., 182 U. S. 499, aff'g. 27 Colo. 1, 59 Pac. 607; Bradford vs. Morrison, *supra*; Doe vs. Waterloo Co., *supra* (10).

[12] Koons vs. Bryson, 69 Fed. 297; Cosmos Co. vs. Gray Eagle Co., 112 Fed. 4; Lange vs. Robinson, *supra* (5); see Badger Co. vs. Stockton Co., 139 Fed. 838; Costello vs. Mulheim, 9 Ariz. 422, 84 Pac. 906. See Butte & S. Co. vs. Clark-Montana Co., 249 U. S. 12, aff'g. 248 Fed. 609; aff'g. 233 Fed. 547.

[13] Lange vs. Robinson, *supra* (5).

[14] Justice Co. vs. Barclay, 82 Fed. 561. Every locator is presumed to be the owner of his claim and of the mineral therein until some one else shows a better right thereto. Leadville Co. vs. Fitzgerald, Fed. Cas. 8158. Long continued possession resumes ownership. Risch vs. Wiseman, 36 Or. 484, 59 Pac. 1111. But mere possession is not good as against one who has complied with the mining laws. Foster vs. Black, 20 Ariz. 68, 176 Pac. 847; DuPrat vs. James, 65 Cal. 556, 4 Pac. 562.

[15] Butte & S. Co. vs. Clark-Montana Co., *supra* (12).

[16] Turner vs. Sawyer, 150 U. S. 578. One cotenant can recover possession of an entire claim as against all persons except his cotenants. Erhardt vs. Boaro, *supra* (10); Black Lode vs. Excelsior Lode, 22 L. D. 343; Field vs. Tanner, 32 Colo. 278, 75 Pac. 916.

[17] Union Con. Co. vs. Taylor, 100 U. S. 40; Faubel vs. McFarland, 144 Cal. 717, 78 Pac. 261; Lockhart vs. Leeds, 10 N. M. 597, 63 Pac. 48.

[18] Miller vs. Chrisman, *supra* (11).

[19] Evalina Co. vs. Yosemite Co., 15 Cal. A. 716, 115 Pac. 946; see, also, Riste vs. Morton, 20 Mont. 139, 49 Pac. 656. See Becker-Franz Co. vs. Shannon Co., 256 Fed. 522.

[20] Cole vs. Ralph, *supra* (1); Humphreys vs. Idaho Co., 21 Ida. 126, 120 Pac. 823. As to sufficiency of discovery see Cameron vs. U. S. 252, U. S. 450, aff'g. 250 Fed. 943. As to appropriate use, see Adams vs. Smith Co., 273 Fed. 652. As to what constitutes "working and holding" of a mining claim, see dissenting opinion in Ralph vs. Cole, 249 Fed. 95.

[21] Wood vs. Elder, *supra* (1); Bradford vs. Morrison, *supra* (11); Cole vs. Ralph, *supra* (1); Earhart vs. Powers, 17 Ariz. 55, 148 Pac. 286. Of the two titles to public lands valuable chiefly for minerals, the first confers the right of possession for the purpose of carrying on mining operations on certain conditions, and the second is

§ 1111. Rights of Heirs and Assigns.

By the express terms of the act of congress, the locator, his heirs and assigns have certain rights in a mining claim, and it provides for a conveyance thereof to the grantee to the same extent that such rights were possessed by the grantor.[22]

§ 1112. How Controversies Determined.

The law of possession is that the prior location and occupation carry with them the prior and better right.[23] All controversies must be determined by the law of possession;[24] and no greater proof of a right to recover can be required in a state court than would be required in a court of the United States, unless made so by a statute of the state.[25]

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an absolute title which may or may not be acquired by the locator or his grantees by other and a different consideration, and this title depends on no conditions. Teller vs. U. S., 113 Fed. 281; see, also, Branagan vs. Dulaney, 2 L. D. 714; Miller vs. Hamley, 31 Colo. 501, 74 Pac. 980. The possessory right to a mining claim properly is assessed as real estate. Bakersfield Co. vs. Kern County, 144 Cal. 148, 77 Pac. 892; it is subject to judgment lien upon real estate. Bradford vs. Morrison, *supra* (11); Butte Co. vs. Frank, 25 Mont. 344, 65 Pac. 1; Phoenix Co. vs. Scott, 20 Wash. 48, 54 Pac. 777. It may be sold under execution. McKeon vs. Bisbee, 9 Cal. 137, and see, Roseville Co. vs. Iowa Gulch Co., 15 Colo. 29, 24 Pac. 920.

[22] Black vs. Elkhorn Co., 163 U. S. 452; approved and distinguished in Bradford vs. Morrison, *supra* (11); O'Connell vs. Pinnacle Co., 131 Fed. 106, aff'd. 140 Fed. 854; Bay vs. Oklahoma Co., 13 Okla. 430, 73 Pac. 936. The law does not purport to grant a fee simple estate or any title whatsoever. It relates to the right of possession only. It grants nothing to the heirs except the right to inherit. They can inherit only the identical interests and rights which were vested in the deceased ancestor during his lifetime. His heirs are not designated as a class entitled to a vested exclusive right to acquire the title to mining property from the government, as such a right would be incompatible with the locator's right of alienation and incompatible with the rights of the several states to tax mining claims and enforce payment by sale. O'Connell vs. Pinnacle Co., *supra*. See, also, Costello vs. Cunningham, 16 Ariz. 447, 147 Pac. 701; Keeler vs. Trueman, 15 Colo. 143, 25 Pac. 311.

[23] Meydenbauer vs. Stevens, 78 Fed. 787. Although actual possession of mineral land upon the public domain without a location is valid and will be protected against a mere intruder it will not avail as against one who peaceably enters for exploration or makes a valid location. Ferris vs. McNally, 45 Mont. 30, 121 Pac. 889. See, also, *supra*, note 6. In Noyes vs. Black, 4 Mont. 527, 2 Pac. 769, the court said: "This is a case of actual possession against a valid location. The plaintiffs by virtue of possession alone, attempted to hold mining ground, as against a valid location of the same ground. This they can not do. In the case of Belk vs. Meagher, 3 Mont. 80, 81, we held that 'there is no grant from the government under the act of congress, unless there is a location according to law, and the local rules and regulations. Such a location is a condition precedent to the grant. Mere possession, not based upon a valid location, would not prevent a valid location under the law.' The Supreme Court of the United States affirmed that decision in 104 U. S. 284. * * * As against a stranger, possession is sufficient to maintain trespass or ejectment. Have the plaintiffs attempted to stand upon bare possession, without a location, as against the defendants who have a location—a grant which carries with it the right of possession, and the right to acquire a full title? In such a case there is no presumption of title in favor of the party in possession. But if there was, he who shows a valid location as against naked possession had the better right." See, also, Horswell vs. Ruiz, 67 Cal. 111, 7 Pac. 197; Le Fevre vs. Amonson, 11 Ida. 45, 81 Pac. 71; Saxton vs. Perry, 47 Colo. 263, 107 Pac. 281.

[24] O'Connell vs. Pinnacle Co., *supra* (22). In suits to determine the right of possession of mining claims no presumption of fact as to title arises. Title and right of possession are facts to be established by the evidence. Bay State Co. vs. Brown, 21 Fed. 167.

[25] Harris vs. Kellogg, *supra* (6); see Haws vs. Victoria Co., 160 U. S. 317. A valid title or possessory right to a mining claim can not be established without proof of compliance with the local rules and regulations of miners as well as with the federal and state statutes. Butte City Co. vs. Baker, 196 U. S. 119, aff'g. 28 Mont. 222; Creede Co. vs. Uinta Co., 196 U. S. 337; aff'g. 119 Fed. 164; Clason vs. Matko, 223 U. S. 646, aff'g. 10 Ariz. 175; Woodruff vs. North Bloomfield Co., 18 Fed. 753; Con. Republican Co. vs. Lebanon Co., 9 Colo. 343, 12 Pac. 212; Becker vs. Pugh, 9 Colo. 590, 12 Pac. 906; Street vs. Delta Co., 42 Mont. 371, 112 Pac. 701; Sisson vs. Sommers, *supra* (8); *but see* Butte & S. Co. vs. Clark-Montana Co., *supra* (12); Zerres vs. Vanina, *supra* (8); Stock vs. Plunkett, 181 Cal. 193, 183 Pac. 657; Thompson vs. Barton Gulch Co., 63 Mont. 190, 207 Pac. 108; Fisher vs. Jackson, 120 Wash. 107, 206 Pac. 929. For a discussion of this subject see Hedrick vs. Lee, 39 Ida. 42, 227 Pac. 27.

§ 1113. Valid Mining Claim Not Subject to Governmental Reservation Nor Disposal.

The United States is without power to deprive the claimant of a valid mining claim, of its exclusive possession and enjoyment.[26] In other words, if a valid mining location was made prior to the withdrawal of deposits of mineral from location its claimant is not subjected to any forfeitures that did not apply to the mining act under which the claim was initiated. The mere fact that the particular mineral deposit so appropriated by him no longer is subject to location is of no importance. The rights of the locator or his grantee remain unimpaired even to the extent of a resumption of labor after the withdrawal. His rights after resumption are restored to exactly the same standing that they had, if no default had been made. Furthermore, if such claimant complies with all the requisites necessary to entitle him to a patent its issuance remains the mere ministerial duty of the Secretary of the Interior which may be compelled by a writ of mandamus.[27]

§ 1114. Right of Locator as Against Railroad Grant.

The possessory right of the locator of a valid mining claim on the public lands is superior to any title or right of possession by a subsequent patent and grant to a railroad company. As to all junior claimants a patent to such land as nonmineral is conclusive.[28]

ADVERSE POSSESSION

§ 1115. Prescriptive Title.

Adverse possession of a mining claim to ripen into a title by prescription must be in accordance with the laws of the state and the local rules and regulations of the mining district within which the claim may lie.[29]

§ 1116. General Rule.

It is a general rule that the acts of dominion must be adapted to the particular land, its condition, locality, and appropriate use,[30] for he

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[26] See U. S. vs. West, 30 Fed. (2d) 742, dist'g. Hodgson vs. Midwest Oil Co., 17 Fed. (2d) 71; aff'd. with mod. 280 U. S. 307; U. S. vs. Deasey, 24 Fed. (2d) 108; Van Ness vs. Rooney, 160 Cal. 131, 116 Pac. 392; Chino Co. vs. Hamaker, 39 Cal. A. 274, 178 Pac. 738; *but see* Metson vs. O'Connell, 52 L. D. 313.

[27] U. S. vs. West, *supra* [26].

[28] Chino Co. vs. Hamaker, *supra* [26].

[29] Glacier vs. Willis, 127 U. S. 471; Tyee Con. Co. vs. Langstedt, 136 Fed. 124; Bodcaw Co. vs. Goode, 160 Ark. 48, 254 S. W. 345; Standard Co. vs. Habishaw, 132 Cal. 115, 64 Pac. 113; Madden vs. Hall, 21 Cal. A. 541, 132 Pac. 213; Mattes vs. Hall, 21 Cal. A. 552, 132 Pac. 213; Hopkins vs. Noyes, 4 Mont. 550, 2 Pac. 280; Manning vs. Kansas Co., 181 Mo. 359, 81 S. W. 140; see Springer vs. S. P. Co., 67 Utah 590, 248 Pac. 819; Lavagnino vs. Uhlig, 26 Utah 1, 71 Pac. 1046, aff'd. 198 U. S. 443; Newport Co. vs. Bead Lake Co., 110 Wash. 120, 188 Pac. 27. Whatever the rule in other jurisdictions may be, to create a bar under the statute of limitations in California five elements must exist before one can acquire title by adverse possession. The possession must be actual, open and notorious, continuous and uninterrupted for the statutory period of five years, exclusive, hostile, and under a claim of right, and taxes must be paid by the adverse claimant. Sheehan vs. All Persons, 195 Cal. 546, 252 Pac. 337; Weyse vs. Biedebach, 86 Cal. A. 736, 261 Pac. 1086; Wood vs. Henley, 88 Cal. A. 441, 263 Pac. 870. The burden of proving all essential elements of an adverse possession or prescriptive title is upon the party relying upon it. San Francisco vs. Wells, 196 Cal. 705, 239 Pac. 319; Phelan vs. Drescher, 92 Cal. A. 393, 268 Pac. 465; Scott vs. Warden, __ Cal. A. __, 296 Pac. 95.

A paper title is not essential to prevent the running of the statute of limitations under a claim of adverse possession. Minnesota Co. vs. Brasier, 18 Mont. 444, 45 Pac. 632; Risch vs. Wiseman, 36 Or. 484, 59 Pac. 1111, and cases therein cited. See, also, Phelan vs. Drischer, *supra*; Golden vs. Murphy, 31 Nev. 395, 103 Pac. 394.

[30] Cox vs. Hart, 260 U. S. 433; aff'g. 270 Fed. 51; Cox vs. Hart, 42 L. D., 594; Adams vs. Smith, *supra* [20]; Webber vs. Clarke, 74 Cal. 11, 15 Pac. 431; Brookshire Oil

who asserts an exclusive ownership over the land must perform acts in harmony with his claim of title.[31]

§ 1117. Patent Application.

When, in patent proceedings title to mining ground is claimed by adverse possession it must be shown that there was "discovery,"[32] annual assessment work, the boundaries so marked and indicated as to afford actual notice of the extent and boundaries of the claim and continual actual possession, exclusion of all adverse claimants for the full period prescribed by the local statute of limitations;[33] and, when so provided by local law, the payment of taxes.[34]

§ 1118. Insufficient Acts.

Mere possession of mining ground coupled with the payment of taxes,[35] the occasional use of the ground without the knowledge of the owner of the repudiation of his rights,[36] performing desultory work upon the claim,[37] secret underground work,[38] the possession of the dip of the vein or lode without possession of the apex thereof[39] pos-

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Co. vs. Casmalia Oil Co., 156 Cal. 211, 103 Pac. 927; see Scadden Flat Co. vs. Scadden, 121 Cal. 33, 53 Pac. 440; Gibbons vs. Yosemite Co., 190 Cal. 172, 211 Pac. 4. In ascertaining the limits of a mining possession, the same common law principles are to be relied upon as those which regulate the right to the possession of agricultural lands, although the *indicia* of possession are not necessarily the same; the possession in such cases may be proved by satisfactory evidence of notorious acts of occupation, reference being had to the nature of the lands, the uses to which they can be put, and to the general practices or customs of the region with respect to the occupation of lands of the particular character, but the possession, however proved, being established, the presumption of grant arises. Lux vs. Haggin, 69 Cal. 255, 10 Pac. 674. See, also, Northcut vs. Church, 135 Tenn. 541, 188 S. W. 220.

[31] *Id.* Possessory titles do not live upon possession alone. They must be supported by a compliance with the law that gives the right to and sustains the possession. The mere naked possession of a mining claim upon the public lands is not sufficient to hold such claim as against a subsequent location, made in pursuance of the law and kept alive by a compliance therewith. Hopkins vs. Noyes, *supra* (1); see Con. Mutual Oil Co., vs. U. S., 245 Fed. 525; Ferris vs. McNally, 45 Mont. 20, 121 Pac. 890.

[32] Cole vs. Ralph, *supra* (1); Humphreys vs. Idaho Co., *supra* (20). See Springer vs. S. P. Co., *supra* (29); Law vs. Fowler, 45, Ida. 1, 261 Pac. 667.

[33] *Id.*; see Belk vs. Meagher, *supra* (1); Upton vs. Santa Rita Co., 14 N. M. 97, 89 Pac. 275; Law vs. Fowler, *supra* (32); Childers vs. Laham, 19 N. M., 301, 124 Pac. 924. In Jones vs. Prospect Co., 21 Nev. 339, 31 Pac. 642, it was said: "The defendant claims ownership of the tunnel by virtue of adverse possession. Possession alone for the term of the statute is not sufficient to divest the title of the true owner. It must be possession under claim of title in hostility to that owner. McDonald vs. Fox, 20 Nev. 364, 22 Pac. 234. This claim of exclusive and hostile ownership the notice tended to establish, without regard to whether it was sufficient under the mining statutes; and it should therefore have been admitted."

Uninterrupted possession of a mining claim by part of the owners for fifteen years under assertion of right based on recorded conveyances purporting to pass to them the whole claim, doing whatever was necessary to preserve it, with no recognition of others as coowners, is exclusive, hostile, and not in any relationship of trust or confidence. Hodgson vs. Federal Oil Co., 274 U. S. 20, aff'g. 5 Fed. (2d) 442, aff'd. 274 U. S. 15. See, generally, Gibson vs. Hjul, 32 Nev. 360, 108 Pac. 758.

[34] See Glacier vs. Willis, *supra* (20); Allan vs. McKay, 120 Cal. 352, 52 Pac. 828; Wilder vs. Nicolaus, 50 Cal. A. 776, 195 Pac. 1068; Woods vs. Prim, 13 Fed. (2d) 572, see *supra*, note (1).

[35] Adams vs. Smith, *supra* (20).

[36] See *supra*, note 30; see, also, Stewart vs. Rees, 25 L. D. 447. The record owner must have notice, actual or constructive, that the claimant's possession is hostile. Mattes vs. Hall, *supra* (2); Gallo vs. Gallo, 31 Cal. A. 189, 159 Pac. 1058.

The possession, to be adverse, must be inconsistent with the title of the true owner, who is out of possession, and of such a character as to operate as notice to him that the possession held, under a claim of right, or color of title, sufficient to establish an ouster of the owner. Thompson vs. Pioche, 44 Cal. 517; Mauldin vs. Cox, 67 Cal. 387, 7 Pac. 804; Hibberd vs. McCosker, 55 Cal. A. 571, 203 Pac. 810; McDonald vs. Fox, *supra* (33).

[37] Pacific Co. vs. Pioneer Co., 205 Fed. 591.

[38] Badger Co. vs. Stockton Co., 139 Fed. 838; see Last Chance Co. vs. Bunker Hill Co., 131 Fed. 579; Pierce vs. Barney, 209 Pa. St. 132, 52 Atl. 152.

[39] Davis vs. Shepherd, 31 Colo. 141, 72 Pac. 57. As to following dip from apex, see Golden vs. Murphy, 31 Nev. 395, 103 Pac. 394; rehearing denied, 31 Nev. 395, 105 Pac. 99.

session of the surface, or of the minerals thereunder, where there has been a severance of the surface and of the mineral rights,[40] are acts insufficient to constitute adverse possession under a state statute of limitations.

§ 1119. Right to Patent Established.

Actual, open, notorious, exclusive, continuous and hostile possession for a period equal to the time prescribed by the local statute of limitations,[41] when coupled with discovery [42] and the expenditure of at least five hundred dollars upon the claim [43] establishes the right to a patent in the absence of an adverse claim [44] filed in land office.[45]

§ 1120. Loss of Adverse Right.

An adverse right will be lost if not made the subject of an adverse claim and suit thereunder when patent is adversely applied for.[46] The adverse right must commence anew from and after the date of the patent.[47]

§ 1121. Tacking.

The possession of an adverse possessor may be coupled with that of his grantee to complete the statutory period of adverse possession.[48]

§ 1122. Severance.

It is well settled that possession of the surface after there has been a severance of the minerals is not possession of the minerals, and can

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[40] Con. Coal Co. vs. Yonts, 25 Fed. (2d) 406; Catlin Co. vs. Lloyd, 176 Ill. 275, 52 N. E. 144; *Id.* 180 Ill. 398, 54 N. E. 214; Crowe Co. vs. Atkinson, 85 Kan. 357, 116 Pac. 499; Lulay vs. Barnes, 172 Pa. St. 331, 34 Atl. 52; see Gordon vs. Park, 219 Mo. 600, 117 S. W. 1163; see, also, Original Co. vs. Abbott, 167 Fed. 681; Alabama Co. vs. Broadhead, 210 Ala. 545, 98 So. 789; Couch vs. Armory, 154 N. Y. S. 945; see Vance vs. Clark, 252 Fed. 495.

[41] Hamilton vs. Southern Nevada Co., 33 Fed. 562; Tyee Co. vs. Langstedt, *supra* [29]; Pacific Co. vs. Pioneer Co., *supra* [31]; see Taylor vs. Monday, 104 Okla. 241, 231 Pac. 75.

[42] See *supra*, note 32, and § 343.

[43] Capital No. 5 Claim, 34 L. D. 462; see, also, Donnelly vs. U. S., 228 U. S.; Humphreys vs. Idaho Co., *supra* [20].

[44] Belk vs. Meagher, *supra* [1]; Blackburn vs. Portland Co., 175 U. S. 587; Stewart vs. Rees, 21 L. D. 446; Horst vs. Shea, 23 Mont. 397, 59 Pac. 364.

[45] McCowan vs. McClay, 16 Mont. 241, 40 Pac. 602; see Upton vs. Santa Rita Co., *supra* [33].

[46] 6 Fed. St. Ann., p. 555, § 2325; People vs. Court, 19 Colo. 343, 35 Pac. 731; Marshall Co. vs. Kirtley, 12 Colo. 410, 21 Pac. 492, wherein it was said: "The issuance of a patent to the appellant can not be stayed by reason of some one else claiming a better right to the possession of the premises, unless the person making such claim file the same against the claim made by the applicant." Lancaster vs. Coale, *supra* [9]; Round Mt. Co. vs. Round Mt. Co., 36 Nev. 543, 138 Pac. 71, rev'g. 35 Nev. 392, 129 Pac. 308.

[47] Redfield vs. Parks, 132 U. S. 239; see Tyee Co. vs. Langstedt, *supra* [29]; Tyee Co. vs. Jennings, 137 Fed. 863; see, also, Clark vs. Barnard, 15 Mont. 176, 38 Pac. 834; N. P. R. Co. vs. Cash, 67 Mont. 585, 216 Pac. 782; South End Co. vs. Tinney, 22 Nev. 221, 38 Pac. 401. Adverse possession can not be initiated and the statute of limitations does not begin to run before the issuance of patent when such possession is asserted in defense of a claim adverse to that of the government. N. P. R. Co. vs. Slaght, 205 U. S. 122, aff'g. 39 Wash. 576, 81 Pac. 1062; Hempill vs. Moy, 31 Ida. 69, 169 Pac. 288, and cases therein cited (explaining N. P. R. Co. vs. Pyle, 19 Ida. 3, 112 Pac. 678). A person may admit title in the government and yet hold adversely to others. Francoeur vs. Newhouse, 43 Fed. 236; Harvey vs. Holles, 160 Fed. 531; Eastern Oregon Co. vs. Brosnan, 173 Fed. 867, aff'g. 147 Pac. 807; Allen vs. McKay, *supra* [34]; Fellows vs. Evans, 33 Or. 30, 53 Pac. 491; Boe vs. Arnold, 54 Or. 52, 102 Pac. 290; Sharpe vs. Catron, 67 Or. 368, 136 Pac. 20; Phipps vs. Stancliff, 110 Or. 299, 222 Pac. 340. See C. J., §§ 224, 225.

[48] Northcutt vs. Church, *supra* [36]; see J. B. Gathright Co. vs. Begley, 200 Ky. 808, 255 S. W. 837. But the successor in possession of a tenant at will who at all times recognized the rights of the owner can not tack the possession of such tenant to his own for the purpose of making title by adverse possession. Original Co. vs. Abbott, 167 Fed. 681; Sawyer vs. Kendall, 10 Cush. (Mass.) 241.

give the surface owner no title thereto. But, unless there has been such severance, it is a general presumption that one who has possession of the surface has possession of the subsoil also. But when by conveyance or reservation a separation has been made of the ownership of the surface from that of the minerals below the surface, the owner of the former can acquire no title to the latter by his exclusive and continued enjoyment of the surface; nor does the owner of the minerals lose his right of possession by any length of nonusage; but to lose his right he must be disseized, and there can be no disseizen by an act which does not actually take the minerals out of his possession.[49]

[49] It is essential in order to effect adverse possession of minerals, after severance of title from the surface, that the adverse claimant do some act or acts evincing a permanency of occupation and use, as distinguished from acts merely occasional, desultory or temporary, acts that are suitable to the enjoyment and appropriation of the minerals so claimed and hostile to the rights of the owner; but the mere possession of the surface after such severance does not give title to the minerals. Birmingham Co. vs Boshell, 190 Ala. 597, 67 So. 403; Gill vs. Colton, 12 Fed. (2d) 533; Con. Coal Co. vs. Yonts, *supra* [40]. A grant by a land owner of the underlying minerals implies the right to construct and operate roads and tram and railway tracks upon the surface for the use of the mine, to sink shafts, run tunnels, and remove minerals through such openings, erect machinery, store water for the use of the engine, and in general to do that which reasonably is necessary for the use of the thing granted; and it is not requisite to an implied grant that there be absolute physical necessity for the right demanded. Himrod vs. Ft. Pitt Co., 220 Fed. 82, aff'd. 238 Fed. 746.

CHAPTER LV.

RESCISSION.

§ 1123. How Effected.

A rescission can be effected by consent or by placing or offering to place the party against whom the rescission is sought in the position in which he stood in relation to the property at the time the contract or option was entered into, unless the property is of no value.[1]

§ 1124. Restoration.

Restoration is a condition precedent to suit for rescission; it must be promptly made and suit be brought within a reasonable time thereafter.[2] This rule applies with peculiar force in relation to mining property because of its fluctuating and speculative character.[3]

§ 1125. Salting.

The "salting" of a mining claim which is the subject of a contract or of an option,[4] or an error as to the amount of "ore in sight" [5] therein, are sufficient grounds for rescission.

§ 1126. Election of Remedies.

In the event of a sale of a salted mining claim the party who has been thus defrauded may keep the property and sue for damages, or repudiate the contract, restore the property and demand the return of the money paid, provided, that he acts within a reasonable time after the discovery of the fraud.[6]

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[1] Harwood vs. U. S. Corp., 32 Fed. (2d) 680-1, rev'g. 26 Fed. (2d) 116; Kelly vs. Owens, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797; Harrington vs. Paterson, 124 Cal. 542, 57 Pac. 476; Brown vs. Klein, 89 Cal. A. 156, 264 Pac., 496.

A rescission by consent may be implied from the acts of the parties. Tatterson vs. Kehrlein, 88 Cal. A. 47, 263 Pac. 285; but a recission effected by consent is a new contract, to which there must be a meeting of minds; though this may be evidenced by conduct. Tuson vs. Green, 194 Cal. 574, 229 Pac. 327. See also, Peoples' Co. vs. Burdg, 128 Kan. 390, 277 Pac. 796; Smith vs. Cadillac Co., 152 Wash. 131, 277 Pac. 453. A parol agreement to rescind may be inferred from the acts of the parties. Treadwell vs. Nickel, 194 Cal. 244, 228 Pac. 25.

It is not necessary in an action to rescind on the ground of mistake, that the mistake must be mutual. While some jurisdictions hold that the mistake must be mutual, Cal. Civ. Code and the numerous decisions of the Californian courts show that an action to rescind may be based upon the mistake only of the party prosecuting the action. Lepper vs. Ratteree, 98 Cal. A. 255, 276 Pac. 1037.

[2] Southern Nevada Dev. Co. vs. Silva, 125 U. S. 247; Bishop vs. Thompson, 196 Ill. 206, 63 N. E. 684; Pettus vs. Roberts, 6 Ala. 811.

[3] Twin Lick Co. vs. Marbury, 91 U. S. 587; Johnson vs. Standard Co., 148 U. S. 360; Patterson vs. Hewitt, 195 U. S. 309. Grymes vs. Sanders, 93 U. S. 62, involved certain mining property. It was sought to rescind the purchase thereof. The court said: "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. * * * he is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value." Cited approvingly in McLean vs. Clapp, 141 U. S. 432, citing many cases.

See Laches, § 385.

[4] See Mudsill Co. vs. Watrous, 61 Fed. 163.

[5] Johnson vs. Withers, 9 Cal. A. 52, 98 Pac. 42; see Neff vs. Engler, 205 Cal. 490, 271 Pac. 744.

Misrepresentations as to the mineral deposits within the land warrant cancellation of purchase money notes. Samuel vs. King, 158 Tenn. 546, 14 S. W. (2d) 963.

[6] Smith vs. Bolles, 132 U. S. 125; Wheeler vs. Dunn, 13 Colo. 428, 22 Pac. 827. As to estoppel, see Hullinger vs. Big Sespe Co., 50 Cal. A. 6, 194 Pac. 832; Gordon Tiger Co. vs. Brown, 56 Colo. 301, 138 Pac. 51.

§ 1127. Insufficient Grounds for Rescission.

Where the purchaser is to find out for himself whether the mining claim is valuable or not,[7] concealment of the mineral value of the land,[8] or the output of adjoining property, provided, there be no wilful misstatement of a material fact intended to mislead the seller as to the value of the land;[9] or the want of a marketable title prior to the expiration of the time to purchase the property,[10] or mere reliance of a defect in the title [11] are insufficient grounds for rescission.

§ 1128. Ratification.

While the offer of rescission on the one side must be accepted on the other, such offer and acceptance are governed by the same rules as govern the inception of contracts generally.

Assumption of ownership of the subject matter of a sale, such as selling it, is a ratification of the rescission of the contract.[12]

§ 1129. Notice of Rescission.

A formal notice of rescission is not always necessary before suit to rescind. An action may be a rescission, but to amount to that it must be prompt.[13]

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[7] Winter vs. Bostwick, 172 Fed. 285; King vs. Lamborn, 186 Fed. 21; Ernest vs. McCauley, 155 Cal. 739, 102 Pac. 924; Crocker vs. Manley, 164 Ill. 282, 45 N. E. 282

[8] Caples vs. Steel, 7 Or. 491.

[9] Harris vs. Tyson, 24 Pa. St. 317; Neill vs. Shamburg, 158 Pa. St. 263.

[10] Winter vs. Bostwick, *supra* (5); Wiley vs. Helen, 83 Kan. 544, 112 Pac. 158.

[11] Moore vs. Pooley, 17 Ida. 57, 104 Pac. 898.

[12] Tatterson vs. Kehrlein, *supra* (1).

[13] Oscarson vs. Grain Ass'n., 81 Mont. 521, 277 Pac. 14.

It is ordinarily a prerequisite to maintaining an action for rescission that a notice of intention to cancel the contract be given to the adverse party. This notice, however, is not required to be couched in any particular form. It ordinarily is sufficient if it clearly expresses the intention to terminate the contract for a breach thereof. McNeese vs. McNeese, 190 Cal. 405, 213 Pac. 36; Simmons vs. Briggs, 69 Cal. A. 463, 231 Pac. 634.

When notice of rescission has been given, the consideration having proved worthless, the rescission is complete and the court should so find. American Co. vs. Packer, 130 Cal. 450, 62 Pac 744; Prewitt vs. Sunnymead Co., 189 Cal. 723, 732, 209 Pac. 995; Hogberg vs. Landfield, 99 Cal. A. 360, 274 Pac. 995. Where there is a total failure of consideration no notice of rescission need be given before suit is brought. Orton vs. Privett, 202 Cal. 754, 262 Pac. 713, and no offer of restoration is necessary. Kelly vs. Owens, *supra* (1).

CHAPTER LVI.

SEPARATE PROPERTY.

§ 1130. Location Rights.

A location of a mining claim made by a married person [1] or by a minor [2] is separate property.[3] If conjointly made, such locators become tenants in common.[4] While unpatented the claim is not subject to dower right.[5] It becomes community property when an interest therein is conveyed by one spouse to the other.[6]

§ 1131. Effect of Patent.

Whenever according to the laws of the United States the title to a location has passed therefrom, then, like all the property within the state, it is subject to state legislation.[7] This means that, *ipso facto,* local legislation relating to dower rights and community property rights of a wife affecting the grant attach thereto.[8]

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[1] Black vs. Elkhorn Co., 163 U. S. 445; Phoenix Co. vs. Scott, 20 Wash. 48, 54 Pac. 777; *but see* Jacobson vs. Bunker Hill Co., 3 Ida. 126, 28 Pac. 396; and see McAllister vs. Hutchinson, 12 N. M. 111, 75 Pac. 42; *compare* Brown vs. Lockhart, 12 N. M. 10, 71 Pac. 1086.

[2] Thompson vs. Spray, 72 Cal. 528, 14 Pac. 182.

[3] The rule that an unpatented mining claim is subject to the locator's sole control and disposition and is therefore his separate property is an application of the rule announced in Hall vs. Russell, 101 U. S. 503, that the grant is not complete till the conditions on which the grant depends are fulfilled. See, also, U. S. vs. Tichenor, 12 Fed. 421; Cooper vs. Wilder, 111 Cal. 195, 43 Pac. 592; Whittenbrock vs. Wheadon, 128 Cal. 150, 60 Pac. 664; Minium vs. Minium, 53 Cal. A. 55, 199 Pac. 1104; Meyer vs. Meyer, 82 Cal. A. 313, 255 Pac. 767. In Guye vs. Guye, 63 Wash. 340, 115 Pac. 731, the law of Washington is declared to be that lands acquired under the Timber and Stone Acts, or under coal land entries as well as lands obtained or acquired under the mining laws of the United States are separate property, while those acquired under the homestead or preemption laws are community property, ordinarily. Community Property in Public Lands, 9 Cal. Law Rev. 267.

[4] Elder vs. Horseshoe Co., 9 S. Dak. 642, 79 S. W. 1060; see, also, Lockhart vs. Leeds, 195 U. S. 427; Cassidy vs. Silver King Co., 199 Fed. 100; Morton vs. Solambo Co., 26 Cal. 528; Morenhaut vs. Wilson, 52 Cal. 263.

[5] Black vs. Elkhorn Co., *supra* [1]; Bechtol vs. Bechtol, 2 Alaska 397, *but see* Headley vs. Colonial Co., 67 W. Va. 628. The court held in Black vs. Elkhorn Co., that under the federal statutes no right was granted to the wife of a locator, present or contingent, and that the government being the owner of the land, could impose its own terms upon which to grant any right, whether of possession or of purchase. That as the government still retained the title, the locator did not take such an estate in the claim that dower attached to it. See Huffman vs. Allen Co., 118 Wash. 549, 204 Pac. 197.

[6] Cole vs. Ralph, 252 U. S. 286; Jacobson vs. Bunker Hill Co., *supra* [1]. In Cole vs. Ralph, an interest in an unpatented claim held by a husband and by him conveyed to his wife, under authority of a number of cases from Nevada, wherein the property was situate, was held to be community property. In Brown vs. Lockhart, 12 N. M. 10, 71 Pac. 1076, the notice posted upon the claim was in the name of the husband, but the recorded notice bore the name of the wife alone without the name of the husband as a locator. The lower court found as a fact on this evidence that the interest was "community property." The appellate court sustained this finding. See, generally, Alferitz vs. Arrivillaga, ___ Cal. ___, 277 Pac. 317; Id. 143 Cal. 646, 77 Pac. 657; Goucher vs. Goucher, 82 Cal. A. 458, 255 Pac. 892.

[7] There is no doubt, of course, that until title is completed the laws of the United States control. Wadkins vs. Producer's Oil Co., 227 U. S. 368; Bernier vs. Bernier, 147 U. S. 242. But when the title has passed, then the land, like all other property in the state, is subject to state legislation. Wilcox vs. Jackson, 13 Pet. 498, 517; Irvine vs. Marshall, 20 How. 564; McCune vs. Essig, 199 U. S. 390. If the United States could impress a peculiar character upon the land within a state, after parting with the title to it, at least the clearest expression would be necessary before such a result could be reached. Wright vs. Morgan, 191 U. S. 58. But it has not tried to do anything of the sort. Buchser vs. Buchser, 231 U. S. 161, citing Teynor vs. Heible, 74 Wash. 222, 133 Pac. 1, as authority for the rule that by the laws of the state of Washington property acquired under the homestead laws of the United States is community property. See Minium vs. Minium, *supra* [3]; Meyer vs. Meyer, *supra* [3].

[8] Buchser vs. Buchser, *supra* [7].

§ 1132. Conveyance of Unpatented Ground.

A local statute which requires both husband and wife to join in the conveyance of real estate has, of course, no application to a conveyance by the locator of unpatented mining property.[9]

[9] Phoenix Co. vs. Scott, *supra* (1). Under the rule stated in the text a local statute which provides that "the wife must join with him (the husband) in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year," etc, is not effective. See Cal. C. C., § 172*a*.

CHAPTER LVII.

STATUTE OF FRAUDS.

§ 1133. Applicability of Statute.

The statute of frauds has no application where parties agree to locate and develop a mining claim. If in pursuance of the agreement one of the parties locates the claim in his own name, he holds the legal title in trust.[1] But, a mining claim being real estate, it, under the statute of frauds, can be transferred only by operation of law or an instrument in writing.[2] Hence, a parol agreement for its transfer can not be enforced.[3] A grub-stake contract,[4] a license[5] or a mining partnership[6] are not within the statute.

§ 1134. Part Performance.

A sale of real property, made orally, may be taken out of the operation of the statute and made valid and enforceable by part performance which puts the party performing in such a situation that nonperformance by the other would be a fraud upon him. Part payment of the price, assuming possession of the land and making improvements thereon is such part performance.[7]

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[1] Shea vs. Nilima, 133 Fed. 209; Caseaden vs. Dunbar, 157 Fed. 62, mod. 191 Fed. 471, *certiorari* denied 212 U. S. 572; Hendricks vs. Morgan, 167 Fed. 106; Rush vs. French, 1 Ariz. 99, 25 Pac. 815; Moritz vs. Lavelle, 77 Cal. 11, 18 Pac. 803; Doyle vs. Burns, 123 Iowa 488, 99 N. W. 195; Welland vs. Huber, 8 Nev. 203; Eberle vs. Carmichael, 8 N. M. 696, 47 Pac. 717; Hibour vs. Reeding, 3 Mont. 15; Murry Hill Co. vs. Havenor, 24 Utah 73, 66 Pac. 762; Raymond vs. Johnson, 17 Wash. 232, 49 Pac. 492; Mack vs. Mack, 39 Wash. 190, 81 Pac. 707.

An agreement to locate mining lands for the benefit of another is not within the statute of frauds. Eberle vs. Carmichael, 8 N. M. 177, 42 Pac. 95; see Book vs. Justice Co., 58 Fed. 106; Moritz vs. Lavelle, *supra*.

The fraud commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement after the other party has been induced to make expenditures, or a change of situation in regard to the subject matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss, and in such case the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds. Hambly vs. Wise, 181 Cal. 289, 184 Pac. 9; Zellner vs. Wassman, 184 Cal. 80, 193 Pac. 84; Holstrom vs. Mullen, 84 Cal. A. 1, 257 Pac. 545.

[2] Moore vs. Hamerstag, 109 Cal. 122, 41 Pac. 805; see Smith vs. Mason, 122 Cal. 426, 55 Pac. 143; Gibbons vs. Yosemite Co., 172 Cal. 716, 158 Pac. 196.

[3] Reagan vs. McKibben, 11 S. Dak. 270, 76 N. W. 946; see Hill vs. Dow, 121 Cal. 42, 53, Pac. 642; McGehee vs. Curran, 49 Cal. A. 198, 193 Pac. 277; Cal. C. C. P., § 1973.

See § 1134.

A writing is necessary to convey "mineral rights." Porter vs. Cluck, ___ Tex. C. A. ___, 13 S. W. (2d) 130. A contract conveying one-eighth of the oil and gas in place in land for one year and as long as either is produced is one for a sale of land, and is void unless it is in writing. Hoffman vs. Nelson, ___ Tex. C. A. ___, 13 S. W. (2d) 131; Cal. C. C. P., § 1973.

[4] Gesner vs. Cairns, 2 Allen 595; Desloge vs. Pearce, 38 Mo. 588; Wheeler vs. West, 71 Cal. 126, 11 Pac. 871.

[5] Shaw vs. Caldwell, 16 Cal. A. 7, 115 Pac. 941.

[6] Jones vs. Patrick, 140 Fed. 403; see Sturm vs. Ulrich, 10 Fed. (2d) 12; Duryea vs. Burt, 28 Cal. 569; Musick Oil Co. vs. Chandler, 158 Cal. 7, 109 Pac. 613; Scott vs. Jungquist, 179 Cal. 9, 175 Pac. 412; Hoge vs. George, 27 Wyo. 423, 200 Pac. 96.

See Tenancy in Common, note 7.

[7] Hoffman vs. Fett, 39 Cal. 109; Shaw vs. McNamara, 85 Mont. 389, 278 Pac. 836; Barrett vs. Crump, ___ Tex. C. A. ___, 15 S. W. (2d) 270. See Dondero vs. Aparicio, 63 Cal. A. 373, 218 Pac. 608, holding that payment of the purchase price does not of itself constitute part performance, and even if it did, part performance does not withdraw a sale of real property from the operation of the statute of

§ 1135. Parol Lease.

A parol lease of a mining claim is valid, where the lessee enters thereunder, and expends labor and money in preparation for mining.[8]

§ 1136. Waiver of Statute.

The benefit of the statute of frauds is waived where no objection to the admission of parol evidence of the contract is made.[9]

§ 1137. Pleading.

The rule that an agreement which the statute of frauds requires to be in writing will be presumed to have been in writing, without an allegation to that effect, applies as well to the answer as to the complaint.[10]

§ 1138. Estoppel.

A court of equity will hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud. The operation of this equitable doctrine is not limited to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present.[11]

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frauds, except for purposes of relief in equity. Windiate vs. Leland, 246 Mich. 659, 225 N. W. 620. The statute does not apply when a contract has been performed by one of the parties. McGinnis vs. McGinnis, 274 Mo. 285, 202 S. W. 1097, cited in Missouri Co. vs. Early, 222 Mo. A. 118, 13 S. W. (2d) 1097, citing, also, 27 C. J. 350; and see Wood vs. Anderson, 199 Cal. 440, 249 Pac. 862. In Barton vs. Simmons, 129 Or. 457, 278 Pac. 83, it is said that an oral contract to purchase land is sufficient consideration for the payment of money or delivery of property, and such money or property can not be recovered, if the vendor is ready, able and willing to carry out his oral contract.

The rule that part performance takes a case out of the statute of frauds does not prevail in Kentucky, but when the statute is relied upon as a defense, the defendant must restore what he has received. Waters vs. Cline, 121 Ky. 611, 85 S. W. 209, 750; Grace vs. Gholson, 159 Ky. 359, 167 S. W. 420. See, generally, Glazebrook vs. Glazebrook, 227 Ky. 628, 13 S. W. (2d) 776.

[8] Ruffati vs. Societe, 10 Utah 386, 37 Pac. 591.

[9] Nunez vs. Morgan, 77 Cal. 427, 19 Pac. 753; McComish vs. Kaufman, 43 Cal. A. 511, 185 Pac. 476.

[10] Bradford Co. vs. Joost, 117 Cal. 204, 48 Pac. 1083. See, also, Barnard vs. Lloyd, 85 Cal. 131, 24 Pac. 658; Alaska Co. vs. Standard Co., 158 Cal. 567, 112 Pac. 454.

[11] Seymour vs. Oelrichs, 156 Cal. 782, 106 Pac. 88; see, also, Dunham Co. vs. Rubber Co., 84 Cal. A. 673, 258 Pac. 663, and cases therein cited.

CHAPTER LVIII.

SURFACE RIGHTS.

§ 1139. Common Law Rule.

The doctrine of the common law, that he who has the right to the surface of any portion of the earth, has also the right to all beneath and above that surface, has but a limited application to the rights of miners. Necessity has compelled a great modification of that doctrine. The well established custom of miners to locate veins of mineral, claiming to follow them with all their dips, spurs and angles, without reference to the occupancy of the surface, has compelled a departure from the common law rules.[1]

§ 1140. Exclusive Possession.

Under the federal mining law the locator of a valid mining claim and his heirs and assigns have the exclusive right of possession and enjoyment of all the surface within the lines of the location.[2] The means by which this exclusive possession may be vested in the locator is the marking of the boundaries of the claim upon the surface.[3] The same ground can not be located nor possessed by another until either

[1] Bullion Co. vs. Croesus Co., 2 Nev. 168; see, also, Montana Co. vs. Clark, 42 Fed. 626; Tyler Co. vs. Last Chance Co., 71 Fed. 848; Collins vs. Bailey, 22 Colo. A. 149, 125 Pac. 543. The word "surface" in mining controversies means that part of the earth or geologic section lying over the minerals in question, unless otherwise defined by the deed of conveyance. It is not merely the top of the glacial drift, soil, or the agricultural surface. The owner of a higher stratum is entitled to the same rights as the actual surface owner. Marquette Co. vs. Oglesby Co., 253 Fed. 111. In other words, where different strata of earth are owned by different persons and there is no contract nor statute which affects their interest, the owner of the upper stratum has an absolute right to have his land supported in its natural position by the stratum below. Audo vs. Western Co., 99 Kan. 454, 162 Pac. 344; Walsh vs. Kansas Co., 102 Kan. 29, 169 Pac. 220. See, also, Yandes vs. Wright, 66 Ind. 319; Keeneshaw vs. Friedrich, 112 Mich. 442, 70 N. W. 896; Ann. Cas. 1913 D. 127.

[2] Mt. Diablo Co. vs. Callison, Fed. Cas. 9886; Crown Point vs. Buck, 97 Fed. 462. The exclusive right of possession given to the locator by the statute is not limited to the surface nor even to a single vein whose discovery is the basis of the location; but it extends to all veins and lodes throughout their entire depth the top or apex of which lies inside of the surface lines of the location extended downward vertically. St. Louis Co. vs. Montana Co., 194 U. S. 237; Wilhelm vs. Silvester, 101 Cal. 358, 35 Pac. 997; see Waterloo Co. vs. Doe, 82 Fed. 49, aff'g. 54 Fed. 935. The presumption as to ownership of all beneath the surface, including minerals, may be overcome by proof of showing that such mineral is a part of a vein or lode apexing within a claim belonging to another, but this always is a matter of defense. Lawson vs. U. S. Co., 207 U. S. 8; Doe vs. Waterloo Co., 54 Fed. 938, aff'd. 82 Fed. 49; Wakeman vs. Norton, 24 Colo. 196, 49 Pac. 283; Grand Central Co. vs. Mammoth Co., 29 Utah 551, 83 Pac. 648. The burden of proof is upon the party claiming ore bodies within the limits of another valid mining claim to overcome the presumption of ownership arising from the possession of such ore bodies, and to show by a preponderance of evidence that the apex and the strike of the vein are within the vertical planes of his own surface location and that between planes drawn vertically downward through the end lines of his location and a certain parallel line the vein from its apex on its dip is continuous, and that the continuity extended to and through the adjoining claim in controversy, and that the ore bodies, the subject of the controversy, form a part of such vein. Grand Central Co. vs. Mammoth Co., *supra*; see, Doe vs. Waterloo Co., *supra*; Con. Wyoming Co. vs. Champion Co., 63 Fed. 540; Pennsylvania Co. vs. Grass Valley Co., 117 Fed. 509. In other words, the doctrine that the owner of the surface owns all beneath until it is shown to belong to another applies to mining claims only where there is doubt as to what apex an underground body of ore may belong. Bunker Hill Co. vs. Empire State Co., 106 Fed. 474. See, also, Baillie vs. Larson, 138 Fed. 178.

[3] Creede Co. vs. Uinta Co., 196 U. S. 346. While the vein located is the principal thing and the surface only an incident thereto yet the mining law has provided no means of locating a vein except by defining a surface claim. Golden Fleece Co. vs. Cable Con. Co., 12 Nev. 329; see Gleeson vs. Martin White Co., 13 Nev. 456; Madeira vs. Sonoma Co., 20 Cal. A. 728, 130 Pac. 175. Such demarcation has been held to be

it is abandoned or forfeited.[1] A tunnel locator can take no rights which are not in subordination to those of the prior surface locator.[5] Surface mining claims located subsequent to the commencement of the construction of a tunnel are taken and held subject to any rights of the tunnel owner thereafter developed.[6]

§ 1141. Subsurface Rights.

Subsurface rights of the lode miner are controlled by the form of his surface location.[7]

§ 1142. Invasion of Surface.

Monuments of a lode mining location may be placed upon the surface of adjoining patented or unpatented property although adversely held, for the purpose of "squaring" the location. The consent of the owner of such property is not essential, but the encroachment must be openly and peaceably done. Subsequent objection by such owner is unavailing.[8] The right of such overlapping locator is, of course, limited to the ground within such boundaries as was then open to location.[9]

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the main act of location; and the ultimate fact in determining the validity of the location as placing of such marks upon the ground as will identify the claim. McCleary vs. Broaddus, 14 Cal. A. 64, 111 Pac. 125; see Donahue vs. Meister, 88 Cal. 121, 25 Pac. 1096; Eaton vs. Norris, 131 Cal. 561, 63 Pac. 856.

[4] St. Louis Co. vs. Montana Co., 171 U. S. 655; Clipper Co. vs. Eli Co., 194 U. S. 227; Stenfjeld vs. Espe, 171 Fed. 825–828; see Omar vs. Soper, 11 Colo. 280, 18 Pac. 443; Sierra Blanca Co. vs. Winchell, 35 Colo. 13, 83 Pac. 628; Berquist vs. W. Virginia Co., 18 Wyo. 270, 106 Pac. 673. A valid and subsisting location of mineral land has the effect of a grant by the United States and the right of present and exclusive possession, and a prior location operates as a bar to any subsequent location. Gwillim vs. Donnellan, 115 U. S. 49; Jones vs. Wild Goose Co., 177 Fed. 97; Worthen vs Sidway, 72 Ark. 225, 79 S. W. 777; Nash vs. McNamara, 30 Nev. 132, 93 Pac. 405. The possession of a vein recognized by the mining laws and to which protection is given is by one who holds the surface at the apex of such vein, and the location of a lode or vein upon its apex or surface will not be defeated by any secret underground working and possession by parties having no right to the surface. Bunker Hill Co. vs. Shoshone Co., 33 L. D. 148; see Eilers vs. Boatman, 3 Utah 159, 2 Pac. 66, 111 U. S. 356.

The possession of the surface ground of a mining claim is sufficient evidence of title as against any one not showing any higher or better right thereto. Carson City Co. vs. North Star Co., 83 Fed. 668.

[5] Calhoun Co. vs. Ajax Co., 182 U. S. 508, aff'g. 27 Colo. 1, 59 Pac. 607; see Enterprise Co. vs. Rico-Aspen Co., 167 U. S. 108; Campbell vs. Ellet, 167 U. S. 116, aff'g. 18 Colo. 510, 33 Pac. 521; Baillie vs. Larson, *supra* [2]. On the discovery of a vein or lode within a tunnel the rights of the tunnel claimant are exactly in extent what they would be if the discovery had been made from the surface. Hope Co. vs. Brown, 7 Mont. 555, 19 Pac. 218.

[6] Creede Co. vs. Uinta Co., *supra* [3].

[7] Flagstaff Co. vs. Tarbet, 98 U. S. 463; Iron Co. vs. Elgin Co., 118 U. S. 196; Argentine Co. vs. Terrible Co., 122 U. S. 478; Del Monte Co. vs. Last Chance Co., 171 U. S. 55; Last Chance Co. vs. Tyler Co., 157 U. S. 683, 27 Cyc. 582; King vs. Amy Co., 152 U. S. 222; Jim Butler Co. vs. West End Co., 247 U. S. 450, aff'g. 39 Nev. 375, 158 Pac. 876.

The mining law has attempted to establish a rule by which each lode claim shall be so many feet of the vein lengthwise of its course to any depth below the surface, although laterally its inclination shall carry it ever so far from the perpendicular. Argonaut Co. vs. Kennedy Co., 131 Cal. 29, 63 Pac. 148, aff'd. 189 U. S. 1.

[8] Del Monte Co. vs. Last Chance Co., *supra* [7]; Bunker Hill Co. vs. Empire State Co., 134 Fed. 268; Grassy Gulch Claim, 30 L. D. 191; Hidee Co., 30 L. D. 120; West Granite Co. vs. Granite Co., 7 Mont. 356, 17 Pac. 547. The boundary marks of lode locations may be placed upon or across the surface of a prior location, or intervening ground. Del Monte Co. vs. Last Chance Co., *supra*; Alice Lode, 30 L. D. 481, whether patented or unpatented, mining or agricultural ground. Hidee Co., *supra*, cited in Bunker Hill Co. vs. Empire State Co., 109 Fed. 538; Mono Fraction, 31 L. D. 121, 34 L. D. 44; McPherson vs. Julius, 17 S. Dak. 98, 95 N. W. 428.

The foregoing rule as to position of monuments of lode claims does not apply to placer location monuments. Stenfjeld vs. Espe Co., *supra* [4].

In the absence of physical markings upon the surface of a mining claim, the right of its claimant does not extend beyond the *possessio pedis*. See O'Reilly vs. Campbell, 116 U. S. 422; Biglow vs. Conradt, 3 Alaska 140; Hess vs. Winder, 30 Cal. 358; Roberts vs. Wilson, 1 Utah 296.

As to the rights of the miner to use the surface see extended note in 48 L. R. A. N. S. 883.

[9] Del Monte Co. vs. Last Chance Co., supra [7]. See Jim Butler Co. vs. West End Co., *supra* [7].

§ 1143. Underlying Minerals.

Independent estates may be carved out of the same land, as, where the owner of the surface grants only the right to the underlying mineral.[10]

§ 1144. Relative Rights.

Unless expressly waived, the surface owner has an absolute right to vertical,[11] but not to lateral support;[12] and the mine owner has the right to use so much of the surface as may be reasonably necessary to conduct his mining operations,[13] nor can he be disturbed in his underground work by excavations made by the owner of the surface.[14]

§ 1145. Notice of Severance.

A subsequent grantee is bound to take notice of the prior deeds in his chain of title; he is therefore charged with notice of an exception of mineral rights in an earlier deed.[15]

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[10] Catron vs. South Butte Co., 181 Fed. 941; Stinchfield vs. Gillis, 96 Cal. 33, 30 Pac. 939; Williams vs. South Penn. Co., 52 W. Va. 181, 43 S. E. 214; Smith vs. Jones, 21 Utah 270, 60 Pac. 1104; Yellow Poplar Co. vs. Thompson, 108 Va. 612, 62 S. E. 358; see Woodside vs. Cieeroni, 93 Fed. 1. A severance of the surface and the minerals or mineral interest may be by conveyance of the mines or minerals only; or by a conveyance of the land with a reservation or exception as to the mines or minerals. It makes no difference whether the word used in the conveyance is "excepted" or "reserved." De Moss vs. Sample, 143 La. 243, 78 So. 486. When the surface of land is owned by one, and the mineral beneath, with the right to extract the same, is owned by another, it is immaterial whether the two interests have been created by a conveyance of the surface, with a reservation of the mineral, or by a grant of the mineral, with a reservation of the surface. In either case the obligation to protect the surface is the same, and it is well settled that the grant of the surface, with reservation of the minerals, and a right to extract the same, does not permit the destruction of the surface, unless the right to do so has been expressed in terms so plain as to admit of no doubt. Catron vs. South Butte Co., *supra*. For rights of owner of surface as against the owner of minerals thereunder, see West Pratt Co. vs. Dorman, 161 Ala. 389, 49 So. 849, and monographic note, 135 A. S. R. 127. In Evans Fuel Co. vs. Leyda, 77 Colo. 356, 236 Pac. 1024, it is said that "it is familiar law that there may be two freeholds in the same body of land, that is to say, a freehold in the surface soil and enough of the earth lying beneath the surface to support it, and a freehold in the minerals underneath the surface estate, with a right of access to mine and extract the minerals. It is also well established by the great weight of authority that the owner of the surface has a right to have the superincumbent soil supported from below in its natural state, and that such a right is an incident to the ownership of the surface." In Wilms vs. Jess, 94 Ill. 464, the court said: "The act of removing all support from the superincumbent soil is, *prima facie*, the cause of its subsequently subsiding; but if the subsiding is, in fact, caused by the weight of buildings erected subsequent to the execution of the lease of the mine, this is in the nature of contributory negligence, and may be proved in defense. The authorities do not require the plaintiff's proof shall exclude that hypotheses in the first instance." See, also, Cincinnati Co. vs. Simpson, ___ Ind. ___, 104 N. E. 306; Standard Oil Co. vs. Watts, 17 Fed. (2d) 981. For a discussion of the English cases upon this subject see Evans Fuel Co. vs. Leyda, *supra*. See, also, Marquette Co. vs. Oglesby, *supra* [(1)]; Wilms vs. Jess, *supra*; Lloyd vs. Catlin Co., 210 Ill. 460, 71 N. E. 335; Coleman vs. Chadwick, 80 Pa. St. 81; Horner vs. Watson, 79 Pa. St. 242; Jones vs. Wagner, 66 Pa. St. 429; Zinc Co. vs. Franklinite Co., 13 N. J. Eq. 342; Harris vs. Ryding, 5 Mees. & Wel. 59; Smart vs. Morton, 5 Ellis & Black 30.

[11] Youghiogheny Co. vs. Hopkins, 198 Pa. St. 343, 48 Atl. 19; Matulys vs. Philadelphia Co., 201 Pa. St. 70, 50 Atl. 823; Miles vs. Pennsylvania Co., 214 Pa. St. 544, 63 Atl. 1032. See Kuhn vs. Fairmont Co., 179 Fed. 199; following Griffin vs. Fairmont Co., 59 W. Va. 480, 53 S. E. 24; Miles vs. New York Co., 250 Pa. St. 147, 95 Atl. 397.

See *infra* notes 16 to 21.

[12] Matulys vs. Philadelphia Co., *supra* [(11)]; see Hendricks vs. Spring Valley Co., 58 Cal. 190, 33 A. S. R. 447–50 note.

[13] Wardell vs. Watson, 93 Mo. 107, 5 S. W. 605; Baker vs. Pittsburgh Co., 219 Pa. St. 398, 68 Atl. 1014. See, also, Porter vs. Mack, 65 W. Va. 636, 64 S. E. 853.

The right to work a mine involves the right to penetrate the surface of the soil for the minerals, to remove them in the manner most advantageous to the mine owner, and to use such means and processes in mining and removing the minerals as may be necessary in the light of modern mining improvements. Oberly vs. H. C. Frick Co., 262 Pa. St. 83, 104 Atl. 865; Hammaistedt vs. Bakely, 182 Iowa 1356, 166 N. W. 729; Northcut vs. Church, 135 Tenn. 541, 188 S. W. 220.

[14] See Bagnall vs. Ry. Co., 7 Hurl & N. 423, aff'd. Hurl & C. 544; *compare* Horner vs. Watson, *supra* [(10)], with Yandes vs. Wright, *supra* [(1)].

[15] Grayson-McLeod Co. vs. Duke, 160 Ark. 76, 254 S. W. 350. A purchaser of land who took his conveyance with knowledge that the surface had been severed from

§ 1146. Adverse Possession of Severed Minerals.

Where there is a severance of the mineral estate from the surface estate, the owner of the minerals does not lose his right or his possession by any length of nonuser,[16] nor does the owner of the surface acquire title by the statute of limitations by his exclusive and continued occupancy and enjoyment of the surface merely.[17] The mine owner's title can be defeated only by acts which actually take the mineral out of his possession.[18] Such acts must not be sporadic [19] nor clandestine,[20] but must be as continuous and constant as the nature of the business and customs of the country permit or require.[21]

§ 1147. Statute of Limitations.

If title to minerals is separated from the title to the surface the statute of limitations does not run against the right to the minerals unless there is an actual adverse holding which constituted an invasion of those particular rights. Possession of the surface by later grantee is insufficient, although the deed does not except the minerals.[22] Neither lapse [23] of time nor, as previously stated, does nonuser impair the right of the ownership of the minerals.[24]

§ 1148. Taxation.

Independent estates in the same land are each subject to taxation.[25]

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the minerals by a deed of the surface reserving the minerals, can not subsequently claim the minerals by adverse possession because of his ownership and possession of the surface. Midkiff vs. Colton, 252 Fed. 424; rev'g. 242 Fed. 273, *certiorari* denied, 248 U. S. 563; see Vance vs. Clark, 252 Fed. 498; see, also, Barker vs. Campbell Ratcliff Co., 64 Okla. 249, 167 Pac. 468; Griffin vs. Delaware & Hudson Co., 257 Pa. St. 432, 101 Atl. 752.

[16] Arnold vs. Stevens, 24 Pick. 106; Marvin vs. Brewster Co., 55 N. Y. 538. In this case it was said: "This claim of an adverse possession can not rest merely upon a nonuser by the grantor of the defendant. The rights now claimed by them were the subject of an express grant. In such case, though there be a nonuser, if there had been no act of the owners of the surface lands which prevented the exercise of the rights of mining, they still exist." In Utt vs. Frey, 106 Cal. 397, 39 Pac. 807, cited in Herbert vs. Graham, 72 Cal. A. 317, 237 Pac. 58, it is said: "Nonuser alone, without any intention to abandon, does not constitute an abandonment."

Where there has been an actual valid severance by deed or by adverse possession of the title to the surface and the title to the minerals underneath, a mere cessation of the working or operation of a mine upon the land by the owner thereof, or the mere nonusage of the mineral, will not deprive the owner of the mineral of his right thereto or his possession thereof. To effect this, there must be more than an abandonment or nonusage by the owner of the particular mine, and the proof must show an abandonment or dissezin of his possession of the mineral right before the owner of the surface can ripen a title to such underlying minerals by adverse possession. Herbert vs. Graham, 72 Cal. A. 314, 237 Pac. 501; McBeth vs. Wetnight, 57 Ind. A. 47, 106 N. E. 411; see, also, Shrewsbury vs. Pocahontas Co., 219 Fed. 147; Birmingham Co. vs. Boshell, 190 Ala. 597, 67 So. 404; Hanks vs. Magnolia Co., ___ Tex. C. A. ___, 14 S. W. (2d) 348, 35 L. R. A. N. S. 745, note.

[17] Pond Creek Co. vs. Hatfield, 239 Fed. 622; Vance vs. Clark, *supra* [15]; Midkiff vs. Colton, *supra* [15]. For a collection of cases upon this subject see 13 A. L. R. 375, note.

[18] Costello vs. Mulheim, 9 Ariz. 422, 81 Pac. 906; Arnold vs. Stevens, *supra* [16]; Gill vs. Fletcher, 74 Ohio St. 295, 78 N. E. 433. Where there has been a severance of surface and subsurface rights possession of the one does not carry with it the possession of the other under the statute of limitations. Midkiff vs. Colton, *supra* [17]; Vance vs. Clark, *supra* [15]; Catlin Co. vs. Lloyd, 176 Ill. 275, 52 N. E. 144, 180 Ill. 398, 54 N. E. 214; Algonquin Co. vs. Northern Co., 162 Pa. St. 114, 29 Atl. 402; Pieree vs. Barney, 249 Pac. St. 132, 58 Atl. 152.

[19] Birmingham Co. vs. Boshell, 190 Ala. 597, 67 So. 404; Jackson vs. Stoetzel, 87 Pa. St. 302.

[20] See *supra*, notes 18 and 19.

[21] Stephenson vs. Wilson, 37 Wis. 482; e. c. 50 Wis. 95, 6 N. W. 240.

[22] Bodcaw Co. vs. Goode, 160 Ark. 48, 254 S. W. 345. See Kentucky Co. vs. Sewell, 249 Fed. 847.

[23] *Id.*

[24] See *supra*, note 16.

[25] Graciosa Co. vs. Santa Barbara Co., 155 Cal. 140, 99 Pac. 483; Mohawk Oil Co. vs. Hopkins, 196 Cal. 148; Con. Coal Co. vs. Baker, 135 Ill. 545, 26 N. E. 651; see, Hutchinson vs. Kline, 199 Pa. St. 564, 49 Atl. 312. Each of the separate layers or

§ 1149. Damages.

It is well established law that the right to surface support is absolute and independent of the degree of care exercised in the removal of the underlying strata and is not dependent on the negligence of defendant, as, see Wilms vs. Jess[26] and Lloyd vs. Catlin Co.;[27] yet, as stated in the opinion in the first-cited case, the failure to leave sufficient support is a breach of a duty so akin to negligence that placing buildings upon the land, thus increasing the burden to be sustained, is called contributory negligence.[28]

In Green vs. Gen. Petroleum Co.,[29] the court said that the defendant is bound to control whatever forces it releases in the course of its work. Failure to take precautions, however burdensome and expensive, gives a right to recover for the damage done.[30] The duty is measured by the exigencies of the occasion.[31]

Negligence means the absence of the care necessary under the circumstances and gross negligence is only a relative term.[32]

§ 1150. Governmental Severance.

In recent years it has been the policy of the federal government by congressional enactment to segregate mineral and surface rights and to permit each class to pass into separate ownership except where, as in the Leasing Act,[33] the relation of landlord and tenant is created and continues, at least as to the mineral rights therein.

A collection of the acts of congress bearing upon the subject of this section is given in the subjoined note.[34]

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strata becomes a subject for taxation, of incumbrance, levy and sale, precisely like the surface. Murray vs. Allred, 100 Tenn. 100, 43 S. W. 355; Northcut vs. Church, *supra* (13); see, also, Kansas Co. vs. Prowers Co., 81 Colo. 177, 254 Pac. 438; Sholl Bros. vs. People, 194 Ill. 24, 61 N. E. 1122; Mt. Sterling Co. vs. Ratcliff, 127 Ky. 1, 104 S. W. 993; Powell vs. Lanzy, 173 Pa. St. 543, 34 Atl. 450; Ridgeway vs. Elk County, 191 Pa. St. 465, 43 Atl. 323; Hutchinson vs. Kline, *supra*; Waterman vs Davis, 66 Vt. 83, 28 Atl. 664; Low vs. Court, 27 W. Va. 785; U. S. Co. vs. Randolph Co., 38 W. Va. 201, 18 S. E. 566; Harvey Co. vs. Allen, 59 W. Va. 605, 58 S. E. 941, 6 L. R. A. N. S. 628. There may be several estates in the same land owned by different persons, one owning the surface, another the timber, and a third the minerals underground, each being a separate estate and each may be subject to taxation N. P. R. Co. vs. Mjelde, 48 Mont. 287, 137 Pac. 391.

Mining rights and interests in minerals are the subject of horizontal severance from the surface and taxable as real estate. Riggs vs. Board, 181 Ind. 172–178, 108 N. E. 1075.

[26] 94 Ill. 464.

[27] 210 Ill. 460, 71 N. E. 335.

[28] See "Flooding of Mines" (Chap. XXXIV), for discussion of damages without negligence.

[29] 205 Cal. 328, 270 Pac. 952.

[30] See Beaver Dam Co. vs. Daniel, ___ Ky. ___, 13 S. W. (2d 254; *compare* Boyle vs. Pure Oil Co., ___ Tex. C. A. ___, 16 S. W. (2d) 146.

[31] Parrott vs. Wells, 15 Wall. 524; Baltimore Co. vs. Jones, 95 U. S. 439; National Bank vs. Ward, 100 U. S. 195; Charnock vs. Texas Co., 194 U. S. 432; Texas Co. vs. Barrett, 166 U. S. 617.

[32] Milwaukee Co. vs. Ames, 91 U. S. 489; see, also, Youghiogheny Co. vs. Hopkins, *supra* (11); Matulys vs. Philadelphia Co., *supra* (11); 27 R. C. L. 132.

[33] 41 Stats. 437.

[34] Indian lands—Act of February 8, 1887, 24 Stats. 388, amended February 28, 1891, 26 Stats. 794; act of June 25, 1910, 36 Stats. 855; act of June 22, 1910, 36 Stats. 583. Surface acts—acts of July 17, 1914, 38 Stats. 510; act of October 2, 1917, 40 Stats. 299. Stock-raising Homesteads—act of December 29, 1916, amended October 25, 1918, 40 Stats. 1016; act of September 29, 1919, 41 Stats. 287; act of March 4, 1923, 42 Stats. 1445; act of June 6, 1924, 43 Stats 469. Leasing Act—act of February 25, 1920, 41 Stats. 437. Prior to the enactment of this act congress made no provision for the disposition of the minerals reserved in agricultural patents issued pursuant to the act of July 17, 1914, and on and after that date the mineral deposits named in the Leasing Act, reserved by such patents, became subject to disposition only in accordance with the terms of that act. Dennis vs. Utah, 51 L. D. 229. Federal Water Power Act—act of June 10, 1920, 41 Stats. 1063.

See Mining Leases.

§ 1151. Oil and Gas Lands Surface Rights.

The determination of the question as to which of two conflicting claimants, an agricultural entryman or an oil and gas permittee, under the Leasing Act, has the paramount right to the exclusive use of the surface, is dependent upon priority in the initiation of the claims.[35]

[35] Blakeney vs. Womack, 51 L. D. 622. See Pace vs. Carstarphen, 50 L. D. 372.

CHAPTER LIX.

TENANCY IN COMMON.

§ 1152. Cotenants.

Cotenancy arises from the joint location of or ownership in a mining claim;[1] cotenants hold by unity of possession [2] and the possession of one

[1] Lockhart vs. Leeds, 195 U. S. 427, rev'g. 12 N. M. 156, 76 Pac. 312; Morton vs. Solambo Co., 26 Cal. 527; Morenhaut vs. Wilson, 52 Cal. 263; Smith vs. Cooley, 65 Cal. 46, 2 Pac. 880; Chase vs. Savage Co., 2 Nev. 14; Elder vs. Horseshoe Co. 9 S. Dak. 636, 70 N. W. 106, 15 S. Dak. 124, 87 N. W. 586, aff'd. 194 U. S. 248; see Hardenburg vs. Bacon, 33 Cal. 356; Grant vs. Bannister, 160 Cal. 774, 118 Pac. 253; see, also, Costello vs. Cunningham, 16 Ariz. 447, 147 Pac. 701. Where two or more persons are interested in a mining location they are tenants in common. Garside vs. Norval, 1 Alaska 19. The relation of mutual trust exists to the extent that one may not act in hostility to the joint title, or to the interest of the other cotenants, in respect to the joint estate. Stevens vs. Grand Central Co., 133 Fed. 28; but they may deal with each other in good faith as strangers in relation to their interests in the common property. Bissell vs. Foss, 114 U. S. 252; Lichtenberger vs. Newhouse, 41 Utah 22, 123 Pac. 624; *but see* Richardson vs. Heney, 18 Ariz. 186, 157 Pac. 980.

While definitions of tenancy in common generally relate to tenants in common in real property, this tenancy can exist in personalty as well as in realty. Higgins vs. Eva, 204 Cal. A. 231, 259 Pac. 505, and 267 Pac. 1081.

A grantee in a mineral lease providing for a joint ownership of gas, oil and minerals is, after discovery of gas in paying quantities, a tenant in common of the gas in place in the land. Prairie Oil Co. vs. Allen, 2 Fed. (2d) 566; Hanks vs. Magnolia Co., ___ Tex. C. A. ___, 14 S. W. (2d) 348; Reynolds vs. McMann Co., ___ Tex. C. A. ___, 14 S. W. 819, denial of rehearing of 11 S. W. 778, rev'g. 279 S. W. 939; Magnolia Co. vs. Connellee, 11 S. W. (2d) 158; Magnolia Co. vs. Akin, 11 S. W. (2d) 1113.

Whether lessor's interest under an oil lease is realty or personalty depends on whether he is to have a share of oil in kind or in money. Continental Co. vs. Texas Co., ___ Tex. C. A. ___, 7 S. W. (2d) 174. Mere lapse of time does not dissolve the cotenancy. Yarwood vs. Johnson, 29 Wash. 643, 70 Pac. 123.

The holder of an undivided sixth interest in land which he has practically abandoned for twenty years may recover only one-sixth of the usual royalty and not one-sixth of the net profits. Germer vs. Donaldson, 18 Fed. (2d) 687.

Where A legally locates a mining claim in the names of himself and B, they become tenants in common, even if the location was made without B's knowledge, and A can not dispose of B's interest, Chase vs. Savage Co., *supra*, nor can he compel B as trustee to convey to him. Moore vs. Hammerstag, 109 Cal. 122, 41 Pac. 805, cited in U. S. vs. Dominion Oil Co., 264 Fed. 956; see, also, U. S. vs. McCutchen, 217 Fed. 650; U. S. vs. California Midway Oil Co., 259 Fed. 354. So, one who locates a mining claim in the names of himself and others, even without their consent, can not deprive such other cotenants of their interests by destroying the location notice and posting a new one in which their names are omitted. Morton vs. Solambo Co.; see, also, U. S. vs. California Midway Oil Co., *supra*; Thompson vs. Spray, 72 Cal. 528, 14 Pac. 182, cited and approved in Vedin vs. McConnell, 22 Fed. (2d) 755, and in West vs. U. S., 30 Fed. (2d) 742.

[2] Turner vs. Sawyer, 150 U. S. 578–586; Ritter, 37 L. D. 715; see Franklin vs. O'Brien, 22 Colo. 129, 43 Pac. 1016; Van Wagenen vs. Carpenter, 27 Colo. 456, 61 Pac. 698; Cedar Canyon Co. vs. Yarwood, 27 Wash. 271, 67 Pac. 749; Yarwood vs. Johnson, *supra* (1). The rule that when one enters avowedly as a tenant in common with others, his possession is the possession of the others, so long as the tenancy in common is not disclaimed. In such cases to constitute the ouster there must be acts of the most open and notorious character, clearly giving notice to the world, and to all having occasion to observe the condition and occupancy of the property, that the intention is to exclude, and does exclude the cotenant. The rule thus stated has no application to a case where the possession of the person in question was neither avowedly begun as a tenant in common nor instituted under a deed or instrument which defined his title as such. Akley vs. Bassett, 189 Cal. 625, 209 Pac. 576; Sheehan vs. All Persons, 80 Cal. A. 393, 252 Pac. 337; Klumpke vs. Henley, 24 Cal. A. 35, 140 Pac. 289 and 313. See Rich vs. Victoria Co., 147 Fed. 380; Newport vs. Hatton, 195 Cal. 144, 231 Pac.. 987.

One cotenant out of actual possession can not rely for adverse possession against another cotenant out of possession upon the possession of a third cotenant. Sheehan vs. All Persons, *supra*.

All acts done by a cotenant and relating to or affecting the common property are presumed to have been done by him for the common benefit of himself and the others. The relation between him and the other owners is always supposed to be amicable, rather than hostile; and his acts are therefore regarded as being in subordination of the title of all the tenants, for by so regarding them they may be made to promote the interests of all. Therefore, as a general proposition, the entry of one tenant in common or joint tenant is always presumed to be in maintenance

is presumed to be for the benefit of all the cotenants.[3] The purchase of an hostile or outstanding title or encumbrance upon the joint estate by one cotenant inures to the benefit of all the cotenants.[4] One cotenant can recover possession of an entire mining claim as against all persons except his cotenants;[5] or he can maintain an action against any cotenant to recover his share of the rents and profits.[6]

§ 1153. Who Are Not Cotenants.

Cotenants, also called coowners, are not "mining partners" unless they unite in working the joint property,[7] and one not so engaged is under the liabilities only of a cotenant in respect to the mine. A per-

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of the right of all, and he shall not be presumed to intend wrong to his companions if his acts will admit of any other construction. The entry of one cotenant is in the absence of clear proof to the contrary, construed as conferring seisin upon all. And supported by the same reasons and prevailing to the same extent, is the rule that the continuing possession of a cotenant, whether the entry was made by himself alone or in connection with his companions, is the possession of all the cotenants. See McCarthy vs. Speed, 11 S. Dak. 362, 77 N. W. 590, 12 S. Dak. 7, 80 N. W. 135, aff'd. 181 U. S. 269; 50 L. R. A. 190.

Uninterrupted possession of a mining claim by part of the owners for fifteen years under assertion of right based on recorded conveyances purporting to pass title to them the whole claim, with no recognition of others as coowners, is exclusive and hostile, and not in any relationship of trust and confidence. Hodgson vs. Federal Oil Co., 274 U. S. 15, aff'g. 5 Fed. (2d) 442, aff'g. 285 Fed. 546.

For a somewhat elaborate presentation of the principles of law regarding tenancies in common and the relative rights of the cotenants, see Wood vs. Henley, 88 Cal. A. 441, 263 Pac. 870.

[3] *Id.* Union Con. Co. vs. Taylor, 100 U. S. 37; McNeil vs. First Society, 66 Cal. 105, 4 Pac. 1096; Packard vs. Moss, 68 Cal. 123, 8 Pac. 823; Oglesby vs. Hollister, 76 Cal. 140, 18 Pac. 146; McClure vs. Colyear, 80 Cal. 378, 22 Pac. 175; Kirkham vs. Moore, 30 Ind. A. 554, 65 N. E. 1042; Crowder vs. McDonald, 21 Mont. 370, 54 Pac. 44; Bradford vs. Armijo, 28 N. M. 288, 210 Pac. 1074, and cases therein cited. Moss vs. Rose, 27 Or. 599, 41 Pac. 668.

Where a mining claim is owned by two or more persons the possession of one is the possession of all, and there can be no abandonment by one owner so long as his coowner continues in possession. Alaska-Dano Co., 52 L. D. 550.

[4] See *supra*, note 2.

[5] Erhardt vs. Boaro, 113 U. S. 537; Hodgson vs. Midwest Oil Co., 17 Fed. (2d) 71; aff'g. 297 Fed. 273, mem. dec. 269 U. S. 534; French vs. Edwards, Fed. Cas. 5098; McCormick vs. Marcy, 165 Cal. 386, 132 Pac. 449; Field vs. Tanner, 32 Colo. 290, 75 Pac. 916; see Weese vs. Barker, 7 Colo. 178, 2 Pac. 919; King Solomon Co. vs. Mary Verner Co., 22 Colo. A. 528, 127 Pac. 129. The judgment in such case will be in subordination to the rights of the other cotenants. Hardy vs. Johnson, 68 U. S. 371. A tenant in common with other locators of a mining claim can maintain an action for the recovery of the land without joining his cotenants; and, if he improperly join any other person, objection to the misjoinder must be taken in the answer. Morenhaut vs. Wilson, *supra* [3].

Tenants in common in a mining claim, each owning undivided interests acquired at different times, may, severally or jointly, sue to recover possession of all their several undivided interests. Franz vs. Franz, 15 Fed. (2d) 800; Binswanger vs. Henninger, 1 Alaska 509; Goller vs. Fett, 30 Cal. 482; McCleary vs. Broaddus, 14 Cal. A. 60, 111 Pac. 127; see Hall vs. Fisher, 20 Barb. 441. As to cotenant suing alone see Jameson vs. Chanslor-Canfield Co., 176 Cal. 8, 167 Pac. 372.

[6] Crowder vs. McDonald, *supra* [3].

[7] Peterson vs. Beggs, 26 Cal. A. 760, 148 Pac. 541; Madar vs. Norman, 13 Ida. 585, 92 Pac. 572; Phillips vs. Homestake Co., 51 Nev. 226, 273 Pac. 658; Hartney vs. Gosling, 10 Wyo. 346, 68 Pac. 1118. See Garside vs. Norval, *supra* [3]; Munsey vs. Mills and Garretty, 115 Tex. 469, 283 S. W. 759. Cotenants of mining property are not mining partners unless actually engaged in working the mine as a joint adventure. Germer vs. Donaldson, 18 Fed. (2d) 697; Julian Corp. Co. vs. Courtney, 22 Fed. (2d) 660; Bowmaster vs. Carroll, 23 Fed. (2d) 825; Transcontinental Co. vs. Mid-Kansas Co., 29 Fed. (2d) 323; Peterson vs. Beggs, 32 Cal. A. 760, 148 Pac. 541; Tidal Oil Co. vs. Fulton-Stuart Co., 129 Okla 457, 278 Pac. 330; Bolding vs. Camp, ___ Tex. C. A. ___, 6 S. W. (2d) 94, rev'g. 296 S. W. 1116; Leath vs. Benton Co., ___ Tex. C. A. ___, 9 S. W. (2d) 501; Lowry Co. vs. Bennett, ___ Tex. C. A. ___, 16 S. W. (2d) 947. They may ordinarily be commercial partners in oil mining leases, without working them for profit. Thompson vs. Crystal Springs Bank, 21 Fed. (2d) 602; see, also, Callahan vs. Danziger, 32 Cal. A. 405, 163 Pac. 65.

Where there has been a severance of the surface rights and of the mineral rights the respective owners are neither tenants in common nor joint tenants, but are owners in severalty of distinct estates in differet subjects. Wilson vs. Missouri Co., 29 Fed. (2d) 665; Interstate Co. vs. Clinton Co., 105 Va. 574, 54 S. E. 593.

In Sturm vs. Ulrich, 10 Fed. (2d) 12, may be found many cases distinguishing mining partnerships from tenancies in common, agency agreements and hiring contracts.

son having merely a inchoate title, such as the holder of a sheriff's certificate of purchase, is not a coowner.[8] A stockholder who has no title separate and distinct from that of the corporation which is the owner of a mining claim in no sense is a cotenant with the corporation or with the other shareholders of such corporation.[9]

§ 1154. Fiduciary Relationship.

A cotenant becomes a trustee for his coowners when he, with the consent of the other cotenants,[10] or fraudulently, relocates the claim,[11] or permits its relocation by a third person, with whom he is in collusion; unless there has been a due severance of the relations of

[8] Turner vs. Sawyer, *supra* (2); Repeater Claims, 35 L. D. 54.

[9] Repeater Claims, *supra* (8); Yard, 38 L. D. 68; see Badger Co. vs. Stockton Co., 139 Fed. 838. *But see* Dunfee vs. Terwilliger, 15 Fed. (2d) 523.

[10] Hunt vs. Patchin, 35 Fed. 816; Royston vs. Miller, 76 Fed. 53; Lockhart vs. Washington Co., 16 N. M. 223, 117 Pac. 833, dis. 199 U. S. 614; s. c. Lockhart vs. Leeds, *supra* (1); Butte Co. vs. Cobban, 13 Mont. 351–360, 34 Pac. 24; see Lockhart vs. Leeds, *supra* (1); Elliott vs. Elliott, 3 Alaska 360; Gore vs. McBrayer, 18 Cal. 583; Van Wagenen vs. Carpenter, *supra* (2); Clark vs. Mitchell, 35 Nev. 447, 134 Pac. 448; see Hornsilver Cases, 35 Nev. 464, 134 Pac. 449; O'Neill vs. Otero, 15 N. M. 707, 113 Pac. 614; Golden Giant Co. vs. Hill, 27 N. M. 124, 198 Pac. 276, and cases therein cited.

[11] Hunt vs. Patchin, *supra* (10); Stevens vs. Grand Central Co., *supra* (1); Guerin vs. American Co., 28 Ariz. 160, 236 Pac. 684–687; Sussenbach vs. Bank, 5 Dak. 504, 41 N. W. 662; Yarwood vs. Johnson, *supra* (1); Kittilsby vs. Vevelstadt, 103 Wash. 126, 173 Pac. 744; see Turner vs. Sawyer, *supra* (2); McCarthy vs. Speed, *supra* (2). An agreement by one to perform the annual assessment work on a location for an interest therein, and an agreement by him to relocate another claim in the joint names of the parties establishes a trust relation; and if he fails to perform the work, and the first claim reverts to the public domain, and in relocating the second one he does not include his coowners, the latter may enforce the trust. Clark vs. Mitchell, *supra* (10). See, also, Lockhart vs. Johnson, 181 U. S. 530; aff'g. 9 N. M. 344, 54 Pac. 336, s. c. Lockhart vs. Leeds, *supra* (1).

In Turner vs. Sawyer, *supra* (2), the court said: "It is well settled that cotenants stand in a certain relation to each other of mutual trust and confidence, and that neither will be permitted to act in hostility to the other, in reference to the joint estate, and that a distinct title acquired by one will inure to the benefit of all. A relaxation of the rule has been sometimes admitted in certain cases of tenants in common who claim under different conveyances and through different grantors. However that may be, such cases have no application to the one under consideration, wherein a tenant in common proceeds surreptitiously in disregard of the rights of his cotenants, to acquire a title to which he must have known, if he had made a careful examination of the facts, he had no shadow of right. * * * A title thus acquired the patentee holds in trust for the true owner, and this court has repeatedly held that a bill in equlty will lie to enforce such trust." Kline vs. Wright, 42 Fed. (2d) 927.

One who has agreed to do the assessment work on a location can not get an interest in the mine by having third parties relocate it, in their names for him, after failing to do the work as agreed. And the third parties, having knowledge of the facts, likewise get no interest, but must convey to the original owners. Soule vs. Johnson, 34 Ida. 439, 201 Pac. 834. And, in Ballard vs. Golob, 34 Colo. 417, 83 Pac. 379, it is said:

"This court has held * * * that obtaining a patent from the government for mineral land by a cotenant in his own name is not the purchase of an outstanding adverse title by the cotenant, as that expression is ordinarily used, but rather, the perfection of the common title, which inures to the benefit of the cotenants of the patentee, to which the above rule of cotenancy applies, for the reason that cotenants stand in that relation of mutual trust and confidence towards each other that the title thus acquired by patent the patentee holds as trustee for his coowners in the premises. Mills vs. Hart, 24 Colo. 508, 52 Pac. 680." Willoughby vs. Brandes, 317 Mo. 544, 297 S. W. 58; Stevens vs. Golob, 34 Colo. 429, 83 Pac. 381.

"The rule, however, is not a hard and fast one, but of equitable cognizance, which courts of equity mold and apply so as to do justice among the tenants, the facts of the particular case considered. Rector vs. Waugh, 17 Mo. 17, and see Becker vs. Becker, 254 Mo. 668, 163 S. W. 865.

"It seems to us too clear to admit of dispute that a relocation of a mining claim by one tenant in common, under the circumstances, attending the relocation of the Paris, would inure to the benefit of his cotenants, whether the relocation was made with their knowledge and consent or not; that such a result would necessarily follow from the fiduciary relation that exists between tenants in common, which prevents one of them from acquiring title to the common property in violation of the trust and confidence that such relation imposes." Van Wagenen vs. Carpenter, *supra* (2).

cotenancy;[12] or when he obtains patent in his own name for the claim held in joint ownership,[13] or purchases an outstanding title to such claim.[14] The land department has no authority to adjudge that a cotenant is a trustee and holds in trust for the benefit of the other cotenants. That is a question which must be determined by the courts.[15] The trust between cotenants may be terminated by agreement or laches[16] or by the statute of limitations.[17]

§ 1155. Title of Cotenant.

The title of a cotenant in an unpatented mining claim may be divested by his failure after due notice to contribute his proportion of annual expenditures;[18] or by the actual adverse possession for the statutory period of the other cotenants, or some of them,[19] evidenced

[12] Lockhart vs. Johnson, *supra* (11); Lockhart vs. Leeds, *supra* (1); Stevens vs. Grand Central Co., *supra* (1); Strang vs. Ryan, 16 Cal. 34; Doherty vs. Morris, 11 Colo. 12, 16 Pac. 911; Saunders vs. Mackey, 5 Mont. 523, 6 Pac. 361; Lockhart vs. Wills, 9 N. M. 344, 54 Pac. 341, overruling 9 N. M. 263, 50 Pac. 318; s. c. Lockhart vs. Leeds, *supra* (1).

[13] Turner vs. Sawyer, *supra* (2); Badger Co. vs. Stockton Co., *supra* (9); Butte Co. vs. Cobban, *supra* (10); Brundy vs. Mayfield, 15 Mont. 201, 38 Pac. 1067; Delmoe vs. Long, 35 Mont. 156, 88 Pac. 778; Lakin vs. Sierra Buttes Co., 25 Fed. 337; Stevens vs. Grand Central Co., *supra* (1); Golden & Cord Claims, 31 L. D. 178.

[14] A tenant in common in a junior location can not buy in the title of a senior conflicting mining claim and assert it against his cotenant in the junior location. Franklin Co. vs. O'Brien, *supra* (2).

A party taking a lease in his own name of which three others have for several years paid each one-fourth, holds title in trust for himself and his three associates, as coowners; and he can not terminate this trust without notice. A failure to pay his share does not terminate a joint adventurer's rights. Kirkpatrick vs. Baker, 135 Okla. 142, 276 Pac. 193.

[15] Coleman vs. Homestake Co., 30 L. D. 364; see Turner vs. Sawyer, *supra* (2); Thomas vs. Elling, 25 L. D. 495; Malaby vs. Rice, 15 Colo. A. 364, 62 Pac. 228.

[16] Patterson vs. Hewitt, 195 U. S. 309; Holt vs. Murphy, 207 U. S. 407, aff'g. 15 Okla. 13, 79 Pac. 265.

[17] Gregory vs. Gregory, 102 Cal. 50, 36 Pac. 364; dist'g. In re Grider, 81 Cal. 571, 22 Pac. 908; Akley vs. Bassett, *supra* (2).

[18] Faubel vs. McFarland, 144 Cal. 717, 78 Pac. 261; Elder vs. Horseshoe Co., *supra* (1). See Donohoe vs. Tyosivig, 6 Alaska 139; Haynes vs. Briscoe, 29 Colo. 137, 67 Pac. 156; Porter vs. Jugovich, 47 Ida. 682, 278 Pac. 219; see Mecum vs. Metz, 30 Wyo. 495, 222 Pac. 574, 32 Wyo. 79, 229 Pac. 1105.

[19] Feliz vs. Feliz, 105 Cal. 1, 38 Pac. 521; Akley vs. Bassett, *supra* (2); Smith vs. Barrick, 41 Cal. A. 33, 182 Pac. 56. The entry and possession of one tenant in common ordinarily is deemed the entry and possession of all, and this presumption will prevail in favor of all until some notorious act of ouster or adversary possession is brought home to the knowledge of the others. Yet a tenant in common may enter adversely and claim in severalty, and when he does so, the statute of limitations will run in his favor and against his cotenants. Virginia Co. vs. Hylton, 115 Va. 421, 79 S. E. 337. See Hodgson vs. Federal Co., 5 Fed. (2d) 442, aff'g. 285 Fed. 546, aff'd. 274 U. S. 15. In Hendricks vs. Musgrove, 183 Mo. 300, 81 S. W. 1265, the court said: "In order for one tenant in common to acquire title by limitation against another tenant in common, he must do some act toward his cotenant that will amount to a disseisin or a repudiation or denial of the rights of his cotenant and such as will show an intention to hold adversely to his cotenant, and such an act must be totally irreconcilable with a recognition of the rights of his cotenant. Akley vs. Bassett, *supra*, and cases cited. It is not essential, however, that it be shown that such acts were brought to the notice of the cotenant. Fuller vs. Swensberg, 106 Mich. 305, 64 N. W. 463. Any act of the cotenant in the exclusive possession which manifests any intention on his part to hold exclusively for himself is equivalent in law to an actual ouster. Akley vs. Bassett, *supra* (2). Upon the question of what constitutes disseisin of one cotenant by another cotenant, and the notice of adverse possession by the latter the court said in Elder vs. McClaskey, 70 Fed. 542, *certiorari* denied 163 U. S. 685, that, "It is not necessary for him to give actual notice of this ouster or disseizing of his cotenant to him. He must, in the language of the authorities, 'bring it home' to his cotenant. But he may do this by conduct, the implication of which can not escape the notice of the world about him, or of any one, though not a resident of the neighborhood, who has an interest in the property, and exercises that degree of attention in respect to what is his that the law presumes in every owner. Said Mr. Justice Bradley in re Broderick's Will, 21 Wall 503, 519: 'Parties can not, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all transactions of the past. The world must move on, and those who claim an interest in persons and things must be

by ouster,[20] or by their obtaining a patent from the government in their own names,[21] unless the pretermitted cotenant enforces the trust thus created within seasonable time.[22] That is to say, when not barred by laches, the statute of limitations or the intervention of the rights of third parties, without notice.[23]

§ 1156. Remedy of Excluded Cotenant.

A cotenant excluded by his cotenants from an application for patent may bring his adverse suit and have his rights determined so that the patent will convey directly to him whatever interest he shows himself entitled to,[24] but he is not compelled to file either a protest [25] or an adverse claim.[26] He ordinarily may, if he chooses, wait until the conclusion of the patent proceedings, and then assert his equities in the patent title and have the patentees declared trustees for his benefit to the extent of his interest.[27] Hence the excluded cotenant may bring his action in the ordinary way without reference to the patent proceedings.[28]

§ 1157. Questioning Title.

A cotenant can not question the common title upon a contest between himself and his cotenants; nor purchase an adverse title and set it up against his cotenants if they are willing to reimburse him pro rata for

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charged with the knowledge of their status and condition, and of the vicissitudes to which they are subject.'" See Rich vs. Victoria Co., *supra* (2). In Sheehan vs. All Persons, *supra* (2), the court said: "The law well settled that, before one can acquire title by adverse possession, the possession must be actual, open, notorious, continuous, and uninterrupted for the statutory period; exclusive, hostile and under a claim of right, and taxes must be paid by the adverse claimant. An adverse holder who fails to establish any one of these elements can not acquire title by adverse possession."

[20] Union Oil Co. vs. Taylor, *supra* (3); Virginia Co. vs. Hylton, *supra* (19). The elemental idea of ouster is dispossession, which in turn means ejectment or exclusion of one from the realty, if not to his injury then certainly against his interest and without his consent. Pursel vs. Reading Co., 232 Fed. 807. See Schwallbaek vs. Chicago Co., 69 Wis. 299, 34 N. W. 128, *but see* Mason vs. Kellogg, 38 Mich. 143. See Bath vs. Valdez, 70 Cal. 350, 11 Pac. 724; Akley vs. Bassett, *supra* (2); Clavey vs. Loney, 80 Cal. A. 20, 251 Pac. 232; Hurie vs. Quigg, 121 Okla. 80, 247 Pac. 677.

See *supra*, note 2. See, also, Allen vs. Morris, 244 Mo. 357, 148 S. W. 905, Am. Ann. Cas. 1913 D. 1310 & note 1313. It is well settled that where one cotenant enters under a deed purporting to vest the fee to the entire land, asserting open and exclusive ownership, the others are ousted. Kidd vs. Borum, 181 Ala. 144, 61 So. 100, Am. Ann. Cas. 1915 C. 1926 and note 1232; Unger vs. Mooney, 63 Cal. 586; Bath vs. Valdez, 70 Cal. 350, 11 Pac. 724, in effect overruling Seaton vs. Son, 32 Cal. 481. But possession of land by a grantee of a cotenant, after severance of the mineral rights, does not charge the other cotenants with notice of an adverse claim to the minerals. Yates vs. State, ___ Tex. C. A. ___, 3 S. W. (2d) 114; Hanks vs. Magnolia Co., ___ Tex. C. A. ___, 14 S. W. (2d) 348.

A tenant in common, when ousted by his cotenant, may recover damages resulting from the ouster, as well as when ousted by an entire stranger to the land. Carpentier vs. Mitchell, 29 Cal. 330; Paul vs. Cragnaz, 25 Nev. 293, 59 Pac. 860, and 60 Pac. 983 on rehearing.

A tenant in common is not liable for use and occupation unless there has been an actual or constructive ouster of the cotenants. Allen vs. Jones, 12 Fed. (2d) 186.

[21] Stevens vs. Grand Central Co., *supra* (1); Suessenbach vs. Bank, *supra* (11); see Wetzstein vs. Largey, 27 Mont. 212, 70 Pac. 717.

[22] Turner vs. Sawyer, *supra* (2); Stevens vs. Grand Central Co., *supra* (1); Thomas vs. Elling, *supra* (15); Suessenbach vs. Bank, *supra* (11).

[23] *Id.* See Guerin vs. American Co., *supra* (11); Perry on Trusts (6th ed.), § 865, and cases therein cited.

[24] Turner vs. Sawyer, *supra* (2); Badger Co. vs. Stockton Co., *supra* (9); Gold Dirt Lode, 10 C. L. O. 19; Davidson vs. Fraser, 36 Colo. 1, 84 Pac. 695; Mattingly vs. Lewisohn, 8 Mont. 259, 19 Pac. 310; O'Hanlon vs. Ruby Gulch Co., 48 Mont. 80, 135 Pac. 914, 64 Mont. 318, 209 Pac. 1062; Thatcher vs. Darr, 27 Wyo. 452, 199 Pac. 947.

[25] Coleman vs. Homestake Co., *supra* (15); Golden & Cord Claims, *supra* (13).

[26] Turner vs. Sawyer, *supra* (2); O'Hanlon vs. Ruby Gulch Co., *supra* (24); *but see* Ritter, *supra* (2), overruling 36 L. D. 36.

[27] O'Hanlon vs. Ruby Gulch Co., *supra* (24).

[28] Malaby vs. Rice, *supra* (15); O'Hanlon vs. Ruby Gulch Co., *supra* (24).

the amount so expended within a reasonable time,[29] or offer to contribute their proportion thereof, provided, that the purchasing cotenant wishes to be paid and conducts himself accordingly;[30] nor acquire title by adverse possession against other cotenants unless there is complete ouster and no litigation pending.[30a]

§ 1158. Right to Work the Mine.

In the absence of a local statute prohibiting such action,[31] or of an agreement to the contrary between the cotenants, a cotenant who does not exclude his cotenants may work the property and remove mineral therefrom without being charged with waste or being liable to the other cotenants for damages or be subject to an injunction at the instance of his cotenants.[32] The relationship of a cotenant to the property does

[29] Mandeville vs. Solomon, 39 Cal. 133; Stevenson vs. Boyd, 153 Cal. 630, 96 Pac. 284; Harrison vs. Cole, 50 Colo. 478, 116 Pac. 1126; Wilson vs. Linder, 21 Ida. 576, 123 Pac. 487; Darcey vs. Bayne, 105 Md. 369, 66 Atl. 436; Cedar Canyon Co. vs. Yarwood, *supra* (2); see Smith vs. Goethe, 159 Cal. 628, 115 Pac. 223. In Mandeville vs. Solomon, *supra*, the court said: "Equity does not deny to a tenant in common the right to purchase in an outstanding or adverse claim to the common property; it, however, deals with the tenants after such a purchase is made. While it will not permit one of them to acquire such a title solely for his own benefit, or to the absolute exclusion of the other, it at the same time exacts of that other the exercise of reasonable diligence in making his election to participate in the benefit of the new acquisition, and having upon its own principles of fair dealing compelled the purchasing tenant to allow his cotenant this opportunity, the latter will not be permitted to equivocate or trifle with the position thus afforded him, or to make it a means of speculation for himself, by delaying until the rise of the land or some event yet in the future shall determine his course. Unless he makes his election to participate within a reasonable time, and contributes or offers to contribute his ratio of the consideration actually paid he will be deemed to have repudiated the transaction and abandoned its benefit." Smith vs. Goethe, *supra*; Arthur vs. Coyne, 32 Okla. 530, 122 Pac. 690.

Where a cotenant of a mining claim, acquired by location, purchases a title initiated by a relocation, the purchase inures to the benefit of his cotenants in the original location. Mills vs. Hart, *supra* (11). In Hodgson vs. Federal Oil Co., *supra* (2), the Supreme Court said: "The rule as commonly stated forbids a cotenant from acquiring and asserting title against his companions because of the mutual trust and confidence supposed to exist; but the rule does not go beyond the reason which supports it. If the interests of the cotenants accrue at different times, under different instruments and neither has superior means of information respecting the state of the title, then either, unless he employs his cotenancy to secure an advantage, may acquire and assert a superior outstanding title, especially where there is no joint possession. This exception to the general rule is recognized in Turner vs. Sawyer, *supra* (2); Elder vs. McClaskey, 70 Fed. 529, 546; Freeman on Cotenancy and Partition, § 155; Shelby vs. Rhodes, 105 Miss. 255, 267; Sands vs. Davis, 40 Mich. 14, 18; Joyce vs. Dyer, 189 Mass. 64, 67, 75 N. E. 81; Steele vs. Steele, 220 Ill. 318, 323, 77 N. E. 232. See, also, extended note to this case. Hodgson vs. Federal Oil Co., *supra* (2), 54 L. R. A., pp. 874 to 913, containing a very full discussion of this doctrine and its limitations. See U. S. vs. West, 30 Fed. (2d) 742. Since it is the duty of a cotenant to pay the taxes, he can not strengthen his title by permitting them to become delinquent, nor by paying them until open hostility is manifested. Klumpke vs. Henley, *supra* (2).

It has been held that the title acquired by a tenant in common under the purchase of land at a tax sale is fraudulent and void as against his cotenants. Moragne vs. Doe, 143 Ala. 459, 39 So. 161; Weare vs. Van Meter, 42 Iowa 128; see Hurley vs. Hurley, 148 Mass. 444, 19 N. E. 545, and cases therein cited; Wilson vs. Linder, *supra*. One cotenant may buy the whole property at judicial sale and retain it, Starkweather vs. Jenner, 216 U. S. 524, dist'g. Turner vs. Sawyer, *supra* (1), or at sale under trust deed. Becker vs. Becker, *supra* (11).

[30] Boscowitz vs. Davis, 12 Nev. 448, 468, 469. "He will be regarded as holding the title he thus acquires in trust for his cotenants until the presumption is repelled by their refusal to contribute in payment of his outlays." Weare vs. Van Meter, *supra* (29).

[30a] Kline vs. Wright, *supra* (11).

[31] McCord vs. Oakland Co., 64 Cal. 134, 27 Pac. 863; Butte and Boston Co. vs. Montana Co., 24 Mont. 125, 60 Pac. 1039; *Id.*, 25 Mont. 41, 63 Pac. 825. See, also, Boston Co. vs. Montana Co., 24 Mont. 142, 60 Pac. 990.

"Every cotenant has a perfect right to enter upon a 'mining claim and work it.'" Costigan Mining Law, p. 193, § 136. "The doctrine of Murray vs. Haverty, 70 Ill. 318, 'can not be supported.' *Id.*, note 19, citing cases. He has no more right to exclude other cotenants from a tunnel run to work the claim than to exclude them from the claim itself. *Id.* People vs. District Court, 27 Colo. 465, 62 Pac. 206."

[32] McCord vs. Oakland Co., *supra* (31); see Russell vs. Bank, 47 Minn. 288, 50 N. W. 228; Smith vs. Sharpe, 44 N. C. 91; Dettering vs. Nordstrom, 148 Fed. 81. In McCord vs. Oakland Co., *supra*, it was said: "Is it not also true from the very

not give him the right to use the common tunnel [33] or shaft [34] to exploit other mining property in which his cotenants have no interest.[35] In a proper case an injunction will issue restraining such cotenant from continuing such work.[36]

§ 1159. Contribution.

In the absence of a ratification the operating cotenant has no claim for contribution from the nonparticipating cotenants [37] except in a par-

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nature of mining property in this state, valuable only because of the mineral it is supposed to contain, that each of the cotenants may use it in the only way it can be used? The cotenants out of possession may at any time enter into an equal enjoyment of their possession; their neglect to do so may be regarded as an assent to the sole occupation of the other." See, also, Pico vs. Columbet, 12 Cal. 414; Job vs. Potton, L. R. XX, Eq. Cases 84. "Tenants in common are the owners of the substance of the estate. They may make such reasonable use of the common property as is necessary to enjoy the benefit which in a mine or oil well can only be enjoyed by removing the products thereof, the taking of mineral from a mine and the extraction of oil from an oil well are the use and not the destruction of the estate. This being true, a tenant in common without the consent of his cotenant, has the right to develop and operate the common property for oil and gas and for that purpose may drill wells and erect necessary plants. He must not, however, exclude his cotenant from exercising the same rights and privileges. There are cases to the contrary. See Gulf Ref. Co. vs. Carroll, 145 La. 299, 82 So. 277; Zeigler vs. Brenneman, 237 Ill. 15, 86 N. E. 597 (probably because of an Illinois statute); South Penn. Co. vs. Haught, 71 W. Va. 720, 78 S. E. 759. The above rule, however, is supported by the better reason and by the weight of authority. Prairie Co. vs. Allen, 2 Fed. (2d) 566, and cases therein cited.

These last three cases cited may be distinguished from those establishing the better rule, as in each of these the contest is made by a lessee of the whole from a cotenant of the property, and the leases are treated as conveyances beyond the power of a cotenant to make. See the distinction made between profits and rents received in Howard vs. Throckmorton, 59 Cal. 79–89. See, also, North Central Co. vs. Gulf Co., 159 La. 403, 105 So. 411; and for a very full discussion of the whole subject see Young vs. Young, 307 Mo. 218, 270 S. W. 653, 39 L. R. A. 734, and note at p. 741, also note to Prairie Co. vs. Allen, *supra*, in 40 L. R. A., pp. 1400 to 1411.

Zeigler vs. Brenneman, *supra*, is decided on the authority of Murray vs. Haverty, 70 Ill. 318, 320; see the latter case distinguished and shown to be based on a statute of Illinois in McCord vs. Oakland Co., *supra* [31], and see Costigan Min. Law, p. 493, § 136, note 19, quoted *supra* [31].

In Dougherty vs. Creary, 30 Cal. 291, it was said: "As the property can only be used in entirety, it is indispensible to the conducting of the business of mining that those owning the major portion of the property should have the power to control in case all can not agree, otherwise the work might become wholly discontinued." A majority of the coowners of a mining claim may work the same against the objection of a minority owner. Sweeney vs. Hanley, 126 Fed. 97, decided under authority of an Idaho statute; Hawkins vs. Spokane Co., 3 Ida. 650, 33 Pac. 40. *But see* Murray vs. Haverty, *supra* [31], cited as controlling Ziegler vs. Brenneman, *supra*; Anaconda Co. vs. Butte Co., 17 Mont. 519, 43 Pac. 924; Red Mt. Co. vs. Esler, 18 Mont. 174, 44 Pac. 523, decided under authority of § 502, Mont. Code of Civil Procedure.

[33] Laesch vs. Morton, 38 Colo. 171, 87 Pac. 1081.

[34] Butte Co. vs. Montana Co., *supra* [31].

[35] See *supra*, notes 33 and 34. See, generally, Silver King Co. vs. Conklin Co., 204 Fed. 166; Pioneer Co. vs. Shamblin, 140 Ala. 486, 37 So. 391; Walsh vs. Kleinschmidt, 55 Mont. 57, 173 Pac. 549.

[36] Hancock vs. Tharpe, 129 Ga. 812, 60 S. E. 168; Williamson vs. Fleeger, 137 Ill. A. 42; Twort vs. Twort, 16 Ves. Jr. 129, 33 Eng. Reprint, 932. See McCord vs. Oakland Co., *supra* [31].

In Law vs. Heck Co., ___ W. Va., ___, 145 S. E. 601, drilling for oil was enjoined at the suit of one cotenant, as it could not be affirmatively shown that such action was necessary to protect the land from drainage of oil by wells on nearby lands.

[37] McCord vs. Oakland Co., *supra* [31]; Frowenfeld vs. Hastings, 134 Cal. 128, 66 Pac. 178; Neuman vs. Dreifurst, 9 Colo. 228, 11 Pac. 98; Stickle vs. Mulrooney, 36 Colo. 242, 87 Pac. 547; Rico Co. vs. Musgrave, 14 Colo. 79, 23 Pac. 458; Wolfe vs. Childs, 42 Colo. 121, 94 Pac. 292; Wahl vs. Larsen, 70 Colo. 274, 201 Pac. 48; see Goodenough vs. Ewer, 16 Cal. 461; Goller vs. Felt, *supra* [5]; Higgins vs. Eva, 259 Pac. 502; McDaniel vs. Moore, 19 Ida. 43, 112 Pac. 317; Manhattan Co. vs. White, 48 Mont. 565, 140 Pac. 90; Welland vs. Williams, 21 Nev. 230, 29 Pac. 403.

As a general proposition there is no implied contractual relation between cotenants and tenants in common. One cotenant can not bind the other without his consent for the expense incurred in developing and improving the common property, but must recoup, if at all, from the profits derived from the property, as neither can maintain an action against the other to recover any portion of such expense. Circumstances may exist which amount to a ratification of such expenditures and in such case the cotenant is liable. McDaniel vs. Moore, *supra*. Welland vs. Williams, *supra*.

tition suit where the court may adjust the equities between them.[38] Where the work has been done at a profit the operating cotenant can deduct the nonworking cotenant's proper share for all expenditures which improve the property, but not for the expenses of unsuccessful prospecting.[39]

A cotenant who fails to do or contribute his proportion of the annual assessment work upon the property may be "advertised out" and his cotenants obtain title to the entire claim.[40]

§ 1160. Losses and Debts.

As a rule the working cotenant must alone sustain any loss which results from his working the property, and he alone is responsible for the debts thereby contracted.[41]

§ 1161. Accounting.

The working cotenant is liable to the nonparticipating or nonassenting cotenants for their *pro rata* share in the net results.[42] It is the duty of a cotenant of a mining claim who, in fact, or in law, has become a trustee for the other cotenant to notify them of his entry upon the

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That a court of equity has jurisdiction in a partition suit to direct payment by one cotenant to another of his proportionate share of assessment work is not to be doubted. But such right of contribution is lost in a case where the cotenant in possession holds adversely to his cotenant and denies him permission to enter upon the claim or to contribute his proportion of the expenses of maintaining the same, for in such a case the claim for contribution is inconsistent with the prior acts of the cotenant in possession of such a character as to estop him to claim contribution. Becker-Franz Co. vs. Shannon Co., 256 Fed. 522.

[38] Neuman vs. Dreifurst, *supra* (37); Welland vs. Williams, *supra* (3).

[39] McCord vs. Oakland Co., *supra* (31); Hawkins vs. Spokane Co., *supra* (32). A tenant in common out of possession is entitled to his share of the mineral extracted less the expense of mining and the cost of improvements necessary thereto. Wolfe vs. Childs, *supra* (37); Job vs. Potton, *supra* (32); see Sweeney vs. Hanley, *supra* (32); Mallett vs. Uncle Sam Co., 1 Nev. 188; Foster vs. Weaver, 118 Pa. St. 42, 12 Atl. 313; Fulmer's Appeal, 128 Pa. St. 24, 18 Atl. 493; dist'g. Coleman's Appeal, 62 Pa. St. 252. The burden is upon the tenant in possession to show the amount of the expense of mining. Dettering vs. Nordstrom, *supra* (52).

See, also, Prairie Co. vs. Allen, *supra* (1); Broadway vs. Stone, ___ Tex. C. A. ___, 15 S. W. (2d) 230, rev'g. 6 S. W. (2d) 197.

The general rule is applied as follows, that if minerals are extracted under a claim of right made in good faith, the party extracting and converting them is liable only for the value less the cost of extraction and reduction. But a trespasser or cotenant acting in bad faith may not deduct this, but is liable for the full value without any deductions. Reynolds vs. McMann Co., *supra* (1); Elkhorn-Hazard Co. vs. Kentucky Co., 20 Fed. (2d) 67; Broadway vs. Stone, *supra*; Foster vs. Weaver, *supra*; Fulmer's Appeal, *supra*.

A party who takes coal from another's mine by honest mistake is liable only for its value in place, not at the pit mouth. Jewel Co. vs. Watson, 176 Ark. 108, 2 S. W. (2d) 58; Johns Run Co. vs. Little Fork Co., ___ Ky. ___, 3 S. W. (2d) 623; Blackberry Co. vs. Kentland Co., ___ Ky. ___, 8 S. W. (2d) 425.

[40] Evalina Co. vs. Yosemite Co., 15 Cal. A. 714, 115 Pac. 946. See Pack vs. Thompson, 223 Fed. 635. But the burden is on the party claiming forfeiture to show strict compliance with the statutes providing such remedy. Porter vs. Jugovich, *supra* (18).

[41] See *supra*, note 37.

[42] McCord vs. Oakland Co., *supra* (31); Paul vs. Cragnaz, *supra* (20). An accounting may be compelled by either of the parties holding a majority or a minority interest in a mine, of work done and metals extracted. Hawkins vs. Spokane Co., *supra* (32); Memphis Co. vs. Archer, 137 Miss. 558, 102 So. 390; see Guerin vs. American Co., *supra* (11). Damages may be recovered for loss of profits. Paul vs. Cragnaz, *supra*. See McGowan vs. Bailey, 179 Pa. St. 470, 36 Atl. 325.

Mr. Costigan in his work on mining law, p. 494, § 136*a*, says: "Where an accounting is called for, there are various rules for determining what the cotenant in possession must pay. Where the complaining cotenant refused to share the risks, his recovery is limited by some cases to his share to the fair rental value of the land. Early vs. Friend, 16 Gratt. (Va.) 21; see Edsall vs. Merrill, 37 N. J. Eq. 114. The difficulty of such a measure of damages for mining property, if it were possible to fix a fair rental value of such property, is that, if it is to hold, there should be a recovery, even if the tenant in possession has made a loss. The same is true of the measuring recovery by the value of the ore in place. McGowan vs. Bailey, *supra*. The view which gives the complaintant his proportionate share of the profits after deducting all proper expenses, a view which clearly applies where

claim and taking ore from the joint claim.[43] Hostility of possession under claim of title exclusive of any other right if continued for sufficient time under the statute of limitations will bar an accounting.[44]

§ 1162. Action for Accounting.

One cotenant who secretly takes the ores of the joint claim and appropriates to himself the share of his cotenants of the proceeds will, in an action for an accounting, be allowed only the reasonable, proximate causative expense of discovering and extracting and marketing the ore, but he is not entitled to an allowance of the remote and inconsequential expenses.[45]

§ 1163. Abandonment by Cotenant.

An abandonment of his interest by a cotenant does not vest his right or title in his cotenants.[46] When his conduct is such that, if he was the sole owner, he would be held to have abandoned his right in a technical sense he may not thereafter assert title to the interest so renounced.[47]

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the defendant has excluded the plaintiff from the joint property, Williamson vs. Jones, 43 W. Va. 562, 27 S. E. 411, and where the defendant has received royalties from a lessee, Cecil vs. Clark, 49 W. Va. 459, 39 S. E. 202, would seem to be the proper one to apply to the case of mines.

"Wolfe vs. Childs, *supra* [37]; Graham vs. Pierce, 19 Gratt. (Va.) 28, 100 Am. Dec. 658. See Ruffners vs. Lewis Ex'rs., 7 Leigh (Va.) 720, 30 Am. Dec. 513; Martel vs. Jennings-Heywood Oil Syndicate, 114 La. 351, 38 So. 253; Lone Acre Oil Co. vs. Swayne (Tex. Civ. App.) 78 S. W. 380. The only objection is the one applicable to all the others, namely, that it lets a man who refused to take the risk share the profit. The answer to that would seem to be that the cotenant who does the work does so with his eyes open to the consequences. He must make up his mind whether he will get a lease from his cotenants, will force a partition, or will abide by the rules of cotenancy. Under the interpretation given by the Idaho Supreme Court to a state statute, the owner of a majority interest in a claim being worked by a cotenant having a minority interest can dictate the manner in which the latter shall work, because by interfering the majority owner converts the cotenancy into a mining partnership. Hawkins vs. Spokane Co., 3 Idaho 241, 28 Pac. 433. *Id.* 3 Idaho 650, 33 Pac. 40. See Sweeney vs. Hanley, *supra* [32]. That being so, the majority owner must account to the minority for the latter's share of the profits, if the majority owner works the property. *Id.*" § 8059 Rev. St. 1921. Boehme vs. Fitzgerald, 43 Mont. 227 (115 Pac. 413).

As a general rule mining partners may sue each other only in equity for an accounting, except where there has been a settlement, or but one item remains to be adjusted. Bielenberg vs. Higgins, 86 Mont. 521, 277 Pac. 631.

The Idaho statute reads as follows: "3309 R. S., the decision of the members owning a majority of the shares or interests in a mining partnership binds it in the conduct of its business." § 2520 Cal. Civil Code is the same. It is quoted in full in Stuart vs. Adams, 89 Cal. 371, 26 Pac. 970, but not on this point. The case of State vs. District Court, 79 Mont. ___, 254 Pac. 863, enforces this majority rule, holding it proper for the owners of two-thirds to sue in the name of all the partners for the possession of personal property taken under an attachment against the owner of the other third. The statute in Montana is the same as in California and Idaho.

[45] Silver King Co. vs. Conklin Co., *supra* [35]; see Prairie Co. vs. Allen, 2 Fed. (2d) 574; McCord vs. Oakland Co., *supra* [31].

[46] O'Hanlon vs. Ruby Gulch Co., *supra* [21]; *but see* Worthen vs. Sidway, 72 Ark. 215, 79 N. W. 777, wherein it is said: "When a cotenant abandons his interest it does not revert to the government. The law does not recognize the acquisition from the government of fractional parts of mining claims. Each claim must be located and acquired as a whole. The assessment work required to be done is entire. One of the owners can not do his part, and thereby save his part, it passes out, and the other cotenants acquire the entire claim by compliance with the statute." Miller vs. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, aff'd. 197 U. S. 313.

[47] Lockhart vs. Leeds, *supra* [1]; Royston vs. Miller, *supra* [10]; Stevens vs. Grand Central Co., *supra* [1]; Moragne vs. Doe, *supra* [29]; Van Wagenen vs. Carpenter, *supra* [2]; Perelli vs. Candiani, 42 Or. 625, 71 Pac. 537; McCarthy vs. Speed, *supra* [2]; Lockhart vs. Washington, Co., *supra* [10]; Yarwood vs. Johnson, *supra* [1]; see Turner vs. Sawyer, *supra* [2]; Mills vs. Hart, *supra* [11]; Delmoe vs. Long, *supra* [13]; Lehman vs. Sutter, 60 Mont. 97, 198 Pac. 1102. A cotenant who makes an amended location embracing additional ground and obtains a patent thereunder can be required to deed to his cotenants interests in the additional territory upon the basis of their ownership in the original location. Hallock vs. Traber, 23 Colo. 14, 46

The abandonment by one of the cotenants, or his refusal to contribute his proportion of the cost of the assessment work, does not work the destruction of the entire location, but his interest may become the property of his cotenants when they make the required expenditures after notice.[48]

§ 1164. Relocation by Cotenant.

A relocation of the common property made, or caused to be made, by one of the cotenants inures to the benefit of his cotenants although such relocation is intended to deprive them of their interests therein.[49] One of several cotenants after default by all may relocate for his own benefit free from equities.[50]

§ 1165. Partition.

Partition may be had of real property,[51] held and occupied by several persons as copartners, joint tenants or tenants in common, according to their respective rights and interests in it.[52]

The partition of mining property must generally result in its sale.[53]

Pac. 110; see Stevens vs. Grand Central Co., *supra* (1). *But see* Lockhart vs. Johnson, *supra* (11); Saunders vs. Maekey, *supra* (12); Lockhart vs. Wills, *supra* (12); Berquist vs. W. Virginia Co., 18 Wyo. 234, 106 Pac. 682.

[48] McCarthy vs. Speed, *supra* (2); Yarwood vs. Johnson, *supra* (1), *but see* Hodgson vs. Federal Co., *supra* (2); Virginia Co. vs. Hylton, *supra* (19).

[49] Hulst vs. Doerstler, 11 S. Dak. 14, 75 N. W. 270. See Speed vs. McCarthy, *supra* (1); Lewis vs. Carr, 49 Nev. 366, 246 Pac. 695.

The locators of a mining claim sold and conveyed an interest therein to one person and the remaining interest to a corporation. Subsequently the corporation became defunct and abandoned all claim to the property. The other part owner did not abandon or otherwise dispose of his rights and subsequently together with other persons relocated the entire claim and performed the annual assessment work. Such facts are sufficient to show the ownership of the claim in the relocators. Oroville Co. vs. Rayburn, 104 Wash. 137, 176 Pac. 14.

[50] Roberts vs. Date, 123 Fed. 238. For a discussion of this subject see Costigan Min. Law, p. 331, § 96. See *supra*, note 11.

[51] The term "real property" includes mining claims. Bradford vs. Morrison, 212 U. S. 395; see, also, Harris vs. Equator Co., 8 Fed. 863; Black vs. Elkhorn Co., 49 Fed. 552, aff'd. 52 Fed. 859, aff'd. 163 U. S. 445; Merritt vs. Judd, 11 Cal. 59; Hughes vs. Devlin, 23 Cal. 501; cited Ames vs. Ames, 160 Ill. 601; Hopkins vs. Noyes, 4 Mont. 550; Lavagnino vs. Uhlig, 26 Utah 1, 71 Pac. 1046, aff'd. 198 U. S. 443.

In Hughes vs. Devlin, *supra*, the land sought to be partitioned was a mining claim and the court held it was subject to partition, the same as other real property. See, also, Aspen Co. vs. Rucker, 28 Fed. 220; Heinze vs. Butte & B. Co., 126 Fed. 1; Watterson vs. Cruse, 179 Cal. 382, 176 Pac. 870, although the paramount title may be in the United States. Aspen Co. vs. Rucker, *supra*. See Dorsey vs. Newcomer, 121 Cal. 213, 53 Pac. 557, where a sale of a mining location claimed by a mining partnership is ordered in a partition suit.

[52] Smith vs. Cooley, *supra* (1); see, also, Heinze vs. Butte & B. Co., *supra* (51).

[53] Royston vs. Miller, *supra* (10); Manley vs. Boone, 159 Fed. 633, and cases therein cited; Mitchell vs. Cline, 84 Cal. 418, 24 Pac. 164; Musick Oil Co. vs. Chandler, 158 Cal. 7, 109 Pac. 613; East Shore Co. vs. Richmond Co., 172 Cal. 171, 155 Pac. 999; King vs. Amy Co., 152 U. S. 222; Sharkey vs. Candiani, 48 Or. 112, 85 Pac. 219, 7 L. R. A. N. S. 791; Smith vs. Greene, 76 W. Va. 276, 85 S. E. 537. Other authorities expressing various opinions on the proposition are the following: Aspen Co. vs. Rucker, *supra* (51); Dangerfield vs. Caldwell, 151 Fed. 558; Smith vs. Cooley, *supra* (1); Lenfers vs Henke, 73 Ill. 410; Adams vs. Briggs, 7 Cush. (Mass.) 360; Paul vs. Cragnaz, *supra* (20); Kemble vs. Kemble, 44 N. J. Eq. 454; Ryan vs. Egan, 26 Utah 241, 72 Pac. 933; Conant vs. Smith, 1 Aiken (Vt.) 67; Hall vs. Vernon, 47 W. Va. 295, 34 S. E. 764; Dall vs. Confidence Co., 3 Nev. 531. Mining property, from its very nature, is not as a rule susceptible of partition. The ores are unevenly distributed, while the values are purely conjectural until tested by extended development and careful tests, which can only be obtained as the result of a vast expenditure of money and time; so that it is known in advance of bringing a suit for partition that the only feasible relief that can be awarded is a decree for a sale of the property. Brown vs. Challis, 23 Colo. 145, 46 Pac. 679; Hall vs. Vernon, *supra*.

Whether a placer mining claim can be divided so as to make a just partition between tenants in common is a matter of fact to be determined by the court. See Memphis Co. vs. Archer, *supra* (42). The authorities are not uniform as to whether a placer mining location may be divided by a surface partition, or whether a sale should be ordered. Musick Oil Co. vs. Chandler, *supra*.

§ 1166. Parol Partition.

An agreed parol partition accompanied with actual exclusive possession of the respective portions by the parties as assigned to them is valid.[54]

§ 1167. Mining Right.

A bare "mining right" is usufructuary in its character and is not in its nature capable of partition.[55]

§ 1168. Arbitration.

The title to a mining claim is not subject to arbitration.[56]

§ 1169. Receivers.

As between tenants in common the grounds for the appointment of a receiver usually are: (a) Where one tenant is in possession, and excludes his cotenants from participation in the possession or income; (b) where the tenant in possession is insolvent and refuses to account to his cotenant; (c) where one tenant refuses to join his cotenant in the execution of necessary leases for the property owned in common, or interferes in the collection of rents with the tenant in possession; (d) where the court can see from the showing made that the appointment of a receiver is required in order to protect the interests of parties.[57]

§ 1170. Sales.

While a cotenant has capacity to transfer his undivided interest in a mining claim, he has no right to convey by metes and bounds any part thereof, or to convey the mineral and reserve the surface to the prejudice of his cotenants.[58]

A transfer of property interests between cotenants [59] may or may not be tainted with fraud in the concealment of the mineral value of the joint property according to the facts of the particular case.[60]

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[54] Four Twenty Co. vs. Bullion Co., Fed. Cas. 4989; see Tonopah Co. vs. Tonopah Co., 125 Fed. 400; Empire State Co. vs. Bunker Hill Co., 131 Fed. 591; Mitchell vs. Cline, *supra* (53); Dall vs. Confidence Co., *supra* (53); Silver City Co. vs. Lowry, 19 Utah 334, 57 Pac. 11, aff'd. 179 U. S. 196; and see Mullins vs. Butte Co., 25 Mont. 525, 65 Pac. 1004.

[55] Smith vs. Cooley, *supra* (1). See Porter vs. Cluck, ___ Tex. C. A. ___, 13 S. W. (2d) 130.

[56] Spencer vs. Winselman, 42 Cal. 479.

[57] Smith, Rec., § 317. See Heinze vs. Kleinschmidt, 25 Mont. 89, 63 Pac. 933, and see Heinze vs. Butte & B. Co., *supra* (51), wherein Judge Ross, in a dissentory opinion said: "The instances are rare, as said by this court in Thornases vs. Melsing, 106 Fed. 775, where a court is justified in appointing a receiver of a mine or mining claim, and still rarer where it is justified in appointing one with the power to work a mine, and thereby extract the mineral, which usually constitutes the sole value of such property, for, as said in the case just cited: the value of mining property of every character, like the value of any other property, largely depends upon the manner in iwhich it is operated. Many good mines prove unprofitable because of some loose managing or extravagant methods of working them. Of course, there may be, and sometimes are, cases where the proper preservation of the property requires the appointment of a receiver, who may, when the necessities of the case require it, be authorized to operate the property. But the instances are rare, and that a strong showing must be made is well established."

[58] Virginia Co. vs. Hylton, *supra* (19). For the reasons stated in the text see Adams vs. Briggs, *supra* (53).

[59] Bissell vs. Foss, *supra* (1). Tenants in common may contract with each other regarding the management or the disposition of the common property; one tenant being authorized to make a valid contract with his cotenant for the exclusive right to sell and dispose thereof. Laesch vs. Morton, *supra* (33); Lichtenberger vs. Newhouse, *supra* (1); 12 Am. & Eng. Ency. of Law (2d ed.) 672.

[60] Richardson vs. Heney, *supra* (1); see Galbraith vs. Devlin, 85 Wash. 482, 148 Pac. 589; s. c. Langley vs. Devlin, 95 Wash. 171, 163 Pac. 395, 4 A. L. R. 32, and notes pp. 44, 58, 59. In Phillips vs. Homestake Co., *supra* (7), there was a sale by one cotenant to the remaining cotenant of an undivided interest in a lease of

§ 1171. Licenses, Leases and Conveyances.

There is no doubt that one, as a tenant in common, may authorize another to do what he himself could do with the common property,[61] for instance, a license to dig ore in a mine given by one tenant in common extends only to his own interest therein,[62] but his licensee is a trespasser as regards his cotenants.[63] Before a location is perfected a tenant in common may make oral transfer,[64] or if perfected he may transfer the whole or part of his undivided interest in a location, but not of a specific part thereof.[65] He has no power to convey to a stranger the right to divert water from the land,[66] or to grant the right to cut timber[67] thereon, or to create an easement in the common estate against his cotenants.[68]

§ 1172. Compensation.

Tenants in common are not entitled to compensation from each other for services rendered in the care and management of the common property, in the absence of a special agreement or mutual understanding to that effect.[69]

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certain placer ground from which all pay ore and gravel had been extracted; of which the vendor did not apprise the vendee. The court said: "The defendant had the same sources of information open to him as the plaintiff in respect to the physical condition of the property, it can not, therefore, complain. A purchaser of such property must exercise common prudence, and if he fails to avail himself of the ordinary means of information, the law gives him no redress. Andrus vs. St. Louis S. & R. Co., 130 U. S. 643. No fiduciary relation existed between the parties, and no special confidence was reposed in the plaintiff by the defendant. They were independent of each other in the matter of the purchase and sale of plaintiff's interest, and dealt with each other as with strangers as to their respective interests in the common property. Bissell vs. Foss, 114 U. S. 252. Consequently no duty to disclose rested upon the plaintiff, and his failure to do so was not a fraud upon the defendant."

[61] Alford vs. Bradeen, 1 Nev. 228; Paul vs. Cragnaz, *supra* [20]; see Cascaden vs. Dunbar, 191 Fed. 471, modifying 157 Fed. 62.

[62] Omaha Co. vs. Tabor, 13 Colo. 11, 21 Pac. 925; see, also, Williams vs. Bruton, 121 S. C. 30, 113 S. E. 319; Cecil vs. Clark, *supra* [42]; Tipping vs. Robbins, 71 Wis. 507, 37 N. W. 427; Job vs. Potton, *supra* [32]. If his lessee is excluded by the other tenants in common he is entitled to his appropriate remedy. Paul vs. Cragnaz, *supra* [20].

[63] Howard vs. Manning, 79 Okla. 169, 192 Pac. 362.

[64] Doe vs. Waterloo Co., 70 Fed. 455, aff'g. 55 Fed. 11; Miller vs. Chrisman, *supra* [46]; Howard vs. Manning, *supra* [63]; see Weed vs. Snook, 144 Cal. 439, 77 Pac. 1023; Bay vs. Oklahoma Co., 13 Okla. 425, 73 Pac. 936. A deed for a half interest in a mining claim may compel the grantee to perform all of the annual labor thereon. Shaw vs. Caldwell, 16 Cal. A. 3, 115 Pac. 941; see Black vs. Elkhorn Co., 163 U. S. 451.

[65] See *supra*, note 58.

[66] Pfeiffer vs. Regents, 74 Cal. 156, 5 Pac. 622.

[67] Fuller vs. Montafi, 55 Cal. A. 314, 203 Pac. 409; *but see* Alford vs. Bradeen, *supra* [61]. 27 Ruling Case Law, p. 1029, § 18, reads: "If trees be cut, not for the sake of clearing the land, but for sale, it is waste, * * *. But an exception to this rule has been established in favor of the owners of timber estates, i. e., estates cultivated merely for the production of saleable timber, and where timber is cut periodically. Thus cultivation of pine trees for turpentine or cutting down oak trees for staves, or cypress trees for shingles, where that is an ordinary act of ownership, is not destruction and will not be deemed an irreparable injury, unless defendant is insolvent."

"A tenant in common has the right to cut or use timber in the usual and legitimate way of enjoying the property." *Id.*, § 20.

In Fuller vs. Montafi, *supra*, the decision is based partly on the fact that the cutting, which was of oak trees for tan bark, was not in the usual and legitimate way, but was of young trees which should have been left to mature. In Paepcke-Leicht Co. vs. Collins, 85 Ark. 414, 108 S. W. 511, one cotenant cut and sold all the timber on the land, in good faith, believing that it owned the whole; and was held liable only for the value of half of the timber in place, and uncut, with interest. See, also, 38 Cyc. 88, and *supra*, note 39.

[68] Pfeiffer vs. Regents, *supra* [66]; East Shore Co. vs. Richmond Co., *supra* [55]; Moore vs. Moore, 4 Cal. Unrep. 190, 34 Pac. 90; Fuller vs. Montafi, *supra* [67]; Waterford vs. Turlock, 50 Cal. A. 213, 194 Pac. 757.

[69] Wolfe vs. Childs, *supra* [37]; Uncle Sam Co. vs. Richards, 60 Okla. 63, 158 Pac. 1187. A partner in a coal mining partnership is not entitled to compensation for keeping books or selling coal without an agreement therefor with his partners. Gilmer vs. Fleenor, ___ Va. ___, 144 S. E. 458.

CHAPTER LX.

WAIVER.

§ 1173. Defined.

A waiver involves the notion of an intention entertained by the holder of some right, to abandon or relinquish instead of insisting on the right. It is a question of fact.[1] Proof of waiver must include proof of knowledge of the facts upon which the waiver is based.[2]

§ 1174. Adverse Mineral Claimant.

The failure of an adverse claimant to institute proceedings in the local land office within the statutory period against an application for patent,[3] or a dismissal of such proceedings,[4] if brought by him, is a waiver of all adverse rights and interests.

§ 1175. Placer Patentee.

As there is no necessary connection between the placer and the vein or lode an applicant for a placer patent must include any known vein within the boundaries of the placer location, otherwise he waives his right to such vein or lode.[5]

§ 1176 Royalties.

An acceptance of a part of the royalties due is a waiver.[6]

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[1] Ketcham vs. Oil Fields Co., 102 Okla. 74, 226 Pac. 96; see, also, Oelbermann vs. Toyo Kaisha, 3 Fed. (2d) 6; Kerr vs. Reed, 187 Cal. 414; Chester P. Pyle & Co. vs. Fossler, 200 Cal. 599.

See § 323.

[2] Johnson vs. Kaeser, 196 Cal. 698, 239 Pac. 324, holding that "A presumptive waiver of a legal right may be shown by proving a clear, unequivocal and decisive act of the party showing such a purpose or acts amounting to an estoppel. See 27 R. C. L. 908 *et seq.*, § 5; First National Bank vs. Maxwell, 123 Cal. 360, 69 Am. St. Rep. 64, 55 Pac. 980."

[3] Mason vs. Washington-Butte Co., 214 Fed. 25; Gypsum Claims, 37 L. D. 487; Dufresne vs. Northern Light Co., 2 Alaska 566; Conway, 29 L. D. 544; Steel vs. Gold Lead Co., 18 Nev. 87, 1 Pac. 448. See Seymour vs. Fisher, 16 Colo. 191, 27 Pac. 240; South End Co. vs. Tinney, 22 Nev. 59, 38 Pac. 401.

[4] Whitman vs. Haltenhoff, 19 L. D. 247.

[5] Clipper Co. vs. Eli Co., 194 U. S. 228; Migeon vs. Montana Co., 77 Fed. 255; Clary vs. Hazlitt, 67 Cal. 286, 7 Pac. 701.

[6] American Co. vs. Indiana Co., 37 Ind. A. 439, 76 N. E. 1006. See Hinshaw vs. Smith, ___ Cal. ___, 291 Pac. 774.

APPENDIX A

FEDERAL STATUTES

CALIFORNIAN STATUTES

APPENDIX A.

FEDERAL STATUTES.

TITLE XXXII, CHAPTER VI, REVISED STATUTES.

Mineral Lands and Mining Resources.

Mineral lands reserved.

SEC. 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

Mineral lands open to purchase by citizens.

SEC. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Length of mining claims upon veins or lodes.

SEC. 2320. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other.

Proof of citizenship.

SEC. 2321. Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any state or territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

Locators' rights of possession and enjoyment.

SEC. 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

Owners of tunnels, rights of.

SEC. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid, but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

Regulations made by miners.

SEC. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than

one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section his interest in the claim shall become the property of his co-owners who have made the required expenditures.

Patents for mineral lands, how obtained.

SEC. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any

time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

Adverse claim, proceedings on.

SEC. 2326.[1] Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the

[1] See, also, act June 7, 1910 (36 Stats. 459), extending the time in which to file adverse claims and institute adverse suits with respect to mineral applications in Alaska.

surveyor general, whereupon the register shall certify the proceedings and judgment roll to the commissioner of the general land office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of a title conveyed by a patent for a mining claim to any person whatever.

Description of mining vein or lode claims. Amended Apr. 28, 1904 (33 Stat., 545).

SEC. 2327. The description of vein or lode claims upon surveyed land shall designate the location of the claims with reference to the lines of the public survey, but need not conform therewith; but where patents have been or shall be issued for claims upon unsurveyed lands, the surveyors general, in extending the public survey, shall adjust the same to the boundaries of said patented claims so as in no case to interfere with or change the true location of such claims as they are officially established upon the ground. Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent grant is based, and surveyors-general in executing subsequent patent surveys, whether upon surveyed or unsurveyed lands, shall be governed accordingly. The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto.

Patents to conform to official monuments.

Monuments to govern descriptions.

Pending applications; existing rights.

SEC. 2328. Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the general land office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.

Conformity of placer claims to surveys, limit of.

SEC. 2329. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

Subdivisions of ten-acre tracts; maximum of placer locations.

SEC. 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim,

made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide preemption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser.

Conformity of placer claims to surveys, limitation of claims.

SEC. 2331. Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or preemption purposes.

What evidence of possession, etc., to establish a right to a patent.

SEC. 2332. Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

Proceedings for patent for placer claim, etc.

SEC. 2333. Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim and twenty-five feet of surface on each side thereof. The remainder of the placer claim or any placer claim not embracing any vein or lode claim shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence

of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

Surveyor general to appoint surveyors of mining claims, etc.

SEC. 2334. The surveyor general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The commissioner of the general land office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land district where mines are situated for the publication of mining notices in such district, and fix the rates to be charged by such paper; and, to the end that the commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land office, which statement shall be transmitted, with the other papers in the case, to the commissioner of the general land office.

Verification of affidavits, etc.

SEC. 2335. All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office. In cases of contest as to the mineral or agricultural character of the land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party can not be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

Where veins intersect, etc.

SEC. 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

Patents for nonmineral lands, etc.

SEC. 2337. Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.

What conditions of sale may be made by local legislature.

SEC. 2338. As a condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

Vested rights to use of water for mining, etc.; right of way for canals.

SEC. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Patents, preemptions and homesteads subject to vested and accrued water rights.

SEC. 2340. All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

Mineral lands in which no valuable mines are discovered open to homesteads.

SEC. 2341. Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of preemption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this title, relating to "Homesteads."

Mineral lands, how set apart as agricultural lands.

SEC. 2342. Upon the survey of the lands described in the preceding section, the secretary of the interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to preemption and sale as other public lands, and be subject to all the laws and regulations applicable to the same.

Additional land districts and officers, power of the President to provide.

SEC. 2343. The president is authorized to establish additional land districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this chapter.

Provisions of this chapter not to affect certain rights.

SEC. 2344. Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-five, eighteen hundred and sixty-six.

Mineral lands in certain states excepted.

SEC. 2345. The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the States of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any bona fide entries of such lands within the states named since the tenth day of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of preemption as other public lands.

Grant of lands to states or corporations not to include mineral lands.

SEC. 2346. No act passed at the first session of the Thirty-eighth Congress, granting lands to states or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant.

ACTS OF CONGRESS PASSED SUBSEQUENT TO THE REVISED STATUTES.

AN ACT To amend section two thousand three hundred and twenty-four of the Revised Statutes, relating to the development of the mining resources of the United States.

Money expended in a tunnel considered as expended on the lode.

That section two thousand three hundred and twenty-four of the Revised Statutes be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and

such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act. (18 Stat. L., 315.)

AN ACT To exclude the States of Missouri and Kansas from the provisions of the act of Congress entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two.

Missouri and Kansas excluded from the operation of the mineral laws.

That within the States of Missouri and Kansas deposits of coal, iron, lead, or other mineral be, and they are hereby, excluded from the operation of the act entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two, and all lands in said states shall be subject to disposal as agricultural lands. (19 Stat. L., 52.)

AN ACT Authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes.

Citizens of Colorado, Nevada and the territories authorized to fell and remove timber on the public domain for mining and domestic purposes.

That all citizens of the United States and other persons, bona fide residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said states, territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes; *provided,* the provisions of this act shall not extend to railroad corporations.

SEC. 2. That it shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within the respective land districts; and, if so, they shall immediately notify the commissioner of the general land office of that fact; and all necessary expenses incurred in making such proper examination shall be paid and allowed such register and receiver in making up their next quarterly accounts.

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the secretary of the interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months. (20 Stat. L., 88.)

AN ACT To amend section twenty-three hundred and twenty-six of the Revised Statutes relating to suits at law affecting the title of mining claims.

In action brought title not established in either party.

That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title. (21 Stat. L., 505.)

AN ACT To amend sections twenty-three hundred and twenty-four and twenty-three hundred and twenty-five of the Revised Statutes of the United States concerning mineral lands.

Application for patent may be made by authorized agent.

That section twenty-three hundred and twenty-five of the Revised Statutes of the United States be amended by adding thereto the following words: "*Provided*, that where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits; *and provided*, that this section shall apply to all applications now pending for patents to mineral lands." (21 Stat. L., 61.)

AN ACT To repeal the timber-culture laws, and for other purposes.

Town sites on mineral lands authorized.

SEC. 16. That town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof, and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto; *provided*, that no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant. (26 Stat. L., 1095.)

Lands entered under the mineral laws not included in restriction to 320 acres.

SEC. 17. That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto,

shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs, excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs, and that the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz: "No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not include lands entered or sought to be entered under mineral land laws.

AN ACT To authorize the entry of lands chiefly valuable for building stone under the placer mining laws.

Entry of lands chiefly valuable for building stone under the placer-mining laws.

That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer-mineral claims; *provided*, that lands reserved for the benefit of the public schools or donated to any state shall not be subject to entry under this act. (27 Stat. L., 348.)

AN ACT Extending the mining laws to saline lands.

Mining laws extended to saline lands.

That all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer-mining claims; *provided*, that the same person shall not locate or enter more than one claim hereunder. (31 Stat. L., 745.)

AN ACT To provide for stock-raising homesteads, and for other purposes.

Coal and mineral deposits reserved.

SEC. 9. That all entries made and patents issued under the provisions of this act shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to

Disposal under mining laws.

disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the

Locating and prospecting allowed.

coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this act, for the purpose of prospecting for coal or other mineral therein, provided he shall not

injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the secretary of the interior and to be filed with and approved by the register and receiver of the local land office of the district wherein the land is situate, subject to appeal to the commissioner of the general land office; *provided*, that all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notation declaring them to be subject to the provisions of this act with reference to the disposition, occupancy, and use of the land as permitted to an entryman under this act. (Act December 19, 1916, 39 Stat. L., 862.)

Surface entries for mining purposes permitted.

Conditions.

Proviso. Mining patents subject to grazing rights, etc.

AN ACT Changing the period for doing annual assessment work on unpatented mineral claims from the calendar year to the fiscal year beginning July 1 each year.

That section 2 of "An act to amend sections 2324 and 2325 of the Revised Statutes of the United States concerning mineral lands," approved January 22, 1880, be, and the same is hereby, amended to read as follows:

"SEC. 2. That section 2324 of the Revised Statutes of the United States be amended by adding the following words: '*Provided*, that the period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the first day of July succeeding the date of location of such claim; *provided, further*, that on all such valid existing claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922.'" Approved August 24, 1921 (42 Stat., 186).

Changing period for annual assessment work.

Leasing Act.

A synopsis of the act of February 25, 1920, commonly called the "Leasing Act," 44 U. S. Code, Part I, p. 964, § 181, fully annotated, may be found in Report XX of State Mineralogist, p. 218.

AN ACT Providing a civil government for Alaska.

Mining Laws extended to the district of Alaska.

SEC. 8. That the said district of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka. The commissioner provided for by this act to reside at Sitka shall be ex officio register of said land office, and the clerk provided for by this act shall be ex officio receiver of public moneys, and the marshal provided for by this act shall be ex officio surveyor general of said district and the laws of the United States relating to mining claims, and the rights incident thereto shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President; *Provided,* That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: *And provided further,* That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid: *And provided also,* That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States. (23 Stat. L., 24.)

AN ACT To modify and amend the mining laws in their application to the Territory of Alaska, and for other purposes.

Alaska. Association placer-mining claims limited. Assessment required.

That no association placer-mining claim shall hereafter be located in Alaska in excess of forty acres, and on every placer-mining claim hereafter located in Alaska, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, including the year of location, for each and every twenty acres or excess fraction thereof.

Location by attorneys.

SEC. 2. That no person shall hereafter locate any placer-mining claim in Alaska as attorney for another unless he is

duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer-mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or permitted to locate more than two placer-mining claims for any one principal or association during any calendar month, and no placer-mining claim shall hereafter be located in Alaska except under the limitations of this act. Restriction.

SEC. 3. That no person shall hereafter locate, cause or procure to be located, for himself more than two placer-mining claims in any calendar month: *Provided*, That one or both of such locations may be included in an association claim. Number of locations limited. Proviso. Ownership.

SEC. 4. That no placer-mining claim hereafter located in Alaska shall be patented which shall contain a greater area than is fixed by law, nor which is longer than three times its greatest width. Area of claims.

SEC. 5. That any placer-mining claim attempted to be located in violation of this act shall be null and void, and the whole area thereof may be located by any qualified locator as if no such prior attempt had been made. (37 Stat. L., 242, 243.) Effect of violations.

AN ACT Extending the homestead laws and providing for rights of way for railroads in the district of Alaska, and for other purposes.

SEC. 13. That native-born citizens of the Dominion of Canada shall be accorded in said district of Alaska the same mining rights and privileges accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada or the local laws, rules, and regulations; but no greater rights shall be thus accorded than citizens of the United States, or persons who have declared their intention to become such, may enjoy in said district of Alaska; and the Secretary of the Interior shall from time to time promulgate and enforce rules and regulations to carry this provision into effect. (30 Stat. L. 415.) Mining rights in Alaska to native-born citizens of the Dominion of Canada.

AN ACT To amend the laws governing labor or improvements upon mining claims in Alaska.

That during each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in the district of Alaska heretofore or hereafter located. And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Annual improvements, etc., required on mining claims. Filing affidavits.

Contents.

Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days' work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was not done by the owner. Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made. The affidavits required hereby may be made before any officer authorized to administer oaths, and the provisions of sections fifty-three hundred and ninety-two and fifty-three hundred and ninety-three of the Revised Statutes are hereby extended to such affidavits. Said affidavits shall be filed not later than ninety days after the close of the year in which such work is performed.

Prima facie evidence of performance of work, etc.

Forfeiture.

Officer before whom affidavits may be made. R. S., Secs. 5392, 5393, p. 1045.

Time of filing.

Fee.

SEC. 2. That the recorders for the several divisions or districts of Alaska shall collect the sum of one dollar and fifty cents as a fee for the filing, recording, and indexing said annual proofs of work and improvements for each claim so recorded. (35 Stat. L., 1243.)

AN ACT Extending the time in which to file adverse claims and institute adverse suits against mineral entries in the District of Alaska.

Time extended for filing adverse mineral claims, etc., in Alaska (R. S., Secs. 2325, 2326, pp. 426, 427).

That in the District of Alaska adverse claims authorized and provided for in sections twenty-three hundred and twenty-five and twenty-three hundred and twenty-six, United States Revised Statutes, may be filed at any time during the sixty days' period of publication or within eight months thereafter, and the adverse suits authorized and provided for in section twenty-three hundred and twenty-six, United States Revised Statutes, may be instituted at any time within sixty days after the filing of said claims in the local land office. (36 Stat. L., 459.)

For act to supplement the mining laws of the United States in their application to the Territory of Alaska; providing for the location and possession of mining claims in Alaska and repealing all acts and parts of acts in conflict therewith to the extent of such conflicts see Sess. Laws of Alaska, 1913, p. 283.

For a collection of miscellaneous territorial legislation see 3 Lindl. Mines, pp. 2432, 2433.

RULES OF PRACTICE.

(Before the U. S. Land Department.)

[Approved December 9, 1910; effective February 1, 1911; reprint September 1, 1926, with amendments.]

PROCEEDINGS BEFORE REGISTERS.

INITIATION OF CONTESTS.

RULE 1. Contests may be initiated by any person seeking to acquire title to, or claiming an interest in, the land involved, against a party to any entry, filing, or other claim under laws of congress relating to the public lands, because of priority of claim, or for any sufficient cause affecting the legality or validity of the claim, not shown by the records of the land department.

Any protest or application to contest filed by any other person shall be forthwith referred to the division inspector, who will promptly investigate the same and recommend appropriate action.

APPLICATION TO CONTEST.

RULE 2. Any person desiring to institute a contest must file, in duplicate, with the register, application in that behalf, together with statement under oath containing:

(*a*) Name and residence of each party adversely interested, including the age of each heir of any deceased entryman.

(*b*) Description and character of the land involved.

(*c*) Reference, so far as known to the applicant, to any proceedings pending for the acquisition of title to or the use of such lands.

(*d*) Statement, in ordinary and concise language, of the facts constituting the grounds of contest.

(*e*) Statement of the law under which applicant intends to acquire title and facts showing that he is qualified to do so.

(*f*) That the proceeding is not collusive or speculative, but is instituted and will be diligently pursued in good faith.

(*g*) Application that affiant be allowed to prove said allegations and that the entry, filing, or other claim be canceled.

(*h*) Address to which papers shall be sent for service on such applicant.

RULE 3.[1] The statements in the application must be corroborated by the affidavit of at least one witness having such personal knowledge of the facts in relation to the contested entry as, if proven, would render it subject to cancellation, and these facts must be set forth in his affidavit.

RULE 4. The register may allow any application to contest without reference thereof to the commissioner; but he must immediately forward

[1]Amended Sept. 23, 1915.

copy thereof to the Commissioner of the General Land Office, who will promptly cause proper notations to be made upon the records, and no patent or other evidence of title shall issue until and unless the case is closed in favor of the contestee.

CONTEST NOTICE.

RULE 5. The register shall act promptly upon all applications to contest, and upon the allowance of any such application shall issue notice, directed to the persons adversely interested, containing:

(*a*) The names of the parties, description of the land involved, and identification, by appropriate reference, of the proceeding against which the contest is directed.

(*b*) Notice that unless the adverse party appears and answers the allegation of said contest within 30 days after service of notice the allegations of the contest will be taken as confessed.

(For contents of notice when publication is ordered, see Rule 9.)

SERVICE OF NOTICE.

RULE 6. Notice of contest may be served on the adverse party personally or by publication.

RULE 7. Personal service of notice of contest may be made by any person over the age of 18 years, or by registered mail; when served by registered mail, proof thereof must be accompanied by post office registry return receipt, showing personal delivery to the party to whom the same is directed; when service is made personally, proof thereof shall be by written acknowledgment of the person served, or by affidavit of the person serving the same, showing personal delivery of the party served; except when service is made by publication, copy of the affidavit of contest must be served with such notice.

When the contest is against the heirs of a deceased entryman, the notice shall be served on each heir.[2] If the heirs of the entryman are nonresident or unknown, notice may be served upon them by publication as hereinafter provided. If the person to be personally served is an infant under 14 years of age or a person who has been legally adjudged of unsound mind, service of notice shall be made by delivering a copy of the notice to the statutory guardian or committee of such infant or person of unsound mind, if there be one; if there be none, then by delivering a copy of the notice to the person having the infant or person of unsound mind in charge.

RULE 8.[3] Unless notice of contest is personally served within 30 days after issuance of such notice and proof thereof made not later than 30 days after such service, or if service by publication is ordered, unless publication is commenced within 20 days after such order and proof of service of notice by publication is made not later than 20 days after the fourth publication, as specified in Rule 10, the contest shall abate; *provided*, that if the defendant makes answer without questioning the service or the proof of service of said notice, the contest will proceed without further requirement in those particulars.

[2] Amended July 13, 1921.
[3] Amended Nov. 15, 1912, and Jan. 6, 1925.

SERVING NOTICE BY PUBLICATION.

RULE 9. Notice of contest may be given by publication only when it appears, by affidavit by or on behalf of the contestant, filed within 30 days after the allowance of application to contest and within 10 days after its execution, that the adverse party can not be found, after due diligence and inquiry, made for the purpose of obtaining service of notice of contest within 15 days prior to the presentation of such affidavit, of the postmaster at the place of address of such adverse party appearing on the records of the land office and of the postmaster nearest the land in controversy and also of named persons residing in the vicinity of the land.

Such affidavit must state the last address of the adverse party as ascertained by the person executing the same.

The published notice of contest must give the names of the parties thereto, description of the land involved, identification by appropriate reference of the proceeding against which the contest is directed, the substance of the charges contained in the affidavit of contest, and a statement that upon failure to answer within 20 days after the completion of publication of such notice the allegations of said affidavit of contest will be taken as confessed.

The affidavit of contest need not be published.

There shall be published with the notice a statement of the dates of publication.

RULE 10.[4] Service of notice by publication shall be made by publishing notice at least once a week for four successive weeks in some newspaper published in the county wherein the land in contest lies; and if no newspaper be printed in such county, then in a newspaper printed in the county nearest to such land.

Copy of the notice as published, together with copy of the affidavit of contest, shall be sent by the contestant within 10 days after the first publication of such notice by registered mail directed to the party for service upon whom such publication is being made at the last address of such party as shown by the records of the land office and also at the address named in the affidavit for publication, and also at the post office nearest the land.

Copy of the notice as published shall be posted in the office of the register and also in a conspicuous place upon the land involved, such posting to be made within 10 days after the first publication of notice as hereinabove provided.

RULE 11.[5] Proof of publication of notice shall be by copy of the notice as published attached to and made a part of the affidavit of the publisher or foreman of the newspaper publishing the same, showing the publication thereof in accordance with these rules.

Proof of posting shall be by affidavit of the person who posted notice on the land, and the certificate of the register as to posting in the district land office.

Proof of the mailing of notice shall be by affidavit of the person who mailed the notice, attached to the postmaster's receipt for the letter or (if delivered) the registry return receipt.

[4] Amended March 7, 1911.
[5] Amended Jan. 6, 1925.

DEFECTIVE SERVICE OF NOTICE.

RULE 12. No contest proceeding shall abate because of any defect in the manner of service of notice in any case where copy of the notice or affidavit of contest is shown to have been received by the person to be served; but in such case the time to answer may be extended in the discretion of the register.

ANSWER BY CONTESTEE.

RULE 13. Within 30 days after personal service of notice and affidavit of contest as above provided, or, if service is made by publication, within 20 days after the fourth publication, as prescribed by these rules, the party served must file with the register answer, under oath, specifically meeting and responding to the allegations of the contest, together with proof of service of a copy thereof upon the contestant by delivery of such copy at the address designated in the application to contest, or personally in the manner provided for the personal service of notice of contest.

Such answer shall contain or be accompanied by the address at which all notices or other papers shall be sent for service upon the party answering.

FAILURE TO ANSWER.

RULE 14.[6] Upon failure to serve and file answer as herein provided, the allegations of the contest will be taken as confessed, and the register will forthwith forward the case, with recommendation thereon, to the general land office, and notify the parties by ordinary mail of the action taken.

DATE AND NOTICE OF TRIAL.

RULE 15. Upon the filing of answer and proof of service thereof the register will forthwith fix a time and place for taking testimony, and notify all parties thereof by registered-letter mail not less than 20 days in advance of the date fixed.

PLACE OF SERVICE OF PAPERS.

RULE 16. Proof of delivery of papers required to be served upon the contestant at the place designated under clause "*h*" of Rule 2 in the application to contest, and upon any adverse party at the place designated in the answer, or at such other place as may be designated in writing by the person to be served, shall be sufficient for all purposes; and where notice of contest has been given by registeed mail, and the registry-return receipt shows the same to have been received by the adverse party, proof of delivery at the address at which such notice was so received shall, in the absence of other direction by such adverse party, be sufficient.

Where a party has appeared and is represented by counsel, service of papers upon such counsel shall be sufficient.

CONTINUANCE.

RULE 17. Hearing may be postponed because of absence of a material witness when the party applying for continuance makes affidavit,

[6] Amended April 17, 1926.

and it appears to the satisfaction of the officer presiding at such hearing, that—

(*a*) The matter to which such witness would testify, if present, is material.

(*b*) That proper diligence has been exercised to procure his attendance, and that his absence is without procurement or consent of the party on whose behalf continuance is sought.

(*c*) That affiant believes the attendance of said witness can be had at the time to which continuance is sought.

(*d*) That the continuance is not sought for mere purposes of delay.

RULE 18. One continuance only shall be allowed to either party on account of absence of witnesses, unless the party applying for further continuance shall, at the same time, apply for order to take the testimony of the alleged absent witnesses by deposition.

RULE 19. No continuance shall be granted if the opposite party shall admit that the witness on account of whose absence continuance is desired would, if present, testify as stated in the application for continuance.

Continuances will be granted on behalf of the United States when the public interest requires the same, without affidavit on the part of the government.

DEPOSITIONS AND INTERROGATORIES.

RULE 20. Testimony may be taken by deposition when it appears by affidavit that—

(*a*) The witness resides more than 50 miles, by the usual traveled route, from the place of trial.

(*b*) The witness resides without, or is about to leave, the state or territory, or is absent therefrom.

(*c*) From any cause it is apprehended that the witness may be unable to, or will refuse to, attend the hearing, in which case the deposition will be used only in the event personal attendance of the witness can not be obtained.

RULE 21. The party desiring to take deposition must serve upon the adverse party and file with the register affidavit setting forth the name and address of the witness and one or more of the above-named grounds for taking such deposition, and that the testimony sought is material; which affidavit must be accompanied by proposed interrogatories to be propounded to the witness.

RULE 22. The adverse party will, within 10 days after service of affidavit and interrogatories, as provided in the preceding rule, serve and file cross-interrogatories.

RULE 23. After the expiration of 10 days from the service of affidavit for the taking of deposition and direct interrogatories, commission to take the deposition shall be issued by the register directed to any officer authorized to administer oaths within the county where such deposition is to be taken, which commission shall be accompanied by a copy of all interrogatories filed.

Ten days' notice of the time and place of taking such deposition shall be given, by the party in whose behalf such deposition is to be taken, to the adverse party.

RULE 24. The officer before whom such deposition is taken shall cause each interrogatory to be written out, and the answer thereto inserted immediately thereafter, and said deposition, when completed, shall be read over to the witness and by him subscribed and sworn to in the usual manner before the witness is discharged, and said officer will thereupon attach his certificate to said deposition, stating that the same was subscribed and sworn to at the time and place therein mentioned.

RULE 25. The deposition, when completed and certified as aforesaid, together with the commission and interrogatories, must be inclosed in a sealed package, indorsed with the title of the proceeding in which the same is taken, and returned by mail or express to the register, who will indorse thereon the date of reception thereof, and the time of opening said deposition.

RULE 26. If the officer designated to take the deposition has no official seal, certificate of his official character under seal must accompany the return of the deposition.

RULE 27. Deposition may, by stipulation filed with the register, be taken before any officer authorized to administer oaths, and either by oral examination or upon written interrogatories.

RULE 28. Testimony may, by order of the register and after such notice as he may direct, be taken by deposition before a United States commissioner, or other officer authorized to administer oaths near the land in controversy, at a time and place to be designated in a notice of such taking of testimony. The officer before whom such testimony is taken will, at the completion of the taking thereof, cause the same to be certified to, sealed, and transmitted to the register in the like manner as is provided with reference to depositions.

RULE 29. No charge will be made by the register for examining testimony taken by deposition.

RULE 30. Officers designated to take testimony will be allowed to charge such fees as are chargeable for similar services in the local courts, the same to be taxed in the same manner as costs are taxed by registers.

RULE 31. When the officer designated to take deposition can not act at the time fixed for taking the same, such deposition may be taken at the same time and place before any other qualified officer designated for that purpose by the officer named in the commission or by agreement of the parties.

RULE 32. No order for the taking of testimony shall be issued until after the expiration of time allowed for the filing of answer.

TRIALS.

RULE 33. The register and other officers taking testimony may exclude from the trial all witnesses except the one testifying and the parties to the proceeding.

RULE 34. The register will be careful to reach, if possible, the exact condition and status of the land involved in any contest, and will ascertain all the facts having any bearing upon the rights of parties

in interest; to this end said officer should, whenever necessary, personally interrogate and direct the examination of a witness.

RULE 35. In preemption cases the register will particularly ascertain the nature, extent, and value of alleged improvements; by whom made, and when; the true date of the settlement of persons claiming; the steps taken to mark and secure the claim; and the exact status of the land at that date as shown upon the records of his office.

RULE 36. In like manner, under the homestead and other laws, the conditions affecting the inception of the alleged right, as well as the subsequent acts of the respective claimants, must be fully and specifically examined.

RULE 37. Due opportunity will be allowed opposing claimants to cross-examine witnesses.

RULE 38. Objections to evidence will be duly noted, but not ruled upon, by the register, and such objections will be considered by the commissioner. Officers before whom testimony is taken will summarily stop examination which is obviously irrelevant.

RULE 39. At the time set for hearing, or at any time to which the trial may be continued, the testimony of all the witnesses present shall be taken and reduced to writing.

When testimony is taken in shorthand the stenographic notes must be transcribed, and the transcription subscribed by the witness and attested by the officer before whom the testimony was taken; *provided, however,* that when the parties shall, by stipulation, filed with the record, so agree, or when the defendant has failed to appear, or fails to participate in the trial, and the contestant shall in writing so request, such subscription may be dispensed with.

The transcript of testimony shall, in all cases, be accompanied by certificate of the officer or officers before whom the same was taken, showing that each witness was duly sworn before testifying, and, by affidavit of the stenographer who took the testimony, that the transcription thereof is correct.

RULE 40. If a defendant demurs to the sufficiency of the evidence, the register will forthwith rule thereon. If such demurrer is overruled, and the defendant elects to introduce no evidence, no further opportunity will be afforded him to submit proofs.

When testimony is taken, before an officer other than the register, demurrer to the evidence will be received and noted, but no ruling made thereon, and the taking of evidence on behalf of the defendant will be proceeded with; the register will rule upon such demurrer when the record is submitted for his consideration.

If said demurrer is sustained, the register will not be required to examine the defendant's testimony. If, however, the demurrer be overruled, all the evidence will be considered and decision rendered thereon.

Upon the completion of the evidence in a contest proceeding, the register will render a report and opinion thereon making full and specific reference to the posting and annotations upon the records.

RULE 41. The register will, in writing, notify the parties to any proceeding of the conclusion therein, and that 15 days will be allowed

from the receipt of such notice to move for new trial upon the ground of newly discovered evidence, and that if no motion for new trial is made, 30 days will be allowed from the receipt of such notice within which to appeal to the commissioner.

NEW TRIAL.

RULE 42. The decision of the register will be vacated and new trial granted only upon the ground of newly discovered evidence, in accordance with the practice applicable to new trials in courts of justice; *provided, however,* that no such application shall be granted except upon showing that the substantial rights of the applicant have been injuriously affected.

No appeal will be allowed from an order granting new trial, but the register will proceed at the earliest practicable time to retry the case, and will, so far as possible, use the testimony theretofore taken without reexamination of same witnesses, confining the taking of testimony to the newly discovered evidence.

RULE 43. Notice of motion for new trial, setting forth the grounds thereof, and accompanied by copies of all papers not already on file to be used in support of such motion, shall be served upon the adverse party, and, together with proof of service, filed with the register not more than 15 days after notice of decision; the adverse party shall, within 10 days after such notice, serve and file affidavits or other papers to be used by him in opposition to such motion.

RULE 44. Motions for new trial will not be considered or decided in the first instance by the commissioner or the Secretary of the Interior, or otherwise than on review of the decision thereof by the register.

RULE 45. If motion for new trial is not made, or if made and not allowed, the register will, at the expiration of the time for appeal, promptly forward the same, with the testimony and all papers in the case, to the commissioner, with letter of transmittal, describing the case by its title, nature of the contest, and he land involved.

The register will not, after forwarding of decision, as above provided, take further action in the case unless so instructed by the commissioner.

FINAL PROOF PENDING CONTEST.

RULE 46.[7] The pendency of a contest will excuse the submission of final proof on the entry involved until a reasonable time after the disposition of the proceedings, but final or commutation proof may be submitted at any stage thereof. The payment of the final commissions or purchase money, as the case may be, should be deferred until the case is closed, when, if the contest is dismissed and the proof is found satisfactory, claimant will be allowed 30 days from notice within which to pay all sums due and furnish a nonalienation affidavit, upon receipt of which the proper form of final certificate will issue.

In such cases the fee for reducing the proof testimony to writing must be paid at the time the proof is submitted.

The final proof should be retained in the district land office until the record in the contest case is forwarded to the general land office, but

[7] Amended May 16, 1916.

will not be considered in determining the merits of the contest, though it may be used for the purpose of cross-examination during the trial.

In such cases the party making the proof will at the time of submitting the same be required to pay the fees for reducing the testimony to writing.

APPEALS TO COMMISSIONER.

RULE 47. No appeal from the action or decision of the register will be considered unless notice thereof is served and filed in the district land office in the manner and within the time specified in these rules.

RULE 48. Notice of appeal from the decision of the register shall be served and filed with such register within 30 days after receipt of notice of decision; *provided, however,* that when motion for new trial is presented and denied, notice of such appeal shall be served within 15 days after receipt of notice of the denial of said motion.

RULE 49. No person who has failed to answer the contest affidavit, or, having answered, has failed to appear at the hearing, shall be allowed an appeal from the final action or decision of the register.

RULE 50. Such notice of appeal must be in writing, and set forth in clear, concise language the grounds of the appeal, in the form of specifications of error, which shall be separately stated and numbered; where error is based upon insufficiency of the evidence to justify the decision, in the assignment thereof the particulars wherein it is deemed insufficient must be specifically set forth in the notice. All grounds of error not assigned or noticed and argued in the brief will be considered as waived.

Upon failure to serve and file notice of appeal as herein provided the case will be closed.

RULE 51. When any party fails to move for a new trial or to appeal from the decision of the register within the time specified, such decision shall, as to such party, be final and will not be disturbed except in case of fraud or gross irregularity.

No case will be remanded for any defect which does not materially affect the aggrieved party.

RULE 52. All documents received by the register must be kept on file and the date of filing noted thereon; no papers will, under any circumstances, be removed from the files or from the custody of the register, but access to the same, under proper regulations, and so as not to interfere with transactions of public business, will be permitted to the parties or their attorneys.

COSTS AND APPORTIONMENT THEREOF.

RULE 53. A contestant claiming preference right of entry under the second section of the act of May 14, 1880 (21 Stat. 140), must pay the costs of contest. In other cases each party must pay the cost of taking the direct examination of his own witnesses and the cross-examination on his behalf of other witnesses; the cost of noting motions, objections, and exceptions must be paid by the party on whose behalf the same are made.

RULE 54. Accumulation of excessive costs will not be permitted. When the officer before whom testimony is being taken shall rule that

a course of examination is irrelevant, the same will not proceed except at the sole cost of the party insisting thereon and upon his depositing the amount reasonably sufficient to pay therefor.

RULE 55. Where a party contesting a claim shall by virtue of actual settlement and improvement establish his right of entry of the land in contest under the preemption, homestead, or desert-land laws by virtue of settlement and improvement without reference to the act of May 14, 1880, the costs of contest will be imposed as prescribed in the second clause of Rule 53.

RULE 56. The only cost of contest chargeable by registers are the legal fees for reducing testimony to writing. No other contest fees or costs will be allowed to or charged by those officers, directly or indirectly.

RULE 57. Registers may at any time require either party to give security for costs, including expense of taking and transcribing testimony.

RULE 58. Upon the filing of the transcript of the testimony in the local office, any excess in the sum deposited as security for costs of transcribing testimony will be returned to the parties depositing the same.

RULE 59. When hearings are ordered on behalf of the government, all costs incurred on its behalf will be paid from the proper appropriation, and when, upon the discovery of reason for suspension in the usual course of examination of entries and contest, hearings are ordered between contending parties, the costs will be paid as required by Rule 53.

RULE 60. The costs provided for by the preceding rules will be collected by the register when the parties are brought before him in obedience to the order for hearing.

Rule 61 was abolished by Circular No. 962, approved October 10, 1924 (50 L. D. 656).

PREPARATION OF NOTICES.

RULE 62. All notices and other papers not required to be served by the register must be prepared and served by the respective parties.

RULE 63. The register will require proper provision to be made for such notices not specifically provided for in these rules as may become necessary in the usual progress of the case to final decision.

APPEAL FROM DECISION REJECTING APPLICATION TO ENTER PUBLIC LANDS.

RULE 64. To facilitate appeals from his action relative to applications to file, enter, or locate upon the public lands, the register will—

(*a*) Indorse upon every rejected application the date of presentation and reasons for rejection.

(*b*) Promptly advise the party in interest of the action and of his right of appeal.

(*c*) Note upon his records a memorandum of the transaction.

RULE 65. The party aggrieved will be allowed 30 days from receipt of notice in which to file notice of appeal in the district land office.

The notice of appeal, when filed, will be forwarded to the general land office with full report upon the case, which should recite all the facts and proceedings had and must embrace the following particulars:

(*a*) The original application, with reasons for the rejection thereof.

(*b*) Description of the tract involved and statement of its status, as shown by the records of the district office.

(*c*) Reference to all entries, filings, annotations, memorandum, and correspondence shown by the record relating to said tract and to the proceedings had.

II.

PROCEEDINGS BEFORE THE DISTRICT CADASTRAL ENGINEER.

RULE 66. The proceedings in hearings and contests before the district cadastral engineer shall, as to notices, depositions, and other matters, be governed as nearly as may be by the rules prescribed for proceedings before registers, unless otherwise provided by law.

III.

PROCEEDINGS BEFORE THE COMMISSIONER OF THE GENERAL LAND OFFICE AND SECRETARY OF THE INTERIOR.

EXAMINATION AND ARGUMENT.

RULE 67. The commissioner will cause notice to be given to each party in interest whose address is known of any order or decision affecting the merits of the case or the regular order of proceedings therein.

RULE 68. No additional evidence will be admitted or considered by the commissioner unless offered under stipulation of the parties or in support of a mineral application or protest; *provided, however,* that the commissioner may order further investigation made or evidence submitted upon particular matters to be by him specifically designated.

Affidavits or other ex parte statements filed in the office of the commissioner will not be considered in finally determining any controversy upon the merits.

RULE 69. After receipt of the record by the commissioner 30 days will be allowed to expire before any action is taken thereon, unless, in the judgment of the commissioner, public policy or private necessity shall require summary action, in which event he will proceed at his discretion, first notifying the attorneys of record of his intention so to do; *provided,* that where no appeal has been filed the case may be immediately considered and disposed of.

RULE 70. If brief is not filed before a case is reached in its order for examination, the argument will be considered closed, and no further argument or motion of any kind will be entertained, except upon application and upon good cause appearing to the commissioner therefor.

RULE 71. In the discretion of the commissioner, oral argument may be presented, at a time to be fixed by him and upon notice to opposing counsel, which notice shall specify the time for such argument and the specific matter to be discussed. Except as herein provided, oral hearings or suggestions will not be allowed.

REHEARINGS.

RULE 72. No motion for rehearing of any decision rendered by the Commissioner of the General Land Office will be allowed.

MOTIONS.

RULE 73. No motion shall be entertained or considered in any case after the record has been transmitted to a reviewing officer.

In ex parte cases, where the entryman has been allowed by the commissioner to furnish additional evidence or to show cause, or, in the alternative, to appeal, both the evidence or showing and the appeal are filed, the commissioner shall pass upon the evidence or showing submitted, and, if found sufficient, note the appeal as closed. If such evidence or showing be found insufficient, the appeal will be forwarded to the secretary as in other cases.

APPEAL FROM THE COMMISSIONER TO THE SECRETARY.

RULE 74. Except as herein otherwise provided, an appeal may be taken to the Secretary of the Interior from the final decision of the commissioner in any proceeding relating to the disposal of the public lands and private claims.

RULE 75. No appeal shall be had from the action of the commissioner affirming the decision of the register in any case where the party adversely affected shall have failed to appeal from the decision of said register.

RULE 76. Notice of appeal from the commissioner's decision must be served upon the adverse party and filed in the office of the register, or in the general land office within 30 days from the date of service of notice of such decision.

RULE 77. When the commissioner considers an appeal defective he will notify the party thereof; and if the defect be not cured within 15 days from the date of receipt of such notice, the appeal may be dismissed and the case closed.

RULE 78. In proceedings before the commissioner in which he shall decide that a party has no right to appeal to the secretary, such party may apply to the secretary for an order directing the commissioner to certify said proceedings to the secretary and suspend action until the secretary shall pass upon the same; such application shall be in writing, under oath, and fully and specifically set forth the grounds upon which the same is made.

RULE 79. When the commissioner shall decide against the right of appeal he will suspend action on the case for 20 days from service of notice of such decision to enable the party against whom the decision is rendered to apply to the secretary for an order certifying the record as hereinabove provided.

RULE 80. The appellant will be allowed 20 days after service of notice of appeal within which to serve and file brief and specification of error, as provided by Rule 50, the adverse party 20 days after service of such within which to serve and file reply thereto; appellant will be allowed 10 days after service of such reply within which to serve and

file response; *provided, however,* that if either party is not represented by counsel having offices in the city of Washington, 10 days in addition to each period above specified will be allowed within which to serve and file the respective briefs.

No arguments otherwise than above provided shall be made or filed without permission of the secretary or commissioner granted upon notice to the adverse party.

RULE 81. (Abolished.)

ORAL ARGUMENT BEFORE THE SECRETARY.

RULE 82.[8] Oral argument in any case pending before the Secretary of the Interior will be allowed, on motion, in the discretion of the secretary, at a time to be fixed by him, after notice to the parties. The counsel for each party will be allowed only one-half an hour, unless an extension of time is ordered before the argument begins.

REHEARING OF SECRETARY'S DECISION.

RULE 83.[9] Motions for rehearing before the secretary must be filed within 30 days after receipt of notice of the decision complained of and will act as a supersedeas of the decision until otherwise directed by the secretary. Such motions, briefs, and arguments must not be served on the opposite party and must be filed directly with the Secretary of Interior, Washington, D. C.

Any such motion must state concisely and specifically the grounds upon which the motion for rehearing is based and be accompanied by brief and argument in support thereof.

If proper grounds are not shown the rehearing will be denied and sent to the files of the general land office, whereupon the commissioner will proceed to execute the decision before rendered. If upon examination grounds sufficient for rehearing are shown, a rehearing will be granted and the moving party will be notified that he will be allowed 15 days from receipt of notice within which to serve a copy of his motion, together with all argument in support thereof, on the opposite party, who will be allowed 30 days thereafter in which to file and serve answer, brief, and argument. Thereafter the cause or matter will be again considered and appropriate action taken, which may consist either in adhering to the former decision or modifying or vacating the same, or the making of any further or other order deemed warranted.

As applied to the Territory of Alaska, the periods of time granted by this rule shall be doubled.

MOTIONS FOR REVIEW AND REREVIEW.

RULE 84. Motions for review and rereview are hereby abolished.

SUPERVISORY POWER OF SECRETARY.

RULE 85. Motion for the exercise of supervisory power will be considered only when accompanied by positive showing of extraordinary emergency or exigency demanding the exercise of such authority.

[8] Amended Nov. 6, 1911.
[9] Amended Oct. 25, 1915.

In proceedings before the Secretary of the Interior the same rules shall govern, in so far as applicable, as are provided for proceedings before the Commissioner of the General Land Office.

RULE 86. No rule here prescribed shall be construed to deprive the Secretary of the Interior of any direct or supervisory power conferred upon him by law.

ATTORNEYS.

RULE 87.[10] Every attorney, before practicing before the Department of the Interior and its bureaus, must comply with the requirements of the regulations prescribed by the Secretary of the Interior pursuant to section 5 of the act of July 4, 1884 (23 Stat. 101).

RULE 88. In all cases where any party is represented by attorney, such attorney will be recognized as fully controlling the same on behalf of his client, and service of any notice or other paper relating to such proceedings upon such attorney will be deemed notice to the party in interest.

Where a party is represented by more than one attorney service of notice or other papers upon one of said attorneys shall be sufficient.

RULE 89. No person hereafter appearing as a party or attorney in any case shall be entitled to notice of any proceeding therein who does not, at the time of appearance, file in the office in which the case is pending a statement showing his name and post-office address and the name and post-office address of the party whom he represents.

RULE 90. Any attorney in good standing employed, and whose appearance is regularly entered in any case pending before the department, will be allowed full opportunity to consult the records therein, together with abstracts, field notes, tract books, and correspondence which is not deemed privileged and confidential.

RULE 91. Verbal or other inquiries by parties or counsel directed to any employee of the department, except the commissioner, assistant commissioner, or chief of the division of the general land office, or the secretary and assistant secretaries, the solicitor, members of the board of appeals, or the supervising attorney, or with the consent of one or more of said officers, is expressly forbidden.

RULE 92. Abuse of the privilege of examining records of the department or violation of the foreging rule by any attorney will be treated as sufficient cause for institution of disbarment proceedings.

SERVICE OF NOTICE.

RULE 94.[11] Fifteen days, exclusive of the day of mailing, will be allowed for transmission of notice or other papers by mail from the general land office, except in case of notice to resident attorneys, in which case one day will be allowed.

In computing time for service of papers under these rules of practice the first day shall be excluded and the last day included; *provided,* that where the last day is a Sunday, a legal holiday, or half holiday such time shall include the next full business day.

[10] Amended April 9, 1915.
[11] Amended April 30, 1917.

RULE 95.[12] Notice of all motions and proceedings before the commissioner or secretary, except as specified below, shall be served upon parties or counsel personally or by registered mail, and no motion will be entertained except on proof of service of notice thereof. As to motions for rehearing, petitions for certiorari and petitions for the exercise of supervisory authority before the secretary, service of notice shall be made only after such proceeding has been entertained and service directed, as provided by Rule 83.

RULE 96. Ex parte proceedings and proceedings in which the adverse party does not appear will, as to notice of decision, time for appeal, and filing of exceptions and arguments, be governed by the rules prescribed in other cases, so far as the same are applicable. In such cases the commissioner or secretary may, pursuant to application and upon good cause being shown therefor, permit additional evidence to be presented for the purpose of curing defects in the proofs of record.

INTERVENTION.

RULE 97. No person shall be allowed to intervene in any case except upon application therefor, under oath, showing his interest therein.

HOW TRANSFERREES AND INCUMBRANCERS MAY ENTITLE THEMSELVES TO NOTICE OF CONTEST OR OTHER PROCEEDINGS.

RULE 98.[13] Transferees and incumbrancers of land the title to which is claimed or is in process of acquisition under any public-land law shall, upon filing notice of the transfer or incumbrance in the district land office, become entitled to receive and be given the same notice of any contest or other proceeding thereafter had affecting such land which is required to be given the original entryman or claimant. Every such notice of a transfer or incumbrance must be forthwith noted upon the records of the district land office and be promptly reported to the general land office, where like notation thereof will be made. Thereafter such transferee or incumbrancer, as well as the entryman, must be made a party defendant to any proceeding against the entry.

ACKNOWLEDGMENT OF THE FILING OF APPLICATIONS AND OTHER PAPERS.

RULE 99.[14] The secretary and the commissioner of the general land office will not acknowledge the receipt of papers forwarded by mail, but if a prepared receipt is forwarded to a district land office with any paper the register will sign and return the receipt to the party who fowarded the same, after inserting the date and the serial number.

NOTICE OF PREFERENCE RIGHT.

RULE 100. Where preference right of entry is awarded under section 2 of the Act of May 14, 1880 (21 Stat. 140), the register will, after service of notice of such right upon contestant and the expiration of the 30 days allowed for exercise thereof, transmit to the commissioner of the general land office by special letter the evidence of service for filing

[12] Amended Sept. 28, 1917.
[13] Adopted Sept. 23, 1915.
[14] Adopted Nov. 10, 1915.

with the canceled entry record. A fee of $1 for giving such notice must be tendered to the register of the district land office before any application for the land will be approved.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

CALIFORNIAN STATUTES.

CIVIL CODE—TITLE X.

Mining Claims, Tunnel Rights and Mill Sites.

§ 1426. Any person, a citizen of the United States, or who has declared his intention to become such, who discovers a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposit, may locate a claim upon such vein or lode, by defining the boundaries of the claim, in the manner hereinafter described, and by posting a notice of such location, at the point of discovery, which notice must contain:

First. The name of the lode or claim.

Second. The name of the locator or locators.

Third. The number of linear feet claimed in length along the course of the vein, each way from the point of discovery, with the width on each side of the center of the claim, and the general course of the vein or lode, as near as may be.

Fourth. The date of location.

Fifth. Such a description of the claim by reference to some natural object, or permanent monument, as will identify the claim located. 1909–313.

§ 1426*a*. The locator must define the boundaries of his claim so that they may be readily traced, and in no case shall the claim extend more than fifteen hundred feet along the course of the vein or lode, nor more than three hundred feet on either side thereof, measured from the center line of the vein at the surface. 1909–314.

§ 1426*b*. Within thirty days after the posting of his notice of location upon a lode mining claim, the locator shall record a true copy thereof in the office of the county recorder of the county in which such claim is situated, for which service the county recorder shall receive a fee of one dollar. 1909–314.

§ 1426*c*. The location of a placer claim shall be made in the following manner: By posting thereon, upon a tree, rock in place, stone, post or monument, a notice of location, containing the name of the claim, name of locator or locators, date of location, number of feet or acreage claimed, such a description of the claim by reference to some natural object or permanent monument as will identify the claim located, and by marking the boundaries so that they may be readily traced; pro-

vided, that where the United States survey has been extended over the land embraced in the location, the claim may be taken by legal subdivisions and no other reference than those of said survey shall be required and the boundaries of a claim so located and described need not be staked or monumented. The description by legal subdivisions shall be deemed the equivalent of marking. 1909–314.

§ 1426*d*. Within thirty days after the posting of the notice of location of a placer claim, the locator shall record a true copy thereof in the office of the county recorder of the county in which such claim is situated, for which service the recorder shall receive a fee of one dollar. 1909–314.

§ 1426*e*. The locator of a tunnel right or location shall locate his tunnel right or location by posting a notice of location at the face or point of commencement of the tunnel, which must contain:

First. The name of the locator or locators.

Second. The date of the location.

Third. The proposed course or direction of the tunnel.

Fourth. A description of the tunnel, with reference to some natural object or permanent monument as shall identify the claim or tunnel right. 1909–314.

§ 1426*f*. The boundary lines of the tunnel shall be established by stakes or monuments placed along the lines at an interval of not more than six hundred feet from the face or point of commencement of the tunnel to the terminus of three thousand feet therefrom. 1909–314.

§ 1426*g*. Within thirty days after the posting the notice of location of the tunnel right or location, the locator shall record a true copy thereof, in the office of the county recorder of the county in which such claim is situated, for which service the recorder shall receive a fee of one dollar. 1909–314.

§ 1426*h*. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original location notice was defective, erroneous, or that the requirements of the law has not been complied with before filing; or in case the original notice was made prior to the passage of this act, and he shall be desirous of securing the benefit of this act, such locator, or his assigns, may file an additional notice, subject to the provisions of this act; provided, that such amended location notice does not interfere with the existing rights of others at the time of posting and filing such amended location notice, and no such amended location notice or the record thereof, shall preclude the claimant, or claimants, from proving any such title as he or they may have held under previous locations. 1909–315.

§ 1426*i*. Where a locator, or his assigns, has the boundaries and corners of his claim established by a United States deputy mineral surveyor, or a licensed surveyor of this state, and his claim connected with the corner of the public or minor surveys of an established initial point, and incorporates into the record of the claim, the field notes of such survey, and attaches to and files with such location notice, a certificate of the surveyor, setting forth: first, that such survey was actually made by him, giving the date thereof; second, the name of the claim surveyed and the location thereof; third, that the description incorporated in the declaratory statement is sufficient to identify; such

survey and certificate becomes a part of the record, and such record is prima facie evidence of the facts therein contained. 1909–315.

§ 1426*j*. The proprietor of a vein or lode claim or mine, or the owner of a quartz mill or reduction works, or any person qualified by the laws of the United States, may locate not more than five acres of non-mineral land as a mill site. Such location shall be made in the same manner as hereinbefore required for locating placer claims. 1909–315.

§ 1426*k*. The locator of a mill site claim or location shall, within thirty days from the date of his location, record a true copy of his location notice with the county recorder of the county in which such location is situated, for which service the recorder shall receive a fee of one dollar. 1909–315.

§ 1426*l*. The amount of work done or improvements made during each year to hold possession of a mining claim shall be that prescribed by the laws of the United States, to wit: One hundred dollars annually. 1909–315.

§ 1426*m*. Whenever mine owner, company or corporation shall have performed the labor and made the improvements required by law upon any mining claim, the person in whose behalf such labor was performed or improvements made, or some one in his behalf, shall within thirty days after the time limited for performing such labor or making such improvements make and have recorded by the county recorder, in books kept for that purpose, in the county in which such mining claim is situated, an affidavit setting forth the value of labor or improvements made, the name of the claim and the name of the owner or claimant of said claim at whose expense the same was made or performed. Such affidavit, or a copy thereof, duly certified by the county recorder, shall be prima facie evidence of the performance of such labor or the making of such improvements, or both. 1909–315.

§ 1426*n*. For recording the affidavit herein required, the county recorder shall receive a fee of ten cents per folio, twenty cents per indorsement, and ten cents for indexing the name of each claim and each owner. 1915–734.

§ 1426*o*. Whenever a co-owner or co-owners of a mining claim shall give to a delinquent co-owner or co-owners the notice in writing or notice by publication provided for in section two thousand three hundred and twenty-four, Revised Statutes of the United States, an affidavit of the person giving such notice, stating the time, place, manner of service, and by whom and upon whom such service was made, shall be attached to a true copy of such notice, and such notice and affidavit must be recorded in the office of the county recorder, in books kept for that purpose, in the county in which the claim is situated, within ninety days, after the giving of such notice; for the recording of which said recorder shall receive the same fees as are now allowed by law for recording deeds; or if such notice is given by publication in a newspaper, there shall be attached to a printed copy of such notice an affidavit of the printer or his foreman, or principal clerk of such paper, stating the date of the first, last and each insertion of such notice therein, and where the newspaper was published during that time, and the name of such newspaper. Such affidavit and notice shall be recorded as aforesaid, within one hundred and eighty days after the first publication thereof. The original of such notice and affidavit,

or a duly certified copy of the record thereof, shall be prima facie evidence that the delinquent mentioned in section two thousand three hundred and twenty-four has failed or refused to contribute his proportion of the expenditure required by that section, and of the service of publication of said notice; provided, the writing or affidavit hereinafter provided for is not of record. If such delinquent shall, within the ninety days required by section two thousand three hundred and twenty-four, aforesaid, contribute to his co-owner or co-owners, his proportion of such expenditures, and also all costs of service of the notice required by this section, whether incurred for publication charges, or otherwise, such co-owner or co-owners shall sign and deliver to the delinquent or delinquents a writing, stating that the delinquent or delinquents by name has within the time required by section two thousand three hundred and twenty-four aforesaid, contributed his share for the year _____, upon the _____ mine, and further stating therein the district, county and state wherein the same is situated, and the book and page where the location notice is recorded, if said mine was located under the provisions of this act; such writing shall be recorded in the office of the county recorder of said county, for which he shall receive the same fees are are now allowed by law for recording deeds. If such co-owner or co-owners shall fail to sign and deliver such writing to the delinquent or delinquents within twenty days ofter such contribution, the co-owner or co-owners so failing as aforesaid shall be liable to the penalty of one hundred dollars to be recovered by any person for the use of the delinquent or delinquents in any court of competent jurisdiction. If such co-owner or co-owners fail to deliver such writing within said twenty days, the delinquent, with two disinterested persons having personal knowledge of such contribution, may make affidavit setting forth in what manner, the amount of, to whom, and upon what mine, such contribution was made. Such affidavit, or a record thereof, in the office of the county recorder, of the county in which such mine is situated, shall be prima facie evidence of such contribution. 1909–316.

§ 1426*p*. The record of any location of a mining claim, mill site or tunnel right, in the office of the county recorder, as herein provided shall be received in evidence, and have the same force and effect in the courts of the state as the original notice. 1909–317.

§ 1426*q*. Copies of the records of all instruments required to be recorded by the provisions of this act, duly certified by the recorder, in whose custody such records are, may be read in evidence, under the same circumstances and rules as are now, or may be hereafter provided by law, for using copies of instruments relating to real estate, duly executed or acknowledged or proved and recorded. 1909–317.

§ 1426*r*. The provisions of this act shall not in any manner be construed as affecting or abolishing any mining district or the rules and regulations thereof within the State of California. 1909–317.

§ 1426*s*. The failure or neglect of any locator of a mining claim to perform development-work of the character, in the manner and within the time required by the laws of the United States, shall disqualify such locators from relocating the ground embraced in the original location or mining claim or any part thereof under the mining laws, within three years after the date of his original location and any attempted

relocation thereof by any of the original locators shall render such location void. 1909–317.

CODE OF CIVIL PROCEDURE—ARTICLE III.

Summary Sale of Mines and Mining Interest.

The provisions of the probate law of California in relation to the summary sale of mines and mining interests are as follows:

§ 1529. When it appears from the inventory of the estate of any decedent that his estate consists in whole or in part of mines, or interests in mines, such mines or interests may be sold under the order of the court having jurisdiction of the estate, as hereinafter provided.

§ 1530. The executor or the administrator, or any heir at law, or creditor of the estate, or any partner or member of any mining company, in which interests or shares are held or owned by the estate, may file in the court a petition in writing, setting forth the general facts of the estate being then in due course of administration, and particularly describing the mine, interest, or shares which it is desired to sell, and particularly the condition and situation of the mines or mining interests, or of the mining company in which such interests or shares are held, and the grounds upon which the sale is asked to be made.

§ 1531. Upon the presentation of such petition, the court, or a judge thereof, must make an order directing all persons interested to appear before such court, at a time and place specified, not less than four or more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell such mine, mining interests, shares, or stocks, as are set forth in the petition and belonging to the estate. A copy of the order to show cause must be personally served on all persons interested in the estate, at least ten days before the time appointed for hearing the petition, or published at least four successive weeks in such newspaper as such court or judge shall specify; *provided, however,* that when it appears from the inventory and appraisement that the value of the whole estate does not exceed the sum of two hundred and fifty dollars, the court, or a judge thereof, may at his discretion, order in lieu of publication that notices of the hearing be posted in at least three public places in the county. If all persons interested in the estate signify in writing their assent to such sale, the notice may be dispensed with.

§ 1532. If, upon hearing the petition, it appears to the satisfaction of the court that it is to the interest of the estate that such mining property or interests of the estate should be sold, or that an immediate sale is necessary in order to secure the just rights or interests of the mining partners, or tenants in common, such court must make an order authorizing the executor or administrator to sell such mining interests, mines, or shares, as hereinafter provided.

§ 1533. After the order of sale is made, all further proceedings for the sale of such mining property, and for the notice, report, and confirmation thereof, must be in conformity with the provisions of article four of this chapter.

Postponement of Trial Involving Title to a Mining Claim.

"In actions involving the title to mining claims, or involving trespass for damages upon mining claims if it be made to appear to the satisfaction of the court that in order that justice may be done and the action fairly tried on its merits, it is necessary that further developments should be made underground or upon the surface of the mining claims involved in said action, the court shall grant the postponement of the trial of the action, giving the party a reasonable time in which to prepare for trial and to do said development work."

Civil Code, § 595.

ORE BUYERS LICENSE ACT, COMMONLY REFERRED TO AS "THE HIGH GRADE BILL."

Chapter 70, Cal. Statutes 1925; Amended 1927; Amended 1929 (Chapter 183)

An act to provide for the regulation, control and licensing of any person, firm or corporation, engaged in the business of milling, sampling, concentrating, reducing, refining, purchasing or receiving for sale ores, concentrates, or amalgams, bearing gold or silver, gold dust, silver or gold bullion, nuggets or specimens; to provide rules and regulations therefor; and to provide penalties for the violation of the provisions of this act.

SECTION 1. Hereafter it shall be unlawful for any person, firm, association or corporation without first procuring the license herein provided for, to engage in the business of milling, sampling, concentrating, reducing, refining, purchasing or receiving for sale, ores, concentrates, or amalgams bearing gold or silver, gold dust, gold or silver bullion, nuggets or specimens. Every person, firm, association, or corporation who annually mills, samples, concentrates, reduces, refines, purchases or receives for sale such ores, concentrates or amalgams of the total value of one thousand dollars or more, shall pay a license tax of fifteen dollars per annum to the State of California. Every such person, firm, association or corporation who annually mills, samples, concentrates, reduces, refines or who purchases or receives for sale such ores, gold or silver concentrates or amalgams of the total value of less than one thousand dollars shall pay a license tax of two dollars per annum to the State of California. No license shall be granted to any person, firm or association unless such person and the members of such firm or association shall be bona fide residents of the State of California, and of good moral character; and no license shall be granted to any joint stock company or corporation unless such company or corporation is duly qualified to exist and do business as a corporation of this state or unless such company or corporation has complied with all the laws of this state relating to the qualifications of foreign corporations to do business in this state: *provided*, that this section shall not be construed as requiring a license for any mill, sampler, concentration or reduction plant used exclusively by the owner in sampling, milling, or reducing or concentrating ores produced by such owner.

SEC. 2. The application for license to carry on such business must be made to the state mineralogist of the State of California, and shall contain the full names and addresses of applicants, if natural persons, and in the case of firms and associations the full names and addresses of the members thereof, and in the case of corporations, the full names and addresses of the officers and directors thereof, and the place or places where such business is to be carried on. Such application shall be sworn to by the person making it. Every license granted shall date from the first day of the month in which it is issued and expire on the thirty-first day of the following December, and such license or copies thereof shall be kept conspicuously displayed in the place or places of business of the licensee within the State of California. Every application shall be filed not less than thirty days prior to the granting of such license, and notice of the filing of such application shall be posted in the office of such state mineralogist and be published at the cost of the applicant once a week for three successive weeks in a newspaper published in the county or counties where such business is to be carried on. Protest may be made by any person to the issuing of such license, and when such protests are filed with the state mineralogist, the latter shall give notice of and hold a public hearing upon said protest before issuing such license. The said state mineralogist shall have the power to reject any application or license after a hearing upon such protest as aforesaid, and he shall also have power to revoke any license for failure on the part of the licensee to observe this act or any part thereof, or when the licensee shall have violated the provision or provisions of any law of the State of California relating to ore buying or of any law of said state relating to larceny or receiving stolen property; *provided*, that no license shall be revoked except upon written charges filed by two or more reputable persons as accusers, specifying the violations of law for which revocation is sought, and after a public hearing as in case of protests against the granting of licenses. An application for a review of any order granting, refusing, or revoking, a license made by the state mineralogist under this act, may be made to the superior court in and for the county where the aggrieved parties reside, by any person or persons who may feel aggrieved by such order and whose name or names appear in the record of the proceedings before the state mineralogist as a licensee, applicant for license, protestant, or accuser, by lodging in the office of the clerk of said court a certified copy of the transcript of the proceedings before the state mineralogist, including copies of all papers filed therein. The transcript shall be accompanied by a short petition naming the person or persons applying for the review as plaintiff or plaintiffs and the state mineralogist as defendant, and praying for a review of the order.

Within ten days after lodging such application the party or parties applying for the review shall serve notice of its pendency upon the state mineralogist, in writing, and if the review be of an order granting a license or refusing to revoke a license, such notice shall also be served upon the person to whom the license was thereby granted or whose license was thereby permitted to remain in force.

Such notice may be served by personal delivery or by registered mail, and proof of service shall be made to the satisfaction of the court

if not admitted. No review shall be allowed unless taken within thirty days after entry of the order. The said court shall try all such reviews upon the transcript, and such evidence as may be offered and admitted. When the court has finally determined any such proceeding, it shall forthwith cause its order in the premises to be certified to the state mineralogist. The costs in such review shall be awarded at the discretion of the court, and if any costs are awarded against the state mineralogist, the same shall be paid out of funds arising from the payment of license fees under this act. When a review is had, as herein provided, of an order of the state mineralogist revoking a license, such review shall operate as a stay upon such order.

For the making of the transcript herein provided for, the state mineralogist shall collect from the person or persons ordering the same, twenty-five cents per folio of one hundred words, and twenty-five cents for certifying the same.

The superior court in and for the county or city and county in which the aggrieved party or parties reside shall have the right and jurisdiction to review the action of the state mineralogist in granting, refusing, or revoking a license.

SEC. 3. (Repealed.)

SEC. 4. Every person, firm, association or corporation, carrying on such business, shall keep and preserve a book in which shall be entered at the time of the delivery of any ores, concentrates or amalgams, bearing gold or silver, gold dust, gold or silver bullion, nuggets or specimens:

First—The names of the party on whose behalf such ores, concentrates, gold dust, gold or silver bullion, nuggets or specimens are delivered;

Second—The weight, or amount, and a short description of each lot thereof;

Third—The name and location of the mine or claim from which it shall be stated that the same has been mined or procured;

Fourth—The name of the party delivering the same;

Fifth—The date of delivery; and

Sixth—Whether the party making the delivery is a lessee, superintendent, foreman, or workman in such mine.

Such book shall be open for inspection to the state mineralogist, his deputies, officers, and agents, on every day except Sundays and legal holidays, between the hours of nine o'clock in the forenoon and five o'clock in the afternoon. If any person, on his own behalf or being duly authorized thereunto by another, shall make and file with the said state mineralogist an affidavit stating that to his best knowledge and belief he or his principals, as the case may be, has, within the three months next preceding the filing of such affidavit, sustained a loss of any of the above described property, by theft or trespass, and that he believes that such property was delivered to a licensee under this act, naming such licensee, the state mineralogist shall forthwith issue a permit to such person to examine the book kept by such licensee under this act; and upon the presentation of such permit to such licensee, such person shall have the right to inspect and examine the entries made in said book during said period of three months, on the same terms and conditions as the state mineralogist.

SEC. 4*a*. The state mineralogist shall prescribe the form and contents of all reports in order to comply with section 4 of this act and it shall be the duty of every person, firm, association or corporation to file monthly with the state mineralogist a report of all purchases made under the provisions of this act. Any licensee who shall fail or refuse to comply with the provisions of this act shall be deemed guilty of a misdemeanor.

SEC. 4*b*. All officers and employees empowered by law or authorized by a superior to enforce the provisions of this act are hereby vested with the powers of peace officers to enforce the provisions hereof and may seize and hold any ores, concentrates, or amalgams bearing gold or silver, gold dust, gold or silver bullion, nuggets or specimens wherever found and whenever there appears to be reasonable grounds to believe such ores, concentrates or amalgams have been stolen or otherwise illegally taken, and to hold the same for use as evidence in any action which may be brought.

Whenever any such ores, concentrates or amalgams so seized and held appear to be no longer of use as evidence, the same shall be delivered to the owner thereof upon proof of such ownership, and any person, firm, association or corporation claiming ownership may file a petition in the superior court of the county of his or its residence showing his or its claim or right thereto. A copy of said petition must be served on the attorney general at least twenty days before the hearing thereof who must answer the same and upon the hearing of said petition the court must try the issue as issues are tried in civil actions and if it determines that the petitioner is entitled to such ores, concentrates or amalgams, the court must order the same delivered to such petitioner. If such ores, concentrates or amalgams be not so delivered to the owner thereof as aforesaid, the same shall, after a period of five years from the date upon which the same was so seized and held, escheat to the state upon action brought by the attorney general in the superior court of the State of California in and for the county of Sacramento, in which action shall be joined as parties defendant all persons claiming to be owner or having any right or interest therein. Service of process in such action shall be made as summons is served in other civil actions upon any known claimant and by publication thereof at least once a week for three successive weeks in a newspaper of general circulation printed and published in the county of Sacramento before the trial of such action. Upon the trial the court must hear all parties who have appeared therein and if any such party shall prove his or its ownership or that he or it has any right or interest therein, the court shall make an order for the delivery thereof to such person, firm, association or corporation, or the sale thereof and a distribution of the proceeds to discharge the right or interest which any such person, firm, association or corporation may prove to have therein, or declare such ores, concentrates or amalgams or the balance of the proceeds of the sale thereof to have escheated to the state. Thereafter the state mineralogist may sell such ores, concentrates and amalgams not theretofore sold by court order and account for and report the proceeds of such sales to the state controller and at the same time said moneys shall be remitted to the state treasury to be credited to the ore buyer's license fund hereinafter in this act created.

SEC. 5. Any licensee under this act who shall fail, or neglect or refuse to keep and preserve the book herein provided for, shall forfeit his license and shall in addition, upon conviction, be liable to the penalties provided in section 8 of this act. Any licensee or other person who shall knowingly make any false entries upon such book, or knowingly enter or cause to be entered upon the same any false or fictitious names, shall upon conviction, be liable to the penalties provided in section 8 of this act. Any licensee who shall refuse to permit any person duly authorized as herein provided to inspect said book or the entries therein, shall, on conviction, be liable to the penalties provided for a violation of this act and shall forfeit his license.

SEC. 6. Any person who shall knowingly make any false statements concerning any of the facts required to be stated in section 4 of this act shall be guilty of a misdemeanor.

SEC. 7. Complaints against any licensee or applicant shall be made in writing to said state mineralogist, and reasonable notice thereof, not less than three days, shall be given to said licensee or applicant by serving upon him a copy of such complaint, and a hearing shall be had before the said state mineralogist within one week from the date of the filing of the complaint, and no adjournment shall be taken for longer than one week. A daily calendar shall be kept of all hearings by said state mineralogist, which shall be posted in a conspicuous place in his public office for at least three days before the date of such hearing. The said state mineralogist shall keep a record of all such complaints and hearings, and may refuse to issue and shall suspend or revoke any license for any good cause shown, within the meaning and purpose of this act; and when it is shown that any licensee or applicant under this act, either before or after conviction, is guilty of any conduct in violation of this or any law relating to such business, it shall be the duty of the said state mineralogist of the State of California to suspend, revoke or reject the license of such licensee or applicant, but notice of the proposed action shall be presented to and reasonable opportunity shall be given licensee or applicant to be heard in his defense. Whenever for any reason such license is revoked, said state mineralogist shall not issue another license to said licensee until the expiration of at least one year from the date of revocation of such license. The state mineralogist shall decide all matters submitted to him within thirty days from the time he takes them under advisement.

SEC. 8. Any violation of sections 1, 4, 4*a* and 5 of this act shall be punishable by a fine of not less than one hundred dollars and not more than one thousand dollars, or by imprisonment in the county jail for not less than thirty days nor more than six months or both such fine and imprisonment. The state mineralogist shall notify the district attorney of the county in which the offense occurs of such violation, and the said district attorney shall institute criminal proceedings for the enforcement of this act before any court of competent jurisdiction. All forfeited bail and fines received under the provisions of this section shall be sent without delay by the magistrate receiving the same, fifty per cent to the state treasurer, to be deposited in the state treasury to the credit of the ore buyer's license fund hereinafter in this act created and fifty per cent to the city treasurer of the city,

if incorporated, or to the county treasurer of the county in which the prosecution is conducted.

SEC. 9. Except as herein otherwise provided, all moneys received by the state mineralogist under the provisions of this act, shall be accounted for and reported monthly by said mineralogist to the state controller to be remitted by said controller to the state treasury to the credit of a fund to be known as "the ore buyer's license fund" which said fund is hereby created; except that moneys deposited with the state mineralogist for fees for licenses which have not been granted shall be retained by the state mineralogist in the trust fund of the division to be remitted to the state treasurer upon the issuance of the license or returned to the applicant in case a license is refused under the provisions of sections 2 and 7 hereof. All moneys placed in said fund under the provisions of this section or sections 3, 4*b* and 8 of this act, shall be expended, in accordance with law, for the payment of all actual and necessary expenses incurred in carrying out the provisions of this act.

SEC. 10. Nothing in this act contained shall be construed as limiting, affecting or abrogating any provisions of any law now in force or that may hereafter be enacted transferring to and vesting in the department of natural resources all of the duties, powers, purposes, responsibilities and jurisdiction of the state mineralogist or any officer, deputy, agent, assistant or employee as provided in this act.

SEC. 11. If any section, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act and each sentence, clause and phrase thereof, irrespective of the fact that any one or more of the sections, sentences, clauses or phrases be declared unconstitutional.

MISCELLANEOUS PENAL LEGISLATION AFFECTING ORES

Alaska. Taking ore, mineral amalgam, etc., with intent to steal the same. Sess. Laws (1913), p. 37. To prevent interference with samples or bullion and making false returns. Sess. Laws (1923), p. 93.

Arizona. Falsifying of ores. Rev. Stats. (1901), p. 1269, § 484. Salting of ores. *Id.*, p. 1272, § 494.

Colorado. Mingling base metals with ore. 2 Mills' Ann. Stats. (1925), p. 886, § 1997. Ore buyers—purchasing ores unlawfully. 3 *Id.*, pp. 2182, 2182c, §§ 4961 to 4966. Substituting ores. *Id.*, p. 2183. Regulating the purchase of ores, p. 2183, §§ 4968, 4969.

Idaho. Alteration of ores. Comp. Stats. (1919), p. 2374, § 8497. Use of fraudulent scales for ore. *Id.*, p. 2374, § 8496.

Montana. Penalty for commingling foreign substances with ores. 1 Choates Rev. Codes (1921), p. 1267, § 3438. Making false samples of ore. *Id.*, p. 203, § 11421. Use of false pretenses in selling mines. 4 *Id.*, p. 203, § 11419. Changing samples for assay. 4 *Id.*, p. 203, § 11420.

Nevada. Recovery of stolen ore and metals. 2 Hillyer's Comp. Laws (1930), pp. 1227 to 1229, §§ 4181 to 4184. Regulating purchase of ore, p. 1230, §§ 4185 to 4189. Regulation of persons handling ore for others. *Id.*, p. 1231, § 4190. Changing value of ores. 5 *Id.*, p. 3177, § 10398.

New Mexico. Ore purchases and receipts. Comp. Laws (1929), p. 1147, §§ 88-301. Purchasing stolen ore. *Id.*, p. 1148, § 88.

Oregon. Robbing or attempting to rob any flume, rocker, quartz mill, etc., or trespassing upon a mining claim with intent to commit a felony. 1 Code (1930), p. 1294, §§ 14-374. Penalty for conversion of mine yield by bailee. 3 Code, p. 4285, § 53.

Utah. Larceny from mining claim, etc. Comp. Laws (1917), p. 1603, § 8286. Salting mines, fraudulent assay. *Id.*, p. 1611, § 8348. Changing samples or assay certificate. *Id.*, p. 1611, § 8349. Making or publishing false assay. *Id.*, p. 1189, § 3823. Wrongful taking of ores, Rev. Stats., § 1536.

Washington. Salting mines. 1 Pierce's Code (1921), p. 1189, § 3821. Changing samples. *Id.*, p. 1189, § 3822. False samples. *Id.*, p. 1189, § 3823.

Wyoming. Providing penalty for salting. Comp. Laws (1920), p. 808, § 4386. Having or receiving counterfeit gold dust. *Id.*, p. 1277, § 7288.

The Canadian (Ontario) act concerning "Highgrading" is entitled "The Unwrought Metal Sales Act" of 1924. Its provisions, in part, are as follows, viz:

"3. Every person who not being a license holder buys, sells, deals in, receives or disposes of by way of barter, pledge or otherwise, either as principal or agent, any unwrought metal, shall be guilty of an offense against this act and shall, on summary conviction thereof, in the case of a first offense, incur a penalty not exceeding $500 and in addition thereto may be imprisoned for a period not exceeding one year, and for a second or any subsequent offense, shall incur a penalty not exceeding $1,000 and shall be imprisoned for a period of one year, 1924 c. 20, s. 4.

"4. Every person who knowingly purchases or in any other manner acquires possession of unwrought metal from any person other than a license holder shall be guilty of an offense and shall on summary conviction thereof incur the penalties provided in section 3, 1924, c. 20, s. 5."

APPENDIX B

FORMS AND PRECEDENTS

APPENDIX B.

FORMS AND PRECEDENTS.

Form No. 1

AFFIDAVIT OF ANNUAL EXPENDITURE.

State of_____}
County of_____} ss.

_____being first duly sworn, deposes and says, that at least_____dollars' worth of labor was performed (or improvements made) between the _____ day of _____, 19_____, and the _____day of _____, 19_____, upon the _____ Mining Claim, situate in the _____ Mining District, County of _____, State of _____. Such expenditure was made by or at the expense of_____ the owner of said claim, for the purpose of complying with the laws of the United States and of the State of _____ pertaining to annual assessment work.

Said labor, so performed, (or improvements so made) being as follows:

(Describe the labor or improvements.)

_____

Subscribed and sworn to before me this _____ day of _____, 19_____.

_____
Notary Public.

My commission expires _____.

Form No. 2.

NON-MINERAL AFFIDAVIT.

Department of the Interior.

U. S. Land Office_____, No._____

This affidavit can be sworn to only on personal knowledge, and can not be made on information and belief.

_____, being duly sworn according to the law, deposes and says that I am the identical person or agent for_____, who is an applicant for government title to the_____ _____. Section_____, Township_____, Range_____, _____Meridian; that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my personal knowledge of said land is such as to enable me to testify understandingly with regard thereto;

that there is not, to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to my knowledge, any placer, cement, gravel, or other valuable mineral deposit; that the land contains no salt spring, or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that the application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes; that the said land is not occupied and improved by any Indian, and that my post-office address is_____

_____

(Sign here with full Christian name.)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See Sec. 125, U. S. Criminal Code, below.)

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by_____);

(Give full name and post-office address.)

that I verily believe affiant to be a credible witness and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me, at my office, in_____,

(Town.)

_____within the_____

(County and State.)

_____land district, this_____day of_____, 19____.

_____

_____

(Official designation of officer.)

UNITED STATES CRIMINAL CODE.—CHAP. 6

Sec. 125. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years. (Act, March 4, 1909. 35 Stat., 1111.)

Form No. 3.

ARTICLES OF INCORPORATION.

(As Articles of Incorporation must conform to the laws of the State or Territory within which the corporation is organized, only the "purposes" of a mining corporation are subjoined.)

The business, objects and purposes to be transacted, promoted and carried on by this corporation, and the purposes for which it is formed are locating, working, developing, leasing, buying, selling, and otherwise

dealing in mines, mining locations, mining claims, mining rights, mineral deposits, mill-sites, tunnel-claims or rights, water rights, mining plants, mining dredges, machinery, or works used in connection therewith. Also, to engage in and carry on the business of dredging for gold and other mineral substances or deposits, in water or upon land. Also, to engage in and carry on the business of boring for, producing, owning, holding, buying and selling petroleum oils, natural gas, asphaltum, bitumen, and other hydro-carbon substances. Also, to produce, generate, or otherwise obtain electric light, power, and heat. Also, to engage in and carry on the business of crushing, smelting, milling, calcining, refining, dressing, concentrating, cyaniding, generating, manipulating, and preparing for market gold, silver, quicksilver, lead, tin, copper, zinc, iron, or other ore, coal, slag, petroleum oil, metals, and mineral substances of all kinds; and to carry on any other reducing, smelting, or metallurgical operations which may seem conducive to any of this corporation's objects, purposes or business. Also, to engage in and carry on the business of buying, selling, manufacturing, and dealing in ores, tailings, slag, metals, mining plants, machinery, implements, conveniences, provisions and things used in connection with the business of this corporation, or required by the workmen and others employed by this corporation.

Also, the entering into partnerships, or into any arrangement for sharing profits, union of interests, cooperation, joint adventure, reciprocal concession or otherwise, with any person, firm or corporation carrying on or engaged in, or about to carry on and engage in any business or transaction which this corporation is authorized to carry on, or engage in any business or transaction capable of being conducted so as to directly or indirectly benefit this corporation. Also, to take and acquire, by purchase or exchange, or other lawful modes, and to hold, own, deal in, sell, and otherwise dispose of the capital stock or bonds of other corporations.

And, in general to do, and perform any and every other act or acts, or things, of whatsoever name or nature, incident to, growing out of or connected with the purposes, objects and business for which this corporation is formed.

Form No. 4.

APPOINTMENT OF STATUTORY AGENT.*

KNOW ALL MEN BY THESE PRESENTS:

That _____, corporation organized and existing under the laws of_____, has designated, constituted, and appointed, and by these presents does hereby designate, constitute, and appoint_____, residing in_____, State of_____, its true and lawful attorney upon whom process issued by authority of or under any law of said State of_____ in any action or proceeding against it may be served; and service of such process on said representative shall constitute a valid and binding service on said corporation.

* See 9 Fletcher on Corporations, p. 9920, § 5902, note 66.

In witness whereof, the said corporation has caused its corporate name to be hereunto subscribed and its corporate seal to be hereunto affixed, by its officers thereunto duly authorized, this _____ day of_____, 19____.

Form No. 5.

AGREEMENT TO SELL.*

(Precedent in Eisleben vs. Brooks, 179 Fed. 86.)

Memorandum of agreement made and entered into in duplicate at _____ this_____day of_____, 190____, by and between_____ and_____ both of_____parties of the first part, and _____ all of_____, parties of the second part, witnesseth: That the parties of the first part are the owners and holders of options on the mineral rights and are in process of acquiring under purchase options and leases, other mineral rights in all, or as much thereof as can be had, of what is known as_____ in_____counties in the state of_____.

Money is needed for the immediate prospecting of and the purchasing of said mineral rights from said first parties, and the parties of the second part agree to furnish such funds.

The parties of the first part agree to convey by proper deeds and transfers to_____ of_____, as trustee, or his successor in person or corporation, all of said mineral rights now owned by them or whether they acquire an option thereon, or whether they acquire them by purchase, options or leases at any time in the future. The said parties of the second part agree to furnish for immediate use a drilling fund enough to sufficiently drill said_____ otherwise to accept same without drilling, and as said property is drilled to accept for said trustee, or his successor, the mineral rights under any and all lands in said_____which are now and in the future may be owned, purchased, optioned, or leased by said first parties, which are shown by ordinary methods of drilling to contain_____ paying to said first parties_____ dollars, cash per acre for the same.

Upon completion of said drilling and purchasing, or before if deemed advisable, the parties hereto agree to organize a corporation for the division of and further development of said properties, and to which corporation the parties of the second part hereby subscribe and agree to pay in the sum of_____dollars cash, and which organization shall be duly incorporated under the laws of the state of _____, and its capital stock shall be issued fully paid and non-assessable.

The capital stock of said corporation shall be issued and divided as follows: The said parties of the first part are to receive_____ of said stock and the parties of the second part are to receive_____ of said stock.

It is understood that the corporation thus formed shall refund to said second parties the amount of money paid out by them to the first parties in the purchasing of said mineral rights. In the perfecting of

* For another form, see Cohn vs. Valentine, 88 Cal. A. 437, 263 Pac. 846.

the arrangement under this contract, it is considered and understood that the development of said properties on an extensive scale shall be carried into effect and that no less than_____ fully equipped modern _____ plants shall be put into operation just as soon as the market by proper advertising, soliciting, etc., will justify.

The situation being, however, that the parties of the first part are unable to furnish capital to assist in the carrying of said operation into effect, it is hereby understood and agreed, and is the chief consideration to first parties in this contract, that said second parties shall furnish or acquire for said corporation the necessary capital for said development, and to protect first parties' interests in said corporation until such time as said corporation shall have accumulated sufficient working capital to justly protect first parties therein.

In witness whereof, the parties hereto, and to its duplicate, have set their hands the day and year first above written.

Form No. 6.

COMPROMISE OF ADVERSE CLAIM.

(Precedent in St. Louis Co. vs. Montana Co., 171 U. S. 650.)

The terms of the agreement made this _____ day of _____, 19_____, by and between _____, the party of the first part, and _____, the party of the second part, are as follows:

That in consideration of the compromise and settlement of the adverse suit brought by said party of the _____ part in the _____ Court of the _____, to determine the right of possession to the _____ mining claim, as mentioned and described in the complaint in said suit, and also of the withdrawal of the adverse claim upon which said suit is based, and also of settling and agreeing upon the boundary line between said _____ mining claim and the _____ mining claim of said party of the _____part, the said party of the _____ part hereby agrees and binds _____ within _____ days after the issuance of the patent as applied for to make, execute and deliver to said party of the _____ part, or _____ assigns a good and sufficient deed of conveyance for

(Description)

That thereupon the said party of the _____ part shall immediately dismiss said suit and withdraw said adverse claim.

That during the pendency of said patent proceedings, or during any of the times herein provided for the said party of the _____ part shall not make, nor cause to be made, any motion in said court for the dismissal of said suit, for want of prosecution, nor at all.

In witness whereof, the parties hereto, have hereunto and to its duplicate, set their hands the day and year first above written.

Form No. 7.

GRUB STAKE CONTRACT.*

(Precedent in Morrow vs. Matthew, 10 Idaho 423, 79 Pac. 196.)

The terms of the agreement made this_____day of_____, 19____, between_____, of_____, State of_____, the party of the first part, and_____, of the same place, the party of the second part, are as follows:

That the party of the first part shall forthwith proceed to_____, in the State of_____, and for _____months from the date hereof devote his time, labor, and skill in prospecting for mineral deposits therein, and when found he shall locate mining claims thereon subject to location under the laws of the United States, the State of_____, and the local rules, regulations and customs of miners in force in the mining district in which such deposits may be situated for the joint use and benefit of the said parties hereto.

That the said parties hereto shall be equally interested in each and every mining claim so discovered, located, or which may be acquired in any manner by said party of the first part within said territory during the time aforesaid.

That the said party of the second part shall, from time to time and upon his demand, furnish the said party of the first part with such supplies, tools and instruments and other things of necessity incident to such prospecting, locating and acquiring mining claims as said party of the first part shall properly require in the keeping of this agreement on his part.

In witness whereof, the said parties hereto have hereunto and to its duplicate, set their hands the day and year first above written.

Form No. 8.

CONTRACT WITH MINING ENGINEER.

(Precedent in Wishon vs. Great Western Co., 29 Wash. 355, 69 Pac. 1105.)

This agreement, made and entered into this_____day of_____, 19__, between_____, of_____in the County of_____in the State of_____, the party of the first part, and_____of _____in the County of_____and State of_____, the party of the second part. Witnesseth: That whereas, the said party of the first part is a mining engineer and expert, whose opinions and statements concerning mines and mining properties are of value and are highly regarded by those who are purchasing mines and mining property; and

Whereas, the said party of the second part is desirous of selling and disposing of those certain mines and mining property, of which the said party of the second part is the owner, hereinafter described; and is desirous of employing the said party of the first part in reporting on

*For form of complaint, findings of fact and conclusions of law and decree in case of fraudulent conspiracy of prospector with third parties, see Lockhart vs. Washington Co., 16 N. M. 223, 117 Pac. 833.

the said property, so as to have his professional recommendation, or other report, upon the same, as the property may warrant. Now, therefore, this Agreement witnesseth:

That for and in consideration of the services rendered and to be rendered by the said party of the first part in the sale of the said mines and mining property, which is now pending or on any sale or sales which may be made by and through the report upon said property, by the said party of the first part, at any time, or to any person whomsoever of the _____group or property, consisting of the_____ and_____lode mining claims, situate at_____Mining District, County of_____and State of_____; and in consideration of the report of the said party of the first part, or any part of the said report, or any map, writing, printed matter, or other recommendation, or statement, made by said party of the first part, for and on account of the sale, which is now pending, for the price of_____dollars, or any sale or sales hereafter to be made by and through the said report, or any part thereof, of the said property, the said party of the second part covenants and agrees to and with the said party of the first part that he will pay him, said party of the first part, or his heirs or assigns, the full sum of_____dollars, to be paid immediately upon the payment of the purchase money. And it is further agreed and understood that the expenses incurred in making the trip from_____to the said property and return, and during the examination, assays, maps, etc., by the party of the first part shall be repaid to him by the said party of the second part at the time and times said expense is incurred. And the said party of the first part promises and agrees to and with the said party of the second part that he will use all his professional skill and will make a full and complete report of the said mines and mining property and will expert the same, and will do all in his power to bring about a fair and honest sale of the said property upon the terms and conditions hereinbefore set forth.

In witness whereof, the said parties hereto have hereunto and to its duplicate, set their hands the day and year first above written.

Form No. 9.

OIL WELL DRILLING CONTRACT.*

(Precedent in Cook vs. Columbian Co., 144 Cal. 670, 78 Pac. 287.)

This agreement, made and entered into this_____day of_____, 19__, between_____, of_____, the party of the first part, and _____, of_____, the party of the second part, Witnesseth:

That the party of the second part will furnish at his own cost and expense all the machinery, tools, paraphernalia and materials of all kinds, including labor, fuel, water, and any and all things of whatsoever kind and nature that may be necessary and needful (except casing, pipe and shoes) to properly perform the work of drilling or boring not less than_____feet of hole or wells, and to drill or bore the same at any one or more places on the following described land situate, lying and being in the County of_____, State of_____, and more particularly described as follows, to wit:

* For another form of Oil Well Drilling Contract, see Snyder vs. Noss, 99 Okla. 142, 226 Pac. 319.

(Description.)

as may be desired and designated by the party of the first part, for the agreed price per foot sunk, as shown and set forth in the following scale of prices, at different depths up to_____feet, and in accordance with the further terms and conditions herein contained. Provided, however, that in case the drilling of any well shall be stopped by the party of the first part for any cause after it has been begun, that the party of the first part will pay the net cost of moving the drilling outfit to any other place on the said property, where another well is to be started, in addition to the amount earned for the number of feet sunk in accordance with the said scale of prices per foot and that should work be stopped on any well, for any cause, after a depth of_____ feet has been sunk, then the said party of the second part shall move the rig at his own cost and expense to the place designated by the party of the first part. That in case of abandonment of any well or wells for any cause the party of the second part will pull and remove, in a careful manner, all casing, pipe and fittings used in said well or wells that can be got out by a reasonable and faithful effort by the use of all appliances and tools ordinarily used in performing such work.

That all casing, pipe and shoes of the proper sizes necessary to be used in the well or wells will be furnished and delivered on the ground by the party of the first part and shall be of such sizes as such party may select, and the same shall be properly inserted and used in the wells by the party of the second part and carried to the bottom, if possible without diminishing the size except in cases where it is found absolutely unavailable after the use of under-reamers and other appliances, as may be necessary and proper for keeping the whole in proper shape.

That in case a body of asphaltum be encountered at any considerable depth and it is found impossible after a faithful and reasonable effort so to do that it cannot be drilled through nor penetrated by the use of any of the known tools and appliances, then the said well will be considered as completed and a settlement made in full for the depth drilled according to the said scale of prices; provided, however, that the party of the first part shall have full and free right and privilege to use and operate the machinery and outfit of the party of the second part at his own cost and expense for a period not to exceed_____, or until satisfied that the hole cannot be sunk any deeper.

That in case oil, gas or asphaltum shall be found at any depth in any well and the party of the first part shall elect to stop drilling in such well, the party of the second part shall properly test the well and leave the same in condition ready for the pump or other working appliances before moving the rig and outfit away.

It is understood by and between both parties hereto that this contract is for a total of_____feet of hole or wells, and that the party of the second part agrees to put down any one hole to a total depth of _____feet, if the ground is such that it can possibly be done, by reasonable effort, or that he will stop the drilling of any well at any depth, as directed by the party of the first part and in accordance with the said scale of prices per foot sunk, and the terms and conditions herein contained.

That the party of the first part will pay, or cause to be paid to the party of the second part the amount earned for each foot of hole sunk in accordance with the said scale of prices at times and as follows, to wit:

An advance sum of_____dollars, when the rig and outfit are on the ground and ready to commence the work of drilling; _____ per cent of the amount earned as per scale when the well has been sunk to a depth of_____feet and a like_____per cent of the amount earned at the completion of each_____feet until the well is either completed or abandoned, or the work stopped by the party of the first part, when the balance in full shall be paid, after deducting the said advance payment of_____dollars.

Done in duplicate, the day and year first above written.

Form No. 10.

OPTION.

This agreement, made the_____day of_____, 19__, between _____, a corporation organized and existing under and by virtue of the laws of the State of_____, the party of the first part, and _____, of the County of_____, State of_____, party of the second part, Witnesseth: That the party of the first part, in consideration of_____, will sell to the party of the second part all those certain mining claims and water rights situate, lying and being within the_____Mining District, County of_____, State of _____, more particularly bounded and described as follows, to wit:

(Description.)

upon the following terms and conditions, to wit:

The party of the first part will cause to be deposited in escrow in the Bank of_____in the County of_____, State of_____, at the time of the execution of this instrument, its deed in writing, good and sufficient in the law, to the party of the second part, or his assigns, of each and all of the properties hereinbefore mentioned and described.

The party of the second part is hereby granted an option to purchase all of said mining claims and water rights for the sum of_____ dollars, subject to the terms and special exceptions and conditions hereof, in the following manner: That the said party of the second part shall pay in to the credit of the said party of first part at said Bank of_____, on or before 12 o'clock noon of each day specified, to wit: On or before the_____day of_____, 19__, _____per cent of the said purchase price of said properties and the balance of said purchase money in_____equal payments of_____per cent of the whole every_____months thereafter.

It is hereby agreed that all of the foregoing payments shall be made in lawful money of the United States.

It is hereby agreed that the party of the second part shall have the right to anticipate the payments of the entire unpaid purchase price of said properties at said Bank of_____, but in the event that he exercises such right he shall pay all of the unpaid installments in full; provided, that he be allowed an amount equal to_____per cent

per annum on each unpaid installment for the length of time for which such installment is thus anticipated; and provided further, that such payment or payments, or any part thereof, is not derived from the proceeds of said properties, or any part thereof; and provided further, that if the party of the second part shall exercise the option conferred hereby to anticipate deferred payments, he shall give notice in writing to the party of the first part of his intention to exercise such option _____days prior to the time he shall be allowed to exercise the same.

It is further agreed that during the period from the date hereof until the final payment of the said entire purchase price of said properties is made, said party of the first part shall remain in the entire possession and control of the property hereinbefore particularly mentioned and described, except that upon the making of said first payment of said_____per cent of said purchase price of said properties the said party of the second part may, and shall have the right to enter into and take possession of all and singular said premises and property, and commence work and make improvements thereon, and operate, mine and extract the mineral from said premises and property. That in order that said party of the first part may be fully protected hereunder, it is hereby agreed that all work done and improvements made by said party of the second part upon said premises and property under the terms hereof shall be done in a miner-like and proper manner to enable said premises to be carefully operated, and so that the mineral therein contained may be extracted in an economical and miner-like manner, and all of said work done and improvements made shall be done or made under the supervision of said party of the first part and with its consent, and to that end it is hereby agreed that Mr._____, its superintendent, or his successor in office, shall have the right to finally pass upon and approve of, or reject, any plan or portion of a plan of the party of the second part for the working and improvement of said premises and property, or any part thereof, or of any work or ditches or pipe lines which may be connected therewith. That said party of the second part hereby agrees to dispose of the proceeds of the working of said premises as obtained or received by him from time to time as follows: All of such proceeds, less the actual cost of extraction, reduction or refining, hauling and freight charges, shall be applied as a payment upon the unpaid portion of the next payment falling due hereunder upon the purchase price of said mining claims and water rights.

It is understood and agreed that in consideration of the premises, that said party of the second part shall within_____days from the date hereof enter upon said premises by his duly accredited agent or agents, mining engineer or mining engineers, mining expert or mining experts, together with proper assistants and paraphernalia constituting a proper and sufficient outfit therefor, and in a proper and miner-like manner, and at his own cost and expense, make a proper examination and test of the mineral value of said premises and properties, holding and keeping the same, and all thereof, free and clear of all costs, charges and liens for such examination and working.

It being further understood and agreed that the said party of the second part shall keep the party of the first part fully informed of said work, and permit the said party of the first part at all times, and

at any time, to inspect such work, and any and all thereof; and it is further agreed that in furtherance of such examination and test said party of the second part may use and enjoy the improvements now placed upon said premises and properties together with such personal property now thereon as may be necessary or proper in the making of such examination and test; but in the event that said work is not being done to the satisfaction of the said party of the first part, it shall have the right and it is hereby given the right to cause all work being done by said party of the second part to immediately cease.

It being further distinctly understood and agreed that upon the failure on the part of the party of the second part to enter upon said premises and properties within the time and in the manner lastly hereinbefore aforesaid, this option and all rights and privileges thereunder shall, upon and at the expiration of said_____days be instantly forfeited, cancelled and annulled.

In the event that such examination is made within the time hereinbefore specified, and that thereafter the said party of the second part shall elect not to purchase said premises and properties under the terms hereof, he, the said party of the second part shall deliver to the said party of the first part, free from all cost, charges and expense to it whatsoever, copies of all data, plans, field notes, analyses, samples, photographs and other determinations and reports that he, the said party of the second part, shall have made or caused to be made, or otherwise obtained, in and about and by reason of said examination and test, the same to be so delivered within_____days after this option may have been concluded under the terms hereof.

In the event that the said party of the second part does not purchase said premises and properties, in accordance with the terms hereof, or shall default in any payment herein provided for, or this option be revoked for legal cause by the said party of the first part, any and all improvements placed upon said hereinabove described premises and properties by the said party of the second part, shall thereupon immediately become and be the property of said party of the first part, without any cost, charge or expense to it whatsoever therefor.

It is hereby further agreed that if at any time the party of the second part shall fail to make any payments herein provided for upon the said purchase price of said premises and properties at the time and place herein specified for the same to be made, the rights of the party of the second part under this option shall immediately cease and determine, and the payments which shall have been made by him therefor shall be applied as follows:

Whereas, the damage to the present or future value of the several properties affected by this agreement by a failure to purchase the same as herein provided, and the damage which may be occasioned to the same during the existence of this option prior to any breach thereof by the party of the second part, can not be estimated or established in a court of justice by reason of the difficulty of establishing hereafter the present appearance, prospects and apparent value of said hereinabove described mining claims and the changes in the appearance, prospects and value of the same at the time of such breach, and other difficulties and the consequent damage resulting thereby to the party of the first part.

It is hereby agreed that all payments and expenditures which shall have been made under this option by the party of the second part upon said premises and properties, or upon any part thereof, shall be deemed to be liquidated and assessed damages caused by the said party of the second part to the party of the first part by virtue of his failure to comply with and perform the conditions of this option and shall remain the property of the party of the first part; and the party of the second part hereby releases all claim thereto.

The party of the first part hereby agrees that it will not act nor consent to the doing of any act by it tending to alienate or encumber said premises and properties, or any part thereof, hereinabove described or which will prevent the party of the second part (upon the completion by him of all the conditions herein provided to be performed by him) from acquiring the same rights therein as are now possessed by the party of the first part.

The said party of the second part hereby covenants and agrees to hold harmless the party of the first part hereto as against all liens and claims of mechanics for labor done and materials furnished under this option, and hereby grants to said party of the first part through its duly accredited agent, to be present at the payment and ascertain that all wages of employees of the party of the second part, and all sums of money due to contractors or subcontractors under the said party of the second part, if any, and all sums of money due for materials furnished, are paid.

The party of the second part agrees to have each and every man employed by him and working upon said premises and properties and each and every person, company or corporation from whom he buys material, sign a contract, as follows:

"In consideration of my being employed by_____ or of _____purchasing material from me, I hereby covenant and agree to look alone to said_____for my pay, and I hereby waive all rights or claims that I may have in law or in equity against the properties, or any one of them, upon which said labor is bestowed or to which said material is furnished."

(*All blanks to be properly filled.*)

That upon a failure in any instance to properly secure such waiver of lien this option, and all rights and privileges thereunder shall be instantly forfeited, cancelled, annulled and revoked.

Time is of the essence of this agreement, and upon the failure to perform any of the covenants and obligations hereby imposed upon the party of the second part, the said Bank of_____is hereby authorized and directed to deliver said deed of conveyance, and all other papers, instruments or documents which may be deposited in escrow in said bank by the parties hereto under the terms or by reason of this option to the said party of the first part, and upon the failure of the party of the second part to perform any of the conditions or obligations hereby imposed upon him, the party of the first part is hereby absolved from the performance of any conditions or covenants imposed upon it hereby.

The said Bank of_____is hereby made the sole arbiter between the parties hereto as to whether the said conditions or obligations have been performed, and the said bank's decision shall bind the respective

parties; and if said bank decides that said party of the second part has not fully performed the same as herein provided, said bank shall not be restrained from the surrender of said deed of conveyance and other papers, instruments or documents as herein directed; and said Bank of_____shall be absolved from all liability hereunder, except fraud in the performance of its duties.

Upon the performance by the party of the second part of all the conditions of this option and the payment of the said full purchase price of said premises and properties as herein provided said Bank of_____shall deliver said deed of conveyance, papers, instruments and documents as may be deposited in escrow with it hereunder to the said party of the second part.

This option shall be binding upon, and run in favor of the heirs, executors, administrators, successors and assigns of each of the parties hereto except as herein specially provided.

In witness whereof, the said party of the first part has caused its corporate name to be hereunto subscribed, and its corporate seal to be hereunto affixed, by its officers thereunto duly authorized, and the said party of the second part has hereunto set his hand, in duplicate, the day and year first above written.

Form No. 11.

NOTICE OF NON-LIABILITY FOR LABOR OR MATERIALS FURNISHED.

Notice is hereby given to all persons, that the undersigned_____ is the owner of_____mine or mining claims, hereinafter described, with all the improvements thereon. That said mine or mining claim now is in the possession of and is being worked and operated by_____, pursuant to a contract (*or option to purchase, or lease*) made and executed by the undersigned in favor of said_____dated_____19__; said contract, (*or option to purchase, or lease*) to be in force up to and including_____, 19__.

The undersigned is not working nor operating said mine or mining claim, nor any part thereof, and does not intend to work nor operate said mine or mining claim nor any part thereof, nor purchase any supplies or materials therefor, during the life of said contract, (*option to purchase, or lease*) with said_____.

The name of said mine or mining claim is_____, situate, lying and being in_____Mining District, in the County of_____, State of_____. The notice of location of said mine or mining claim being duly recorded in Book_____, at page_____of_____in the office of the county recorder of said_____county, State of_____; to which said record reference is hereby made for a more particular description of said mine or mining claim.

In witness whereof, the said_____has hereunto set his hand this_____day of_____, 19__.

Form No. 12.

OPTION AND LEASE.

(This option and lease were prepared and used by Messrs. Manson & Allan and A. H. Ricketts, of San Francisco, attorneys for lessor, and Hon. William G. McAdoo, of Los Angeles, for lessee.)

OPTION.

THIS AGREEMENT, made and entered into by and between the_____ MINING COMPANY, a corporation, duly organized and existing under and by virtue of the laws of_____, as party of the first part, and hereinafter called the_____Company, and the_____ MINES COMPANY, a corporation duly organized and existing under and by virtue of the laws of_____, as party of the second part, hereinafter called the_____MINES COMPANY.

WITNESSETH:

WHEREAS, The_____Company is the owner and in possession of certain lode mining claims hereinafter more particularly mentioned and described; and,

WHEREAS, The_____Company represents that said lode mining claims, ground and premises disclose mineral deposits of great value as well as potential development of great ore bodies; and,

WHEREAS, The proper development of such ore bodies, both present and in expectancy and the proper reduction and treatment thereof will necessitate the outlay of large sums of money; and,

WHEREAS, The_____Mines Company is able and willing to furnish the money for such development work, but only under and in accordance with the terms and subject to the conditions hereinafter set forth;

NOW THEREFORE, for and in consideration of One Dollar by the _____Mines Company to the_____Company, paid, receipt whereof is hereby acknowledged, and for and in consideration of the mutual covenants of the parties by each to the other made and herein contained, the parties hereto agree as follows:

1. The_____Company grants to the_____Mines Company for_____months from the date hereof an option upon the terms and conditions in this agreement hereinafter set forth, to receive a mining lease in the form hereto annexed and hereby referred to and made a part hereof, of said above mentioned mineral properties, being all those certain lode mining claims and mill site situate, lying and being in the_____Mining District, in the County of_____, State of_____, more particularly described as follows:

(Description.)

2. That at any time during the period of said option said_____ Mines Company shall have the right to enter into and take exclusive possession of all and singular said above described property and may as consideration for said option, prospect and explore, test, develop and work at its own discretion and at its own proper charge and expense said lode mining claims and any one or more of them, provided all work done and all improvements made by said_____Mines Company upon said property, or any part thereof, under the terms hereof during the period of said option shall be done in a minerlike

and proper manner to enable said premises and all thereof to be carefully operated, and so that the minerals therein contained may be extracted in an economical and minerlike manner. All equipment, tools, machinery, structures, improvements and personal property of every nature and description brought or placed upon said premises prior to the exercise of said option by the_____Mines Company for use in said work shall not become a fixture but shall remain the property of the_____Mines Company and subject to removal by said_____Mines Company, and in the event the said_____ Mines Company shall not exercise said option it shall be entitled to remove all of said equipment, tools, machinery, structures, improvements and personal property from said premises within ninety days from the expiration of said option. And in further consideration for said option the_____Mines Company hereby agrees to enter upon said premises and undertake and carry out such investigation and exploration work to the cost of at least_____Dollars ($_____).

3. All ores extracted by the_____Mines Company during the aforesaid time prior to the exercise of said option shall be and remain the property of the_____Company; provided, that the_____ Mines Company is hereby given the right to take and have as its own for assay samples and mill tests from said mining claims, ore or ores to the amount of 20,000 pounds. In furtherance of the work contemplated in this and the preceding paragraphs, the_____Mines Company shall be entitled to use and enjoy any and all improvements, structures, machinery, tools, equipment or other personal property now situated upon said premises and properties belonging to the_____Company.

4. If at or before the expiration of said period of six months the _____Mines Company shall elect to exercise said above mentioned option and receive a mining lease to said premises as hereinabove provided, it shall so notify the_____Company and it shall upon such notice be entitled to receive in accordance with and subject to the terms of this contract a lease in the form of the lease attached hereto and by reference made a part hereof, and the_____Company hereby agrees upon such notice to make, execute and deliver such a lease to the_____Mines Company. In the event the_____ Mines Company shall elect not to exercise said option, it shall peaceably surrender and turn over said properties to the_____Company in as good condition as they now are in, reasonable wear and tear excepted, and free and clear of any and all liens and incumbrances incurred by the_____Mines Company in its operations on and about the same. In the event that the_____Mines Company shall not elect to exercise said above mentioned option, the_____Mines Company agrees to deliver to the_____Company free and clear of expense, copies of all data, plans, analysis, photographs and other determinations and reports that the_____Mines Company shall have made or caused to be made or otherwise obtained in and about said premises during its possession of the same under said option.

5. The_____Company represents that it is the owner in fee of that certain patented lode mining claim known as and called the _____Mining Claim, hereinabove described, and that it has duly applied for patents or caused patents to be applied for from the United States Government for all the other above described properties covered

by this agreement and each of them, and covenants and agrees that it will proceed diligently to do all acts and things and make all payments to complete said applications and perfect its title to said properties and each of them; and represents and agrees that the properties covered by this agreement, including said patented_____Mining Claim, and each of them, are free from all liens and incumbrances of every nature and description, and during the period of said option the_____Company agrees to protect said properties from any and all liens and/or the possibility thereof, except such as may arise from the acts of the_____Mines Company upon said property, and not to encumber said property or any part thereof; and the _____Company further agrees to furnish to the_____Mines Company satisfactory evidence of good title.

6. The_____Mines Company during its possession of said property and all thereof, agrees to protect said property and all thereof against all claims of labor and materialmen and against all liens and liabilities arising out of the acts of the_____Mines Company upon said property, and to permit the_____Company to place and maintain such notices thereon as shall be lawfully necessary to protect said _____Company against such claims; and the_____Mines Company further agrees to hold harmless the said_____Company against any and all claims for damages for injury incurred by workmen in its employ at said properties, or any other person or persons.

7. It is understood and agreed that during the possession of said property by the said_____Mines Company under said option, the _____Mines Company shall permit a duly authorized representative of the_____Company to be and remain upon the property hereby demised, to represent the_____Company and observe the performance by the_____Mines Company of each and all the terms of this agreement; provided that if said representative shall fail to work harmoniously with the Superintendent of the_____ Mines Company, or should the presence of said representative become a source of trouble, then upon written request by the_____Mines Company to the_____Company, the_____Company shall see that such objectionable conduct shall cease or shall replace such representative with another so that the work may continue harmoniously and in the event that after such request such objectionable conduct on the part of such representative shall not cease, the_____Mines Company shall be entitled to remove such representative from the premises and the_____Company shall be entitled to appoint another representative to take the place of the representative so removed, as often as any particular representative shall become such source of trouble.

8. It is understood and agreed that during the possession of said property by the_____Mines Company under said option, the _____Mines Company shall pay to the_____Company the sum of_____Dollars ($____) per month.

9. It is understood and agreed that any time lost by reason of strikes, riots, acts of God or inevitable delays, is not to run against the time herein specified.

In witness whereof, the parties of the first and second parts hereto have respectively caused their respective corporate names to be here-

unto subscribed and their respective corporate seals to be hereunto affixed by their respective officers thereunto duly authorized.

LEASE (ACCOMPANYING OPTION).

This agreement of lease, made and entered into this_____day of_____by and between the_____Mining Company, a corporation, duly organized and existing under and by virtue of the laws of_____, hereinafter called the Lessor, and the_____Mines Company, a corporation duly organized and existing under and by virtue of the laws of said state, hereinafter called the Lessee,

WITNESSETH:

That the Lessor, for and in consideration of the rents, covenants, agreements, payments and royalties hereinafter reserved and by the Lessee agreed to be paid, kept and/or performed, has granted, let and demised, and by those presents does grant, let and demise unto the Lessee the following described mining properties situate in the_____ Mining District, in the County of_____, State of_____, and more particularly described as follows, to wit:

(Description.)

all of which said claims adjoin each other and said_____Claim and constitute but one parcel of mining ground and one property, and are commonly called the_____group of mines, and which claims were transferred, conveyed and assigned by_____Mining Company to the_____Company by a deed dated_____, and duly recorded on_____, in Vol._____of deeds, at page_____in the office of the recorder of_____County, State of_____; also that certain unpatented mill site known as and called the_____ Mill Site.

To Have and to Hold said premises for the purpose of searching for, mining, extracting, milling, reducing, treating and preparing ores, metals and minerals of every nature and description, and with the exclusive right to possess and work the same for said purposes, for the term of_____ (____) years from the date hereof unless sooner terminated as hereinafter provided.

In consideration of said lease the said Lessee does hereby covenant and agree with the Lessor as follows:

1. The Lessee agrees to enter upon said premises and to proceed at once to erect and fully equip and thereafter maintain upon said premises a not less than____ton mill, together with such appurtenances as may be requisite or proper for the reduction and treatment of ore or ores of the character produced from said properties. The requisite power or use in and about such mill, and its appurtenances shall be furnished by the Lessee, and said Lessee further agrees to enlarge the present working shaft in the so-called_____Claim down to the _____-foot level and do such other work needful to place said properties upon a production basis.

2. The Lessee agrees to work said properties in a miner-like fashion and in a manner necessary and proper to good and economical mining

and so as to take out the greatest amount of ore possible, with due regard to the safety, development and preservation of the same as a workable mine or mines, and to mill the ores so extracted in a manner necessary and proper to the economical and expeditious reduction and/or treatment thereof.

3. The Lessee agrees to work and mine said premises as aforesaid and to mill the ores so extracted steadily and continuously during the continuance of this lease; and an abandonment by said Lessee of the work upon said premises for a period of thirty consecutive days, unless due to strikes, riots, acts of God or unavoidable interruption, may be considered by the Lessor a violation of this lease and cause for forfeiture of the same, as hereinafter provided in paragraph 21 hereof.

4. The Lessee agrees to permit Lessor or its duly authorized agent or representative at any and all times (a) to enter upon and visit all parts of said leased premises and the mill and its appurtenances erected and maintained thereon for the purpose of taking assay samples and of observing whether the terms of this lease are being fully and faithfully complied with by the Lessee; (b) to take samples from any ores awaiting milling, reduction or treatment; and (c) to have surveys made of the workings whether under or above ground, or both, and the Lessee further agrees to furnish Lessor as and when requested by said Lessor, a copy of blueprints of all surveys or maps made by the Lessee, and generally to facilitate in every way such inspection, surveys and samplings, as above provided, and to furnish to the Lessor or its duly authorized agent, when requested, full, true and accurate information not theretofore furnished with regard to the condition of said workings or any part thereof or the quality or character of the minerals therein.

5. In the event said properties or any of them shall be placed upon production by the Lessee, the Lessee shall retain out of the net proceeds of each cleanup prior to the distribution of said net proceeds as hereinafter in paragraphs 6, 7 and 8 provided, and shall set apart as a sinking fund to meet the cost of further exploration and/or development of said premises and/or of the improvement, increase or expansion of the equipment, facilities or improvements used in the operation of the same, a sum equal to____per ton for each and every ton of ore, constituting and being the tonnage from which each cleanup is based, until such sinking fund shall equal a maximum of_____Dollars ($_____). The Lessee may from time to time use all or any portion of said sinking fund in its own discretion, for such work and/or improvement, increase or expansion of facilities or equipment, and shall not be required to wait until the amount in said sinking fund shall equal any specified sum before drawing upon said fund for said purposes or any of them; but the amounts so drawn from said fund shall thereafter be replaced in the same manner in which said fund was originally created as in this paragraph provided; and further payments shall continue to be so made into said fund until there is a total of $_____therein. But said fund shall in no event exceed $_____ except by agreement of the parties and shall be maintained and continued until it shall become apparent that any further exploration and/or development work would be useless or unjustifiable, in which event the amount at such time remaining in said fund shall be divided between the Lessor and the Lessee in the following proportions:

(a) In the event that at such time the Lessee shall not have been fully reimbursed as in paragraph 6 hereof hereinafter provided, the Lessee shall receive all or such portion of the amount in said sinking fund as shall be necessary to fully reimburse the Lessee as in said paragraph provided, and the balance of said fund, if any, shall be divided between the Lessor and the Lessee in the proportion of____ per cent to the Lessor and____per cent to the Lessee.

(b) In the event that at the time of the distribution of said fund the Lessee shall have been fully reimbursed as in said paragraph 6 hereinbelow provided, but the Lessor shall not have received the full amount to which the Lessor shall be entitled under paragraph 7 hereinbelow, the amount remaining in said sinking fund shall be divided in the proportion of____per cent, to the Lessor and____per cent to the Lessee would result in the Lessor receiving a larger total amount than the Lessor would be entitled to under said paragraph 7, the balance remaining over and above the amount needful to pay off the Lessor under said paragraph 7 shall be divided between the Lessor and the Lessee in the proportion of____per cent to the Lessee and____per cent to the Lessor.

(c) In the event that at the time of such distribution of the amount so remaining in said sinking fund the Lessee and Lessor shall both have been fully paid off under paragraphs 6 and 7 hereof, said amount shall be distributed in the proportion of____per cent to the Lessee and____ per cent to the Lessor.

In the event that the Lessor and the Lessee shall be unable to agree as to whether further exploration and/or development work would be useless or unjustifiable so as to require the distribution of said sinking fund as hereinabove in this paragraph provided, the question shall be submitted to two first-class mining engineers or geologists occupying substantially the same standing in the profession now held by Messrs. _____and_____, one to be selected by the Lessee and one to be selected by the Lessor, whose joint decision in said matter shall be final; and in the event that the two so selected can not or do not agree they shall appoint a third arbitrator of substantially the same professional standing whose decision in said matter shall be final, and the compensation of such arbitrators shall be treated as an operating expense of said property to be deducted along with the other expenditures hereinafter required to be deducted from the proceeds in order to compute the "Net proceeds" as the term is herein used.

6. In the event said property shall be placed upon production by the Lessee, then after deducting from the net proceeds of the sale of such production as hereinafter defined, the amounts hereinabove required to be set aside for a sinking fund, the Lessee shall be entitled to retain the entire balance of said net proceeds until it shall have reimbursed itself in full for the cost of doing the equipment and development work hereinabove mentioned in paragraph 1 and placing the properties upon production in the manner mentioned in said paragraph. Said cost shall include:

(a) All labor costs of doing all and every part of said work, erecting said mill, installing said equipment, providing said power and making said improvements and development and placing said property on production;

(b) The cost of dismantling the Lessee's present mill at_____, and preparing the same for transportation to the leased premises, together with the cost of preparing for such transportation all other equipment of the Lessee now at_____and desired by the Lessee to be removed to the demised premises for the purpose of carrying out its obligations under said paragraph 1.

(c) The drafting of the plans and the architectural, surveying and engineering work required for the location and equipment of the new mill upon said premises;

(d) All transportation cost of materials, equipment, supplies, machinery, tools and facilities to the demised premises for use in the work described in said paragraph 1.

(e) The cost of superintendence and inspection and of engineering, geological and other expert advice, if any;

(f) The value of improvements, machinery, equipment, tools, buildings, structures, facilities, materials and other personal property of every nature and description moved, placed and/or set up on said property by or for the Lessee for the purpose of carrying out its obligations and doing all the work hereinabove mentioned in said paragraph 1 and placing said property on production;

(g) A charge for overhead expense not to exceed $_____ per month during the period of such development and equipment work prior to the placing of said properties upon production;

(h) Any damages incurred in the course of said work and not covered by insurance.

(i) Any other amounts which can properly be charged as costs pertaining to the performance of the work covered by said paragraph 1.

The value of said improvements, machinery, equipment, tools, buildings, structures, facilities, materials and personal property of every description so moved or placed on the demised premises and hereinabove referred to in subdivision (f) shall be in the case of such property as shall be specially purchased for such work or installation, the cost of the same on the ground to the Lessee; while in case of such property as shall have been previously owned by the Lessee, its value shall be appraised within thirty days of installation by _____, superintendent of the Lessee, and by _____, agent of the Lessor and said _____ and _____ shall also determine the cost of transportation where such transportation is actually performed by the Lessee in its own vehicle and with its own labor; and in the event said _____ and _____ shall be unable to agree in their valuation they shall unite in selecting an arbitrator whose valuation shall be final upon the costs which the said _____ and _____ are hereby authorized to determine.

7. After the Lessee shall have been so reimbursed in full as in paragraph 6 hereinabove provided out of the net proceeds remaining after setting aside the amounts hereinabove required to be set aside for a sinking fund, thereafter the Lessee shall pay to the Lessor _____ per cent of such net proceeds remaining after so setting aside the amounts required to be paid into said sinking fund, until such payments to the Lessor shall equal the total amount previously retained by the Lessee for its reimbursement under paragraph 6 hereof. While such payments are being made to the Lessor the remaining _____

per cent of such net proceeds, after sinking fund payments, shall be retained by and belong to and be the absolute property of the Lessee. This percentage of distribution shall be effective until the Lessor shall have received a sum of money equal to the sum that the Lessee shall have received by way of reimbursement as in said paragraph 6 hereinabove provided.

8. After the Lessor shall have received the total sum provided to be paid the Lessor under paragraph 7 hereof, thereafter the Lessee shall pay to the Lessor as further rental for said property, _____ per cent of the net proceeds resulting from the operation of the property after the deduction from such net proceeds of the amounts hereinabove required to be set aside in the sinking fund; and the Lessee shall retain and be the absolute owner of the remaining _____ per cent.

9. In determining the net proceeds as the term is used in this lease, there shall be deducted from the amounts received by the Lessee from the sale of the products of said property as shown by the mint returns of the proceeds from said mining claims or any of them.

(a) Postal, freight or express costs of transporting said products to the mint, including insurance costs in transit and other selling charges, if any;

(b) The actual cost of maintaining and operating said premises and keeping the same on production and producing the products thereof, including the cost of property insurance, workmen's compensation insurance, in addition to and/or including any and all insurance which is or may be required by law, or for the protection of either or both of the parties hereto;

(c) An overhead charge not to exceed $_____ per month;

(d) Sums sufficient to meet all taxes, levies, rates, assessments, fees or other governmental charges upon said premises or the mineral rights therein or the mineral content or product thereof or the personal property thereon used or useful in the operation or development of the same, or which may be or become a lien thereon or be levied upon or in connection with the operation thereof;

(e) Amounts paid as damages resulting in the course of operations on said premises not covered by insurance;

(f) The cost of geological, engineering and/or other technical advice which may be required for the proper operation of the demised premises;

(g) The cost of repairing or restoring any equipment, improvements or other property destroyed or damaged by accident, the elements or the act of God, where not covered by insurance;

(h) Any other amounts which can properly be charged as costs pertaining to operation of the properties and production from the same.

10. In the event that the amount at any time in the sinking fund shall be insufficient to defray the cost of improving, enlarging or increasing the equipment, facilities and/or improvements used in operating the premises hereby demised, the cost of defraying the balance of such expenses which can not be paid out of said sinking fund shall become a charge upon the net proceeds from the property remaining after setting aside the amounts hereinabove required to be set aside for a sinking fund, and the distribution of the amount so remaining from said net proceeds as hereinabove provided in para-

graphs 6, 7 and 8 hereof shall not proceed until said cost shall have been so repaid therefrom; provided that no such cost shall be incurred except in the development of the property in a manner mutually beneficial to the interests therein of both Lessor and Lessee.

11. Lessee shall keep proper books of account showing all disbursements of every kind and character made in connection with its development and/or operation of said premises, or any part thereof, and said books of account shall at all proper business hours be open to the examination of the Lessor or its duly authorized agent, and the Lessor is hereby given full and free right to make a copy of said books of account or any portion thereof.

12. In the event that said properties or any of them shall be placed on production, the Lessee agrees to render to the Lessor on or before the _____ day of each month a written statement showing the number of shifts worked, the amount of ore milled reduced and/or treated, the amount of wages and salary paid to the employees of said Lessee engaged in and about said premises in the mining, milling, reduction and/or treatment of said ore, the cost of supplies and all other expenses of operating the demised premises incurred during the next preceding calendar month, and to afford the Lessor or its duly authorized representative every facility for the inspection and copying of all books, assay journals, assay certificates, accounts, pay rolls and vouchers of said Lessee relating to indebtedness or liabilities incurred or claimed for work, services or materials in respect of the operation of said premises and the milling, reduction and/or treatment of ore therefrom.

13. Lessee agrees to keep said premises and every part thereof at all times free and clear of all mechanic's, miners' and/or other labor liens and incumbrances of every other nature and description, and to pay all indebtedness and liabilities incurred by the Lessee which may or might become a lien on said premises before said indebtedness and/or liabilities shall become such lien, and to post and at all times keep posted in some conspicuous place upon the demised premises a notice that the interest of the Lessor therein shall not be subject to any lien for service, labor or material furnished upon or used in connection with this lease or said leased premises by the Lessee, said notice to be on behalf of and in the name of the Lessor.

14. All sums hereinabove required to be paid by the Lessee to the Lessor from the net proceeds of the products of said property shall be paid by the Lessee to the Lessor to the____day of each calendar month succeeding the calendar month in which the cleanup shall be made from which such proceeds shall accrue, and the Lessee at such time shall and will furnish to the Lessor a true account of all ores extracted and milled and all bullion received therefrom after the last cleanup for which such an accounting was previously made.

15. Lessee agree to protect the property hereby demised during the term of this lease against trespassers or other wrongful intruders thereon.

16. Lessee agrees to assume all responsibility for and to save Lessor harmless from any and all accidents to itself or any of its employees, sub-lessees, licensees, agents, associates or visitors upon the demised premises and to post and at all times keep posted at the main working

upon the premises hereby leased, a conspicuous notice in the name of and on behalf of the Lessor, stating in substance that the Lessor will not be liable for damages on account of any such accident or accidents.

17. Lessee agrees that all its operations under this lease shall be conducted so as to fully comply in every respect with the laws of the state of_____.

18. Lessee hereby agrees to provide workmen's compensation insurance at once upon commencement of operations so as to protect the interest of the Lessor in the demised premises from the lien of any judgment obtained in any action brought by reason of the injury to any workmen in and about the operations of the Lessee upon said premises and that such insurance shall be carried with a responsible insurance-carrier.

19. In the event that any action at law by the Lessor against the Lessee in or about any matter connected with this lease, the Lessor shall recover judgment, the Lessee hereby agrees to pay to the Lessor the costs thereof and a reasonable attorney's fee to be fixed in said action, which costs and fee shall become a lien upon said property, but in the event of such action the Lessee shall recover judgment, the Lessor agrees to pay to the Lessee the costs and a reasonable attorney's fee.

20. Lessor represents, covenants and agrees with the Lessee that the properties covered by this lease and each of them, are free from all liens and adverse claims of every kind and character, and the Lessor will warrant and defend the said premises to the said Lessee against all claims and demands of all persons; provided, that if the possession and enjoyment of the said demised premises by the Lessee shall be interfered with as a result of any legal proceedings brought by a party other than the Lessor and Lessee shall thereafter be restored to possession by the judgment of the court in any such proceedings, the costs to the Lessee in such proceedings and any loss resulting in the operation or development of said premises by reason of such disturbed and interrupted possession and enjoyment shall be borne by the Lessor and the Lessee in the proportion of__ per cent. by the Lessee and__ per cent. by the Lessor.

21. In the event of the termination of this lease, for any cause whatsoever, then and in that event, the Lessee shall and will peaceably surrender and yield up the said premises and every part and portion thereof to the Lessor, free and clear of any and all liens and/or encumbrances; or in the event that the mineral deposits included in the premises covered by this lease, shall at any time become exhausted so that it will no longer be commercially practical to operate the same, the Lessee shall have and is hereby given the right or privilege to discontinue operations upon said property and abandon the same.

In the event of any dispute between the Lessor and the Lessee as to such exhaustion, the question shall be submitted to two first-class mining engineers or geologists, occupying substantially the same professional standing as Messrs._____ and _____ now occupy, one to be selected by the Lessee and one to be selected by the Lessor, and in the event that the two so selected cannot or do not agree, they shall appoint a third arbitrator of substantially the same professional standing, whose decision in said matter shall be and become final.

Upon such determination of this lease or the discontinuance of its operations or the abandonment of the premises by the said Lessee, the personal property, tools, equipment and machinery located upon the said property at the time of such termination, discontinuance and/or abandonment, shall belong to and be and become the property of the Lessor and the Lessee in the proportion of____per cent to the Lessee and____per cent to the Lessor; provided the Lessee shall at such time have been repaid in full as in paragraph 6 hereof.

22. Time is of the essence of this lease. In the event of failure by the Lessee to perform any of the covenants or comply with any of the conditions in this lease provided to be performed and/or kept by the Lessee, the Lessor shall be entitled to give written notice of such default to the Lessee and in the event the Lessee shall not proceed with reasonable diligence to remedy such default within_____ (__) days after receipt of such notice the Lessor at its option shall be entitled to terminate this lease and declare the same forfeited.

23. It is further understood and agreed that any time lost by reason of strikes, riots, acts of God or unavoidable delays is not to run against the time herein specified.

24. This agreement shall be binding upon and run in favor of the successors and assigns of each of the parties hereto, except as herein specifically provided. Provided that neither this lease nor any interest of the Lessee therein or thereunder shall be transferred or granted, whether in the form of a sub-lease or otherwise during the term hereof, without the consent in writing of the Lessor or its duly authorized agent first thereto had and obtained.

25. It is understood and agreed that until such time as the Lessor shall have received payment in full of the amount hereinabove provided to be paid to the Lessor in paragraph 7 hereof, to equal the reimbursement of the Lessee provided in paragraph 6 hereof, the Lessee shall permit a duly authorized representative of the Lessor to be and remain upon the property hereby demised, to represent the Lessor and observe the performance by the Lessee of each and all the terms of this agreement; provided, that if said representative shall fail to work harmoniously with the superintendent of the Lessee, or should the presence of said representative become a source of trouble, then upon written request by the Lessee to the Lessor, Lessor shall see that such objectionable conduct shall cease or shall replace such representative with another so that the work may continue harmoniously and in the event that after such objectionable conduct on the part of such representative shall not cease, Lessee shall be entitled to remove such representative from the premises and Lessor shall be entitled to appoint another representative to take the place of the representative so removed, as often as any particular representative shall become such source of trouble.

26. It is understood and agreed that until such time as the Lessor shall have received payment in full of the amount hereinabove provided to be paid to the Lessor in paragraph 7 hereof to equal the reimbursement of the Lessee provided in paragraph 6 hereof, the Lessee shall pay to the Lessor the sum of $_____ per month.

In witness whereof, the parties hereto have caused their respective corporate names and seals to be hereunto affixed by their respective

Presidents and Secretaries, thereunto duly authorized by resolution by their respective Boards of Directors, the day and year first hereinabove written.

Form No. 13.

RATIFICATION BY STOCKHOLDERS.

Know all men by these presents, That we, the undersigned, _____ stockholders of_____Mining Company, a corporation organized and existing under and by virtue of the laws of the State of_____, and having a capital stock of_____dollars, divided into_____ shares of the par value of_____dollars each, and severally the owners and holders of record on the books of said corporation of the number of shares of the capital stock of said corporation set opposite our respective signatures, and together owning and holding more than _____shares of the issued and outstanding capital stock of said corporation, being fully advised in the premises, hereby agree, consent to, approve of, ratify and confirm the foregoing option and lease.

In witness whereof, we have hereunto set our hands this_____ day of_____19__.

Name of Stockholder.	No. of Shares.
_____	_____

Certificate of Secretary.

I, _____, do hereby certify that I am the duly appointed and acting secretary of_____Mining Company, a corporation organized and existing under and by virtue of the laws of the State of_____.

That the capital stock of said corporation is_____dollars, divided into_____shares of the par value of_____dollars each.

That_____shares of said capital stock of said corporation have been issued and are now outstanding. That the persons singing the above and foregoing ratification at the time their respective signatures were affixed thereto were stockholders of said corporation, holding of record at least_____of the entire issued and outstanding shares of the capital stock of said corporation, and were at such time the owners and holders of the number of shares set opposite their respective names.

Witness my hand and the corporate seal of said corporation by me hereto affixed this_____day of_____, 19__.

Short Form of Option.

Form No. 13a.

In consideration of the sum of _____ dollars, to me in hand paid, I, the undersigned, will sell to _____, my certain mining claim known as _____ situate in _____ Mining District, County of ____ and State of _____, for the sum of _____ dollars, at any time within _____ months from date, payable as follows, to wit: _____.

Upon full payment made I will convey said mining claim to said optionee by a good and sufficient deed.

The right of entry and possession of said premises is hereby given to said optionee together with the right to extract ore therefrom, but

with no right thereto or removal thereof, unless and until this option be consummated according to its terms.

All work done upon said mining claim by said optionee shall be done in a minerlike manner and at the sole cost and expense of the optionee. Actual work upon said premises to commence on _____ and to proceed with reasonable diligence unless prevented by strikes, the elements, unavoidable accidents or other causes beyond the control of the optionee.

The optionee shall keep said premises free and clear of all costs, liens and encumbrances done, made or suffered by him.

The optionee shall and will quietly and peaceably quit and surrender said premises and any ore extracted by him therefrom upon the termination of this option from any legal cause.

Upon the failure to make any payments herein provided for upon said purchase price of said premises at the time herein specified for the same to be made the right of the optionee shall immediately cease and determine and the payments theretofore made by him shall immediately become the property of the optioner, and the optionee hereby waives all claim thereto.

All machinery and improvements placed upon said premises by the optionee may be removed by him within ____ days after the termination of this option.

Witness my hand this ____ day of _____.

Form No. 14.

ASSIGNMENT OF LEASE AND OPTION.

(Precedent in Pollard vs. Sayre, 45 Colo. 195, 98 Pac. 816.)

For and in consideration of the sum of_____dollars, to me in hand paid, by_____, the receipt whereof is hereby acknowledged, and the further sum of_____dollars, to be paid to me, my executors, administrators, or assigns, within_____months from the date hereof, I hereby sell, assign, transfer and convey to said _____the within bond and lease and all my right, title, and interest therein and all my right, title and interest in and to the real estate therein described. The deferred payment to be deposited in the _____bank, to the credit of_____.

It is hereby agreed that no personal liability shall attach to said _____for said deferred payment, and that it shall be optional with him whether he shall make the same; but if not paid then all rights acquired by said_____by virtue hereof in and to the within bond and lease and in and to the real estate therein described, shall become forfeited and all payments theretofore made by said_____ shall be likewise forfeited to me and the above assignment and conveyance become null and void.

In witness whereof, I have hereunto set my hand and seal this_____ day of_____, 19____.

Form No. 15.

LEASE (COLORADO FORM).

This Agreement of Lease, made and entered into this _____ day of _____ in the year of our Lord one thousand nine hundred and

_____, by and between The _____ Company, a _____ corporation, (hereinafter termed "the Lessor") party of the first part, and _____, (hereinafter termed "the Lessee"), party of the second part.

Witnesseth, That the said Lessor, for and in consideration of the rents, covenants, agreements, payments and royalties hereinafter reserved and by the said Lessee to be paid, kept and performed, has granted, let and demised, and by these presents does grant, let and demise unto said Lessee the following described mining property, situate in the _____ Mining District, _____ County, _____, to-wit: All of _____ and _____ lode mining claims belonging to the _____ Company situate on _____, except that part lying below the level of the _____ Tunnel.

The rights hereby granted are limited to within the vertical planes of the boundary lines of the above described premises, all extra-lateral rights, if any, being reserved to the Lessor, and Lessee shall have no right to extend his workings beyond such vertical planes.

There are expressly excluded from the above described premises any portions thereof which have been or may be deeded, relinquished or lost to the Lessor in settlement of conflicts or otherwise.

The rights herein granted to the premises hereby leased are limited to that part lying above the level of the _____ Tunnel.

The Lessor herein reserves the right to all dumps now located or which may hereafter be placed upon the premises hereby leased, together with the right, for itself or any parties acting through or under it, to enter upon any and all portions of said premises to sort, screen, wash, sell or remove from said premises any portion or all of any dumps which may be located thereon.

To have and to hold the said demised premises for the purpose of mining, and for no other purpose, for the term of _____ years from the date hereof, to expire at noon on the _____ day of _____ A. D. 19____, unless sooner forfeited or determined through violation of any agreement, covenant or condition hereinafter contained, to be kept and performed by the said Lessee.

In consideration of said lease, the said Lessee does hereby covenant and agree severally and jointly with the said Lessor as follows:

1. To enter upon said premises, and to commence work thereon within _____ days from the date of this lease, and to work the same mine-fashion in manner necessary and appropriate to good and economical mining, so as to take out the greatest amount of ore possible with due regard to the safety, development and preservation of the same as a workable mine: all work, timbering, construction and installation of improvements to be subject to the inspection and approval of the General Manager, Superintendent or other representative of the Lessor.

2. To work and mine the said premises as aforesaid steadily and continuously during the term of this lease, with not less than _____ shifts of underground work during each and every calendar month of the term of this lease, except as stated in Paragraph 6a. No excess above the required number of shifts in any one month to apply on any other month, and a failure on the part of the said Lessee to work said premises with at least said number of shifts each calendar month, or failure

to work said premises at all for ten consecutive days, may be considered by the Lessor a violation of this lease, and shall, at the option of the Lessor, and without demand or notice, work a forfeiture of this lease. The word "shift" is taken and accepted to mean the labor of one man for one day of at least eight hours.

3. To well and sufficiently timber with strong, well fitted and durable timbers, all the workings on the premises hereby leased at all points where proper, in accordance with good mining, and for ventilation, and to promptly repair or replace all timbering which may be rendered insufficient by any cause whatsoever; to keep the timbering of said workings at all times in good, safe and serviceable condition, and to remove no timbering, pipe, rails, tract, etc., from any portion of said premises without the written consent of the Lessor, its Manager or any duly authorized agent.

4. To keep at all times all drifts, tunnels, shafts, winzes and other workings in said premises thoroughly drained and clear of loose rock and rubbish, and in an absolutely safe and secure condition, unless prevented by extraordinary mining casualty, and to maintain at all times and leave the floors of all drifts, crosscuts and other workings in good, even, unobstructed condition, and to stow no waste underground, nor fill any stopes, without the written consent of the Lessor, its Manager or any duly authorized agent.

5. To do no underhand stoping, whether for the purpose of prospecting or taking out of ore, or for any other purpose whatsoever. To do no stoping or mining within twenty feet of any shaft or incline except with the written consent and under the direction of the Lessor, its manager or any duly authorized agent. To run all drifts and levels upon the grade designated by the Lessor, its manager or other authorized agent.

6. To make and keep all shafts, excepting as hereinafter provided, not less than _____ feet long by _____ feet wide in the clear of timbers throughout their entire depths, keeping them vertical and plumb throughout their entire depths, and timbered throughout their entire depths, either with square sets, closely lagged, or with cribbing which shall be at least ____ by ____ inches in size; to keep all ascents and descents in the workings fully equipped at all times with substantial ladders and partitions throughout their entire depths; to make and keep all tunnels, drifts, cross-cuts, raises and winzes not less than ____ by ____ feet in the clear of all timbers and to comply with all of the requirements of the laws of the State of _____.

6a. It is understood and agreed that during the first six months of this lease _____ shifts per month only will be required, _____ shifts per month underground during the second six months and _____ shifts per month underground during the second and third years and ____ shifts per month during the fourth and fifth years.

7. It is understood and agreed that beginning with the third year one hundred feet of sinking is to be done each year, said sinking to be completed before the ____ day of ____ of each year. Other development satisfactory to the parties hereto may be substituted for the above mentioned sinking. It is understood and agreed the Lessee be permitted to sublease any portion of the premises he may desire and that the work

done by the sublessees may apply on the required number of shifts up to one-half the necessary amount, providing the said sublessee work consists of drifting, crosscutting, raising or winzing satisfactory to both parties.

7A. It is understood and agreed that Lessee will carry insurance on the ____ plant and buildings to the amount of $____ being the amount at present in force.

8. To cause or permit no timber standing on the premises hereby leased to be cut or injured in any way or for any purpose; to cause or permit no buildings or structures of any kind to be erected or to remain upon said premises, except such as are necessary for the actual working of the mine, or for hoisting, sorting or shipping of ores extracted therefrom except and in so far as authorized in writing by the Lessor, its manager or any duly authorized agent; and to keep all buildings, machinery and improvements upon the leased premises in repair and at the expiration, cancellation or forfeiture of this lease, to return same in as good condition as they are at the present time, ordinary wear and tear alone excepted.

9. To allow the Lessor, its manager or any duly authorized agent or representative at any and all times; (a) to enter and visit all parts of said leased premises and the workings thereon for the purpose of inspection and taking of assay samples; (b) to take samples from any ores awaiting shipment; (c) to have surveys made of the workings by the Lessor's surveyor and assistants whether under or above ground, or both, as often as the Lessor, its manager or any duly authorized agent shall so order, and also furnish to Lessor copies of blue prints of all surveys or maps made by the Lessee; and generally to facilitate in every way such inspection, surveys and sampling, as above provided.

10. There is expressly reserved to the Lessor rights of way through the premises hereby leased for the more convenient working or examination of adjacent ground, but such rights-of-way shall be so exercised as not to interfere, more than is necessary, with the operations of the Lessee therein and there is also expressly reserved to the Lessor the right and privilege to do any and all development work upon the premises hereby leased which may be rendered desirable by reason of any litigation or controversy which may arise and which may affect said leased premises or other adjacent property in which the Lessor is interested, and to use the workings of the Lessee herein in prosecuting such development work, providing that the same shall not interfere more than is necessary with the mining operations of the Lessee and that all ore mined in the prosecution of such development work shall belong to the Lessee herein (in so far as the same shall be taken from ground hereby leased) subject to the royalty hereinafter provided.

11. The Lessee agrees to render to the Lessor, on or before the ____ day of each month, a written statement showing the number of shifts worked, the wages therefor, amount of salaries, value of supplies and all other expenses of operating this lease incurred during the preceding month, and to afford the Lessor, its manager or any duly authorized agent, every facility, at all times, for the inspection and copying of all books, assay journals, assay certificates, accounts, pay-rolls, vouchers, correspondence and papers generally of said Lessee in so far only as they may relate to indebtedness or liabilities incurred or claimed for

work, services or materials in respect of said premises, or the development of other workings thereon, or shipment of ore therefrom.

12. To keep said premises and every part thereof at all times free and clear of all mechanics' or miners' liens or other liens, encumbrances or liabilities; to settle, pay and discharge on or before the ____ day of each calendar month, all indebtedness and liabilities incurred by the said Lessee prior to the expiration of the preceding calendar month for work done, services rendered or material furnished in respect of said premises, and to forthwith post, and at all times keep posted in some conspicuous place upon the premises hereby leased a notice that said premises are leased to the Lessee and that the interest of the Lessor therein shall not be subject to any lien for services, labor or material furnished upon or used in connection with this lease, or said leased premises, said notice to be on behalf and in the name of the Lessor Company with the signature of the Lessee also attached.

13. To furnish to the Lessor, its manager or any duly authorized agent, full, true and accurate information with regard to the condition of said workings or any part thereof or the quality or character of the mineral therein, and to immediately give the Lessor notice of any discovery of any mineral.

14. To allow no persons not in privity with the parties hereto to take or hold possession of said premises or any part thereof under any claim or pretense whatsoever.

15. To assume all responsibility for and save the Lessor harmless from any and all accidents to himself or any of his employees, sublessees, licensees, agents, associates or visitors, upon the property of the Lessor, as herein leased and to forthwith post and at all times keep posted at the main working upon the premises hereby leased, a conspicuous notice in the name and on behalf of the Lessor, with the name of the Lessee also attached stating in substance that the premises are leased to the Lessee and that the Lessor will not be liable for damages on account of any such accident. The Lessor shall under no circumstances be liable to the Lessee or his agents, servants, employees, licensees, sublessees, associates, visitors or any other person, on account of any such accident.

16. To ship all ore with reasonable diligence after mining, with the right reserved to the Lessor to take and remove all ores not so shipped with reasonable diligence and to apply the proceeds under the directions of this lease; to notify the Lessor, its manager or any duly authorized agent, whenever ore is ready for shipment, giving the estimated tonnage and value thereof, also the intended purchaser, but it is expressly understood and agreed that all ore extracted from said leased premises shall be shipped in the name of the Lessor and Lessee and shall be routed and sent to and treated at the mill, smelter, sampler, or reduction works satisfactory to both parties.

17. It is expressly understood and agreed that the Lessor reserves the property and right of property in and to all ores extracted or to be extracted from said premises and in and to all ores not shipped within ten days after the expiration or other termination of this lease; that all ores which are of too low grade for profitable shipment shall remain on the premises, subject to the sole control and disposition of the Lessor, and that any loss or expense resulting from or incident to any shipment of such low grade ore shall be borne and paid by the Lessee; that all

low grade ore not shipped shall be kept separate from and not mixed with waste, so that they may be available for shipment at any time by the Lessor, and said low grade ore shall be deposited as directed by the Lessor, its manager or any duly authorized agent.

18. Said Lessee furthermore agrees that if he shall discover, in working said premises, any side veins, cross veins, spurs or feeders he shall at once notify the Lessor and said side veins, cross veins, spurs or feeders shall be and remain the property of the Lessor, but the same shall be included in this lease.

19. To pay and deliver, or cause to be paid and delivered to said Lessor, as a rental or royalty upon all ores extracted and shipped or sold from said premises, the following royalty, the rate of which is to be determined in each case by the gross value of the ore, without deduction for transportation and treatment, but the amount of royalty at the rate so determined to be computed upon the net value (the net value of said ores to be deemed in each case to be their value, less transportation and treatment charges with deduction for hauling, switching or sampling) to wit: ____ per cent on all ores up to and including $____ per ton; ____ per cent (__) on all ores from $_____ and including $_____ per ton; ____ per cent (__) on all ores from $____ and including $____ per ton; ____ per cent (__) on all ores over $____ per ton.

The Lessee further covenants and agrees to pay his pro rata of all taxes assessed against the leased premises according to the value of ore mined and shipped therefrom under the terms of this lease and it is hereby mutually agreed that the Lessor shall, in lieu of the Lessee's proportion of said taxes, retain from all shipments ____ per cent of the gross value thereof after deducting transportation and treatment charges. To cause said royalty to be left at the mill, smelter, sampler or reduction works purchasing said ore, payable to the order of the Lessor, on duplicate returns thereof. The Lessor shall not be liable for the proceeds of ore lost through theft or by any accident or failure of the ore buyer.

20. The Lessor reserves the right at all times to keep its manager or any duly authorized agent at said leased premises, in whose presence all ore shall be classed, graded, sorted and shipped and said manager or agent shall be permitted to take samples from all ores mined or sorted for examination or assay. In case any dispute shall arise between the Lessor and the Lessee or between the agents of the parties hereto, in regard to the classing, sorting, grading or shipping of any of said ores, then in that case all shipments of said ore in question shall cease until the controversy is settled by arbitration, as hereinafter provided, to wit: The Lessor and Lessee shall each choose one representative and the two so chosen shall choose a third, and the three so chosen shall pass upon said difficulty, and their decision shall be final; and the cost of arbitration, as above provided, is to be borne by the parties hereto in proportion to the division of returns received for the ore in dispute, and said cost may be deducted from said cash returns before division.

21. It is furthermore agreed and understood between the parties hereto, that the Lessee herein shall not cause this lease nor any sublease or assignment thereof to be recorded in any public records.

22. This lease is personal to the said Lessee and neither said lease nor any interest of said Lessee therein or thereunder shall be assigned,

transferred or granted, whether in the form of a sublease or otherwise, during the term hereof, without the consent in writing of the Lessor, its manager or any duly authorized agent first thereto had and obtained; and in any event no work done by sublessees shall be included in the computation of the work required to be done by the Lessee except as designated in article 7.

23. It is expressly covenanted and agreed between the parties hereto that, should any legal proceedings be instituted, such as injunction, apex suits or any other proceedings whatsoever, which would interfere with the possession and enjoyment of the said demised premises, that the Lessee shall under no circumstances attempt to hold the Lessor liable in damages or otherwise to the Lessee therefor on account of such disturbed and interrupted possession and enjoyment.

24. It is furthermore agreed and understood that the Lessor reserves the right of property to all dumps located upon the said demised premises.

25. The said Lessee does hereby furthermore agree that he will employ no man upon or in working the premises herein leased, who is not satisfactory to the Lessor and that, upon the first day of each month the said Lessee will furnish the Lessor a complete list of all employees working in, upon or about said premises, and that he will promptly discharge any person or persons upon notification from the Lessor that such persons or person are not satisfactory to the said Lessor.

26. It is understood and agreed that the Lessee be permitted to assign this lease to his associates either in the form of a partnership or corporation to be formed, otherwise Article 22 will govern. Lessee will be allowed to work other properties through the _____ working preference being given to _____ work. In case of shortage of dump room, arrangements to be made by Lessee for additional room or other than _____ work.

27. Said Lessee does hereby furthermore covenant and agree that in case he fails to commence work on said premises as aforesaid, or to work and mine the same continuously, with diligence and in a workmanlike manner, or to keep the same securely timbered, drained, clear and in safe condition, or to allow inspection, sampling or survey thereof, or to furnish true information regarding the same according to the conditions herein, or to render monthly statements as provided for herein; or to keep the same free from liens, or to keep notices posted upon the leased premises in manner provided herein, or to make monthly settlement for work, services and materials or to duly notify the Lessor when ore is ready for shipment, or to pay loss in shipping undergrade ore, all as above provided, or shall do any underhand stoping, or assign or sublet any interest in this lease or said premises without written consent of Lessor, or shall record or allow this lease to be recorded or any sublease or assignment thereof, or shall in these or any other respects fail to keep and fulfill any and all conditions, covenants or agreements herein expressed or implied, then and in that case the term of this lease shall at the option of the Lessor, expire, and it shall be lawful for the Lessor, its manager, attorney or other duly authorized agent, to declare this lease void and of no effect thereafter, and with or without process of law and without notice to the Lessee to enter upon

and take possession of said premises, and dispossess all persons occupying the same; and in such case, and also at the expiration of this lease by limitation, to wit, at noon of the last day of the term hereby granted as aforesaid, said Lessee hereby agrees to surrender, yield and deliver to the Lessor its successors or assigns, quiet and peaceable possession and enjoyment of said premises and all buildings and other improvements thereon and therein, including tracks, rail, pipelines and underground improvements except machinery belonging to Lessee and all dumps, ores or other minerals detached or broken down from said premises, but still remaining thereon, together with the appurtenances, in good order and condition, with all drifts, shafts, tunnels, winzes and other passages and workings, thoroughly clear of loose rock and rubbish, and drained, and the mine ready for immediate continued working (accidents not arising from negligence alone excusing) without demand or further notice.

28. Time is the essence of this contract in all particulars.

29. All of the operations of the Lessee under this lease shall be so conducted as to fully comply in every respect with the laws of the State of _____.

30. The Lessee hereby agrees to carry a Workmen's Compensation policy in a responsible Company, said policy to be placed in force forthwith.

31. This agreement shall be binding and enforceable by the respective successors, heirs, executors, administrators and assigns of the parties hereto.

In witness whereof the respective parties hereto have caused this instrument to be executed, on the day and date first above written.

Executed in duplicate.

Form No. 16.

LEASE WITH PRIVILEGE OF PURCHASE.

(Precedent in Settle vs. Winters, 2 Idaho (Hasb.) 215, 10 Pac. 216.)

This Indenture, with privilege of purchase, made and executed this _____day of_____, 19____, by and between_____, the parties of the first part, and_____, the parties of the second part.

Witnesseth: That the said parties of the first part, for and in consideration of_____dollars to them in hand paid, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, do hereby covenant and agree to and with the said parties of the second part, their heirs and assigns, as follows, to wit: That said parties of the first part hereby grant, demise, and lease to the said parties of the second part, the following described property, situate, lying and being in_____Mining District, County of_____, State of_____and more particularly described as follows, to wit:

(Description.)

Also that certain_____and_____, known as the_____, now lying on said_____from the_____day of_____ 19____, on the expiration of a certain lease of the_____and _____ mines, executed and delivered by the parties of the first

part to_____and_____; or in the event of the assignment of said lease to the parties of the second part before the said_____ day of_____19____, then from the date of such assignment until the_____day of_____, 19____, upon the following terms and conditions:

That said parties of the second part, so long as they shall deem fit to hold said property, and to mine and extract ore therefrom and to pay the said parties of the first part_____of the gross proceeds in manner hereinafter specified; and when the sum of_____ dollars shall have been paid, either out of the proceeds of the said property hereby leased, or otherwise, by the said parties of the second part to the parties of the first part, the said parties of the first part hereby covenant and agree, for themselves, their executors, administrators and assigns, to and with said parties of the second part, their heirs and assigns, to convey to them by good and sufficient deed all of the above described property, free and clear of all incumbrance upon such payment, provided, the said sum of_____dollars shall have been paid on or before the_____day of_____19____.

And the said parties of the second part hereby covenant and agree to enter upon said property, and to mine and extract ore from the same so long as they shall find it profitable: to do the work in a proper and workmanlike manner, and at their own cost and expense; and to hold and keep said property free and clear of all costs, charge or lien for the working of the same; and out of the gross proceeds of said mines to pay_____thereof, as fast as taken out, to said parties of the first part in a manner hereinafter specified; and, upon the expiration of the term hereby granted, to surrender up the possession of said premises, with all the improvements, to the said parties of the first part, unless, on or before the said_____day of_____, 19____, the said sum of_____dollars shall have been paid; and in the event of the said parties of the second part, or their assigns, failing to comply with either or any of the foregoing covenants, or any covenant, promise, or thing herein contained, on their part to be done, kept, or performed, that then it shall be lawful for said parties of the first part to re-enter, possess, and enjoy the above described property and premises, and every part thereof; and the said parties of the second part hereby agree, in the event of such non-performance on their part, to surrender possession of the said premises upon demand by said parties of the first part claiming their right to re-enter.

It is hereby mutually covenanted and agreed by and between the parties to this instrument that the said parties of the first part shall have the right, at all times, of inspecting the said mines above described, and all mining operaions and work thereon; that the said parties of the second part shall have the right, at any time, to stop work on said mines when they shall find or deem the same unprofitable; that, in working said ores, at each clean-up the said parties of the second part shall and will furnish a true account of all ores extracted and milled, and all bullion received, to the said parties of the first part; that, in milling said ores so taken from said property, the said parties of the first part, if they so desire, shall have an equal right with said parties of the second part in milling the ores, cleaning and retorting the same, weighing and storing the bullion, until the said parties of the second part receipt to them for_____of the_____proceeds; it being

expressly understood that upon each clean-up the said parties of the second part are to receipt to the said parties of the first part that they own_____of the same, and that the said parties of the second part hold the same for them; and the said parties of the second part are then to dispose of the bullion to the best advantage, and to pay to the parties of the first part_____of the proceeds thereof in money, currency or coin; and upon such payment the parties of the first part will credit said purchase price of_____dollars, with the sum so received; and, lastly, that in no event shall the said properties above described, or any part thereof, be held for any claim, cost, charge, or lien for working the same by the said parties of the second part, under this instrument; but, that all such work shall be done at the expense of the said parties of the second part solely and alone; and the said parties of the first part, for themselves, their executors, administrators and assigns hereby covenant and agree to and with the said parties of the second part, their heirs and assigns, to convey, by good and sufficient deed, all the above described properties, free and clear of all incumbrances, to them, the said parties of the second part, or their assigns, at any time, upon the payment to them, the said parties of the first part, of the sum of_____dollars, either out of the proceeds of the said mines, or otherwise, on or before_____in the manner hereinbefore specified, by the said parties of the second part, or their assigns. And it is hereby expressly and mutually covenanted and agreed that this covenant shall be taken, held and deemed a covenant real, running with and binding the land.

In witness whereof, the said parties have hereunto, in duplicate set their hands and seals this_____day of_____, 19____.

Form No. 17.

OIL AND GAS LEASE.*

(The subjoined is an approved form of an oil and gas lease. It is commonly called the 'Texas Lease'.)

Agreement, made and entered into the _____ day of _____ 19____, by and between _____ _____ of _____ County of _____, State of _____, part____ of the first part hereinafter called lessor (whether one or more) and _____, party of the second part hereinafter called lessee.

Witnesseth, That the said lessor, for and in consideration of _____dollars cash in hand paid, receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of lessee to be paid, kept and performed, ha_____ granted, conveyed, demised, leased and let, and by these presents do____ grant, convey, demise, lease and let exclusively unto the said lessee, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, power-stations and struc-

* For another form of oil lease, see Washburn vs. Gillespie, 261 Fed. 42. See, also, Ricketts on Mines, 2d ed., Form No. 40. For form of oil leases in Indiana, Kansas, New York, Pennsylvania, Tennessee, see Donahue Pet. and Gas., § § 28–34; Thornton's Oil and Gas, appendix.

For an "entertaining and illuminating discussion of the faults of lease forms, which too often are cluttered with obsolete, vague and redundant phraseology," see Robert M. Pease, in Oil Bulletin (Los Angeles), Vol. XVII, No. 1, pp. 25–27, January, 1931.

tures thereon to produce, save and take care of said products, all that certain tract of land situated in the County of _____, State of _____, Section _____, Township _____, _____ Range, _____, _____, _____ M., and containing_____ acres, more or less.

It is agreed that this lease shall remain in force for a term of _____ years from this date, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee.

In consideration of the premises the said lessee covenants and agrees:

1st. To deliver to the credit of lessor, free of cost, in the tanks or pipe lines to which he may connect his wells, the equal _____ part of all oil produced and saved from the leased premises.

2d. To pay the lessor_____dollars each year in advance, for the gas from each well where gas only is found, while the same is being used off the premises, and lessor to have gas free of cost from any such well for all stoves and all inside lights in the principal dwelling house on said land during the same time by making his own connection with the well at his own risk and expense.

3d. To pay lessor for gas produced from any oil well and used off the premises at the rate of _____ dollars per year, for the time during which such gas shall be used, said payments to be made each three months in advance.

If no well be commenced on said land on or before the _____ day of _____, 19____, this lease shall terminate as to both parties, unless the lessee on or before that date shall pay or tender to the lessor, or to the lessor's credit in the _____ Bank at _____, or its successors, which shall continue as the depository regardless of changes in the ownership of said land, the sum of _____ dollars, which shall operate as a rental and cover the privilege of deferring the commencement of a well for ____ months from said date. In like manner and upon like payments or tenders the commencement of a well may be further deferred for like period of the same number of months successively. And it is understood and agreed that the consideration first recited herein, the down payment covers not only the privileges granted to the date when said first rental is payable as aforesaid, but also the lessee's option of extending that period as aforesaid, and any and all other rights conferred.

Should the first well drilled on the above described land be a dry hole, then, and in that event, if a second well is not commenced on said land within twelve months from the expiration of the last rental period for which rental has been paid, this lease shall terminate as to both parties, unless the lessee on or before the expiration of said twelve months shall resume the payment of rentals in the same amount and in the same manner as hereinbefore provided. And it is agreed that upon the resumption of the payment of rentals, as above provided, that the last preceding paragraph hereof, governing the payment of rentals and the effect thereof, shall continue in force just as though there had been no interruption in the rental payments.

If said lessor owns a less interest in the above described land than the entire and undivided fee simple estate therein, the royalties and

rentals herein provided shall be paid the lessor only in the proportion which _____ interest bears to the whole and undivided fee.

Lessee shall have the right to use, free of cost, gas, oil and water produced on said land for his operations thereon except water from wells of lessor.

When requested by lessor, lessee shall bury his pipe lines below plow depth. No well shall be drilled nearer than 200 feet to the house or barn now on said premises. Lessee shall pay for damages caused by his operations to growing crops on said land. Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

If the estate of either party hereto is assigned—and the privilege of assigning in whole or in part is expressly allowed—the covenants hereof shall extend to the assigns and successive assigns, but no change in the ownership of the land or assignment of rentals or royalties shall be binding on the lessee until after the lessee has been furnished a written transfer or assignment or a true copy thereof; and it is hereby agreed that in the event this lease shall be assigned as to a part or as to parts of the above described lands and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportionate part of the rents due from him or them, such default shall not operate to defeat or affect this lease in so far as it covers a part or parts of said lands upon which the said lessee or any assignee thereof shall make due payment of said rental.

Lessor hereby warrants and agrees to defend the title to the lands herein described, and agrees that the lessee shall have the right at any time to redeem for lessor, by payment, and mortgages, taxes or other liens on the above described lands, in the event of default of payment by lessor, and be subrogated to the rights of the holder thereof.

In testimony whereof, we, in duplicate, sign, this the_____ day of _____, 19____.

Form No. 18.

ASSIGNMENT OF LEASE—OIL AND GAS.

(Precedent in Ratcliff vs. Paul, 114 Kan. 506, 220 Pac. 279.)

Know all men by these presents: That _____, on this _____ day of _____, for and in consideration of one dollar and other considerations, the receipt whereof is hereby acknowledged, do hereby assign, sell, transfer and set over unto _____ all _____ right, title, and interest, in and to an oil and gas mining lease, the land assigned being described to wit: (Description) (Record reference to lease). That_____ are the lawful owner__ and holder__ of said oil and gas mining lease, and the same is free from all incumbrances and that _____ have good right and title to sell and assign the same. Witness _____ hand__ the day and year first above written.

I, _____, wife of the said_____, for the considerations aforesaid, do hereby join in this assignment and hereby release and relinquish all my rights of dower and homestead in and to the lease and rights above assigned and transferred.

Witness my hand this_____day of_____, 19__.

Form No. 19.

CONJOINT DEED AND LEASE *

(Precedent in Wright vs. Carter Oil Co., 97 Okla. 46, 223 Pac. 835.)

State of_____)
County of_____) ss.

Know all men by these presents: That _____ and _____, parties of the first part, in consideration of the sum of _____ dollars, in hand paid, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto _____, the party of the second part, an undivided _____ interest in and to all of the mineral rights, including oil, natural gas and petroleum in _____ (description) in _____ County, State of _____, with the right and privilege to the grantors and grantee, or either of them, to go on said land and explore, operate, drill and mine for oil and gas, and other minerals, and to sell the products thereof and divide the same or the proceeds thereof as their interests appear and as provided herein. It is expressly understood, however, that this grant is subject to a certain oil and gas lease now on said premises, dated _____, made and executed by the grantors to the _____ Company.

Signed and delivered this the _____ day of _____.

Witnesses:

Form No. 20.

EXTENSION OF LEASE.

(Precedent in Pellissier vs. Pan-American Co., 62 Cal. A. 546. 217 Pac. 570.)

The lessor__ hereby agree__ that in lieu of commencing and prosecuting operations, for the drilling of a well upon said land described in and leased by said indenture of lease, the lessee__ may, if ____ shall so elect, pay to the lessor__ on the__ day of each and every calendar month, for an additional period of _____months, commencing on the _____ day of _____, as and for rental for said land the sum of _____ dollars per month, and such payments so made from month to month, shall relieve the lessee__ of and from all obligations to commence or prosecute any drilling or other operations upon said land during such month.

In witness whereof the said lessor__ ha__ hereunto set _____ hand__ the _____ day of _____, 19__.

Form No. 21.

NOTICE OF FORFEITURE OF LEASE.

(Precedent in Mathews Slate Co. vs. New Empire Slate Co., 122 Fed. 972.)

To_____(lessee) and_____assigns and employees:

Take notice that under and by virtue of the provisions of the lease

* For additional forms of a conjoint deed and lease, see Texas Co. vs. Davis. —— Tex. C. A. ——, 254 S. W. 304; Munsey vs. Marnet Oil Co., —— Tex. C. A. ——, 254 S. W. 311.

from the_____Company to_____bearing date the_____ day of_____, 19____, that the said company has exercised and does hereby exercise its option to terminate this lease and to reenter upon and possess itself of the premises demised for the reasons that the said _____and his successors in interest have failed to keep and perform their promises, contracts, and agreements in said instrument set forth, as follows:

(Insert ground of forfeiture.)

And you are hereby notified that all rights and privileges conveyed and contracted under said instrument have become forfeit and are hereby terminated.

Dated_____, 19__.

Form No. 21a.

NOTICE OF FORFEITURE AND TERMINATION.

To_____and to the_____Company, a corporation.

You and each of you will please take notice that that certain indenture or agreement, made and entered into on the____day of_____, 19___, by and between the undersigned_____and_____ and signed by said_____on_____to the _____Company, has been forfeited and terminated, and the undersigned hereby elects to and does declare the same forfeited and terminated because of the failure of the said_____and the said_____Company to commence active work as in said indenture or agreement provided, on the_____ day of_____, 19____.

And you and each of you will further take notice that the undersigned without in any way waiving the forfeiture and termination of said lease and agreement, for the reason aforesaid, does hereby elect and does terminate the same and does hereby demand that you and each of you surrender and quitclaim to the undersigned forthwith any right, title and interest you have or have ever had by virtue of said lease or agreement in or to any part of the lands and premises situate in_____County, State of_____, and more particularly described in said lease or agreement, as follows, to wit:

(Description.)

In witness whereof, the said_____has hereunto set his hand this_____day of_____, 19____.

Witness:

Form No. 22.

GAS AGREEMENT.

This agreement, made and entered into this _____ day of _____, 19___, by and between_____ as Lessor (whether one or more), and_____ as Lessee.

Witnesseth:

Whereas the Lessor is now drilling or contemplating the drilling of an oil well or wells and producing natural gas therefrom in the

district known as _____ and more particularly described as _____ and

Whereas it is thought that said gas will contain in gaseous form certain hydrocarbons, which are liquids at ordinary atmospheric temperatures and pressures, said hydrocarbons being hereinafter referred to as "gasoline," and

Whereas it is the intention and desire of the parties hereto that the Lessee extract the gasoline contained in said gas by means of one or more plants to be operated by the Lessee; now, therefore,

The parties hereto do hereby agree as follows:

First: The Lessor hereby grants unto the Lessee the sole and exclusive right or privilege to extract gasoline from any and all natural gas produced during the term hereof from any and all wells now drilled or drilling or that may hereafter be drilled on the property hereinbefore described, together with the sole and exclusive right or privilege of collecting said gas from said wells and transmitting the same to the plant or plants of the Lessee.

Second: The Lessor grants to the Lessee a right of way for the employees and vehicles of the Lessee over and across said lands of the Lessor for any and all purposes necessary or proper in connection with the business of the Lessee, and a right of way for the erection, construction, maintenance and operation of telephone and telegraph lines, oil pipe lines, wet and dry gas lines and water lines, all of said rights of way to be at such points as shall be designated by the Lessor and the right to construct, maintain and operate plant or plants for the extraction of gasoline and marketing of dry gas, all of which shall be used in such manner as not to unreasonably interfere with the operation of the Lessor.

Third: The Lessor shall use reasonable diligence to save and collect said gas so that the same may be delivered to the Lessee in accordance herewith, but neither party hereto shall be under any obligation to store gas. The Lessor shall have the right to disconnect any well from the pipeline system of the Lessee during such times as the connection of said well with the pipeline system of the Lessee would materially interfere with the production of oil from well.

Fourth: Said natural gas produced from any well shall be delivered to the Lessee at the casinghead of said well but if the gas from said well is produced with the oil therefrom, then said gas shall be delivered to the Lessee at trap or other apparatus, which shall be installed by the Lessor for the separation of the gas from said oil. The Lessee shall not be required to take delivery of any gas at any time at a pressure less than that then existing on the Lessee's intake lines. The Lessor shall use reasonable diligence to prevent air from becoming mixed with said gas prior to its delivery to the Lessee.

Fifth: In the event the gasoline content of said natural gas is less than ____ tenths of a gallon per one thousand cubic feet of gas, then the Lessee shall have the right either to treat said gas or class it as dry gas. The Lessee shall not be obligated to accept and treat in excess of _____ cubic feet of natural gas hereunder in any one day.

Sixth: It is particularly understood and agreed that the Lessor shall determine and regulate the pressure at which the gas and/or oil from any wells shall be produced, and that the Lessee shall not cause pressures which are less than atmosphere to exist on any of

said wells or on any trap connected to any of said wells, without the consent of the Lessor. The Lessee shall operate its plants, pipelines, machinery and equipment in such manner as not to interfere with the production of oil from any and all of said wells.

Seventh: The Lessee agrees to lay pipelines connecting the wells on said lands with the plant of the Lessee.

Eighth: The Lessee may receive and treat gas belonging to other parties at the plant or plants at which the Lessor's gas is received or treated and shall have the right to mix or commingle such other gas with that obtained from the Lessor.

Ninth: The Lessee shall measure the gas received from each separate lease, by means of good and sufficient recording meters of standard make, which shall be installed, maintained and operated by Lessee. The Lessee shall also install good and sufficient meters of standard make for measuring the total amount of gas received from all sources at each of its plants where the Lessor's gas is treated, together with good and sufficient recording meters of standard make to measure the total amount of dry gas discharged from said plants. The Lessor shall have the right to have a representative present at such times as any of the meters are read and to examine any of said meters for the purpose of checking the measurements as determined by the Lessee. The amount of gas received from any separate lease, shall be as shown by the reading of the meter measuring said gas, provided, however, that if a test of any meter shows that the same does not register within two (2%) per cent fast or slow of the correct amount, then proper correction of the amount of gas shown by the reading of said meter and said test shall be made but for the current calendar month only. Said meters shall be tested from time to time by the Lessee to determine the accuracy thereof. Upon demand of the Lessor any of said meters shall be tested at any time. If upon such test, it develops that said meter registers within ____ per cent (____%) fast or slow of the correct amount, then the expense of said test shall be borne by the Lessor otherwise, such expense shall be borne by the Lessee. The Lessor shall have the right to have a representative present during the testing of any of said meters.

Tenth: The Lessee shall from time to time and at least once in thirty days make such tests of the gas delivered to the Lessee from each separate lease, as will enable the Lessee to determine with reasonable accuracy the amount of gasoline contained therein per thousand cubic feet.

Eleventh: The amount of gasoline produced from the gas belonging to the Lessor when mixed or commingled with other gas, shall be such proportion of all the gasoline produced from said mixed or commingled gas as the computed gasoline in the Lessor's gas bears to the computed gasoline in all of said mixed or commingled gas, as determined from the meter readings and tests hereinbefore mentioned. The amount of dry gas to be credited to the Lessor shall bear the same proportion to the total dry gas discharged from said plant or plants as the amount of gas received from the Lessor bears to the total amount of gas received by the Lessee from all sources at said plant, it being understood that the Lessee shall have the right to use so much of the dry gas at any plant as may be reasonably used or consumed or lost in

the operation of said plant in the extraction of gasoline therefrom before same is discharged from said plant.

Twelfth: The Lessee shall return from the dry gas due to the Lessor, as much of said dry gas, discharged from the plant as the Lessor may require in operating the Lessor's lease and drilling activities. If there remains any dry gas due to the Lessor, the same may be sold by the Lessee, and in the event of such sale the Lessee agrees to pay the Lessor _____ per cent (__%) of the proceeds of such sale or sales as royalty. It is agreed that such gas as is returned to the Lessor shall be delivered to the Lessor's property on which active operations are being conducted at the point nearest the distributing lines of the Lessee. It is agreed that the Lessee will not be required to return such dry gas at a pressure exceeding _____ pounds per square inch at the plant at which it is obtained.

Thirteenth: The Lessee agrees to pay as royalty _____ per cent (__%) of the proceedings from the sale of the gasoline manufactured from the gas of the Lessor.

Fourteenth: The Lessee agrees to furnish the Lessor with a report, not later than the _____ day of each month, covering the operations of the Lessee during the preceding month, and showing:

(a) The amount of Lessor's gas received from each separate lease.
(b) The amount of Lessor's gasoline saved and sold.
(c) The amount of dry gas returned to the Lessor.
(d) A statement of the balance of the Lessor's dry gas; and
(e) A statement of royalties earned.

It is agreed that any and all objections to any of such reports must be made to the Lessee in writing not later than fifteen (15) days after the receipt thereof by the Lessor, and that such failure by the Lessor to make such objections in writing within such period of fifteen (15) days shall create a conclusive presumption that such report is correct in all particulars, and that if such fifteen (15) day period shall have elapsed without any such written objections having been made to the Lessee, the Lessor shall not thereafter have the right to question or dispute such report in any way.

Fifteenth: In the event that at any time or from time to time the Lessee is required to pay any tax, license or governmental charge, directly or indirectly, upon that part of the gasoline manufactured from the gas of the Lessor to which the Lessor is entitled as royalty or upon the proceeds of the sale of such royalty gasoline, the Lessor shall reimburse the Lessee for the full amount of such tax, license or governmental charge so paid by the Lessee.

Sixteenth: The Lessee agrees to promptly pay before the same becomes delinquent all taxes, which may be assessed or levied during the term of this agreement, upon any property erected, placed or maintained by the Lessee upon any of the lands of the Lessor. In the event that the Lessee fails so to do, the Lessor shall pay such tax and the Lessee shall refund all amounts so paid by the Lessor, with interest from the date of such payment at the rate of ____ per cent (____%) per annum upon demand being made therefor.

Seventeenth: The Lessee shall not suffer any lien or liens to be filed against the plants, pipelines, machinery and equipment, or any other property placed by the Lessee upon the lands of the Lessor for work,

labor, material or supplies furnished in connection therewith, and if any such lien or liens is filed thereon the Lessee agrees to remove the same at its own expense and cost and shall pay any judgments which may be entered thereon or thereunder. Should the Lessee fail, neglect or refuse so to do, the Lessor shall have the right to pay any amount required to release any such lien or to defend any action brought thereon and to pay any judgment entered therein and the Lessee shall be liable to the Lessor for all costs, damages, and counsel fees, and any amounts expended in defending any proceeding or payment of any of said liens or any judgment obtained therefor.

Eighteenth: It is expressly understood and agreed that any failure of any party hereto to perform any of its obligations hereunder, shall be deemed excused if and to the extent that such failure is due to any act of God, inevitable accidents, strikes, interference by any authorized public authority, or to any other cause or condition beyond the reasonable control of the party so failing to perform.

Nineteenth: The term "natural gas" or "gas" as used herein means that natural gas which in its original state as produced, and before the extraction of any gasoline therefrom, contains gasoline in commercial quantities and all other natural gas is referred to herein as "dry gas."

Twentieth: It is agreed that this contract will begin from the date hereof and will continue as long as gas is produced by the Lessor in commercial quantities from said wells. All material and equipment used and/or installed upon the lands of the Lessor by the Lessee shall remain the property of the Lessee and upon the termination of this lease for any cause, the Lessee shall have ninety (90) days to remove its property off the premises, subject, however, to the conditions stated in paragraph seventeen (17) hereof. The Lessee may also remove the material and equipment in or appurtenant to any plant or plants constructed hereunder, when such plant or plants can no longer be operated at a profit.

Twenty-first: The Lessors may elect, upon thirty days notice, in writing, to take their gasoline royalty either in cash or in kind; such election shall be exercised for periods of not less than six months. In the absence of an election by the Lessors, royalty shall be deemed payable in cash.

Twenty-second: Payments for royalty in cash shall be made by the Lessee to the Lessors not later than the _____ (__th) day of each calendar month for sales during the previous calendar month.

All fuel delivered to the Lessor shall be computed on the basis of cost to the Lessee, and the Lessee shall be entitled to retain from the dry gas accruing hereunder to the Lessor amounts sufficient to repay the Lessee for the dry gas so advanced.

The Lessor covenants and warrants title to the property herein leased and agrees to defend the rights of Lessee herein against the claims of all parties affecting the rights of the Lessee.

This agreement shall bind and inure to the benefit of the successors and assigns of the respective parties hereto.

In witness whereof, the parties hereto have caused this instrument to be executed in duplicate by their respective officers thereunto duly authorized, the day and year first above written.

Form No. 23.

ESCROW AGREEMENT.*

(Precedent in Craig vs. White, 187 Cal. 496, 202 Pac. 648.)

----------Company

Dear Sirs:

There is herewith delivered to you a deed of conveyance dated----------, from the undersigned, ----------, as grantor, to----------, as grantee, embracing----------in----------County, State of----------, which deed is placed in escrow with you and is to be held by you and delivered to said grantee, his heirs or assigns, upon the condition that he shall pay, and when he or they shall have paid to you for account of the undersigned, or his heirs or assigns, the sum of----------dollars ($------), in lawful money of the United States, at the time and in the manner following, to wit:----------dollars ($-------) on or before the----------day of----------, and a like sum on or before the ----------day of----------of each----------thereafter until the said sum of----------dollars ($-------) is paid. Together with interest upon all of the said deferred payments at the rate of------per cent (--%) per annum from----------, until paid, interest payable------- at the same time as the payments of the principal installments as above. The whole unpaid balance may be paid at any time and if the same shall be paid within----------, all interest which shall have been actually paid shall in that event be credited upon the principal, and considered as having been paid on that account and not as interest.

If the said grantee, his heirs or assigns, shall fail to make payment of any of such installments at or before maturity, or within----------days thereafter, he or they shall forfeit all right to have a delivery of the said deed, and shall forfeit all right to the moneys which may have been paid, and the said deed shall be re-delivered to the undersigned, his heirs or assigns, free from all claims or rights of the said grantee, his heirs or assigns.

Witness my hand at----------, this------day of----------.

I accept the terms of the within conditions. (Optioner.)

(Optionee.)

Form No. 24.

INSTRUCTIONS TO ESCROW HOLDER.

(Precedent in Pollard vs. Sayre, 45 Colo. 195, 98 Pac. 816.)

To Bank----------at----------.

Herewith enclosed find deed from the undersigned----------conveying the----------and----------mining claims in----------Mining

* For another form of escrow agreement see Shreeves vs. Pearson, 194 Cal. 702, 230 Pac. 448.

District, County of_____State of_____. This deed is to be held by you in escrow subject to delivery to_____his heirs or assigns, upon their complying with the conditions of a_____said property executed by us to said_____, on the_____day of _____, 19__, a copy of which is enclosed herewith. Upon the payment of any sum as therein provided, _____thereof is to be placed to the credit of_____.

Dated_____, 19__.

Form No. 25.

POOLING AGREEMENT.

To the Bank_____.

Gentlemen:

We, _____and_____severally deliver to you the following certificates, calling for the number of shares of capital stock of the _____Mining Company and issued to the persons respectively as herein named:

Certificate No._____to_____for_____shares.
Certificate No._____to_____for_____shares.

These certificates, numbers _____to_____inclusive, are to be held by you as a depositary, and pursuant to the agreement of said persons (herewith evidenced by their signatures to this paper), are not to be redelivered by you to said persons, or any of them, except in the event you should receive instructions in writing signed by all of such persons, it having been, and being now agreed by them, that neither said certificate nor the shares of stock called for thereby, nor any portion thereof, shall be sold, transferred or assigned to any person, or persons, or corporation or corporations without the consent, in writing, of all the said persons being obtained as aforesaid; but, provided, however, that said shares, or any of them, may be sold, transferred and assigned by any of said persons to any other of said persons without such consent.

The foregoing shall be construed both as a letter of instructions to the Bank of _____, and as an agreement between the undersigned.

In witness whereof, the said parties have hereunto set their hands, on _____,this, the_____ day of _____, 19__.

Addendum.

(Precedent in Smith vs. S. F. Ry. Co., 115 Cal. 584, 47 Pac. 582.)

It is mutually agreed between said persons that for the purpose of keeping control of said corporation in the interest of themselves (and of all persons who shall buy any portion of said stock from them) that they will during the period of _____, from the date hereof, retain the power to vote said shares in one body; and that the vote which shall be cast by said shares, whether for directors, or for any other purpose, shall be determined by ballot between them or their survivors.

Form No. 26.

GRANT DEED.

(Precedent in Carter vs. Bacigalupi, 83 Cal. 187, 23 Pac. 363.)

I, _____, grant to_____all that certain mining claim situated in the_____Mining District, County of_____, State of _____, being the_____mining claim, more fully described in the notice of location thereof which is recorded in the office of the County Recorder of said County of_____on the _____day of _____, 19__, in Book_____, at page_____ of the Record of_____of the records of said county; and which said record is hereby referred to and made a part hereof.

Witness my hand this_____day of_____, 19__.

Addendum.

(Precedent in Catron vs. South Butte Co., 181 Fed. 941.)

It being understood that the surface only is hereby conveyed and that all minerals and metals and ores below the surface with the right to mine, prospect for, and extract the same, is hereby reserved to the parties of the first part, their heirs, representatives and assigns, and excepted and excluded from and not passed by this conveyance. But the said parties of the first part, their heirs, representatives and assigns covenant and agree that they will not mine or excavate under the surface of that portion of the lot above described, and which is covered by the said_____lode, nearer to the surface than_____feet from the present surface of the ground, but will in their mining operations, leave_____feet below the present surface of the ground for support. But they do not obligate themselves, or their heirs, representatives or assigns, to support or maintain the said_____feet by timbers or otherwise, but only not to mine or excavate within_____ feet of the present surface.

And the said parties of the first part, for themselves, their heirs, personal representatives, and assigns, covenant and agree that they will not mine or excavate under the surface of that portion of said_____ lode claim which is hereinbefore described, and hereby conveyed nearer to the surface thereof than_____feet, but will so conduct their mining operations as not to injure the surface rights hereby conveyed and so as to at all times abundantly protect said surface with a depth of_____feet thereunder.

Form No. 27.

DEED OF TRUSTEES FOR CORPORATION.

(This form is not applicable within California since the law of 1917. Usher vs. Henkel, 205 Cal. 413, 271 Pac. 494.)

This Indenture, made this_____day of_____, A. D. 19__, between_____and_____as trustees for_____Company and its stockholders, all of_____, the parties of the first part, and _____of_____, in the State of_____, the part___ of the second part, witnesseth:

Whereas, _____Company, a corporation heretofore duly organized and existing under and by virtue of the laws of the State of

_____, and having its principal place of business at_____in the County of_____and State of_____was, at the time of the forfeiture of its charter hereinafter particularly mentioned and prior thereto and at all such times had and now has the record title to all and singular those certain mining claims, ground and premises situate, lying and being in the_____Mining District, County of_____, State of_____, known as_____and hereinafter more particularly described; and

Whereas, at the time of such forfeiture, and prior thereto, and in accordance with and as required by its articles of incorporation the corporate powers, business and property of said corporation were conducted, exercised and controlled by a board of_____directors, and

Whereas, said corporation continued to be a valid corporation under and by virtue of the laws of the State of_____, until, on or about the_____day of_____, 19__, on which last named day the charter of said corporation became and was forfeited by reason of the failure and neglect of said corporation to pay to the Secretary of State of the State of_____, the license tax for the year_____ as provided to be paid by corporations under the provisions of a certain act of the legislature of the said State of_____, entitled "An Act, etc., _____. Approved_____, 19__," and

Whereas, said corporation has not been relieved from said forfeiture nor been rehabilitated under the provisions of said act and since the day lastly hereinbefore aforesaid the said corporation has had and now has no power nor right to do business; and

Whereas, prior to the time of said forfeiture and on, to wit; the _____day of_____, 19__, _____and_____were duly elected as the directors of said corporation and thereafter acted as such. That while acting as such directors and prior to said forfeiture the said _____died on the_____day of_____, 19__. That no person was ever elected to fill the vacancy caused thereby and at the time of said forfeiture of said charter the said parties of the first part _____were the only directors of said corporation in office and since said time have been and now are the sole and only directors of said corporation and by reason of said forfeiture of the said charter of said corporation have become and now are the trustees for the said_____ Company and its stockholders; which said corporation had a capital stock of_____dollars, divided into_____shares.

Now, therefore,

The said parties of the first part, as trustees for said_____ Company and its stockholders, in consideration of the sum of_____ dollars, to them in hand paid, hereby remise, release and quitclaim to the said part_____of the second part, _____ heirs and assigns forever, all of the rights, title and interest which the said parties of the first part, as such trustees for the said corporation, said_____ Company and its stockholders, now hold or have a right to convey, to all and singular all of the said mining claims so owned, claimed or held by the said_____Company.

(Description.)

The said parties of the first part so make this conveyance upon the express terms and conditions that thereby the said parties of the first

part personally assume no liability or responsibility to the said part____ of the second part, or_____heirs or assigns, but in this instrument are acting solely as trustees for the said corporation, said_____ Company and its stockholders, under the provisions of said act hereinbefore particularly mentioned.

In witness whereof, we have hereunto set our hands the day and year first above written.

_____ As Trustees for
_____ _____ Company
_____ and its Stockholders.

Form No. 28.

RATIFICATION OF DEED.*

Know all Men by These Presents: That we_____and_____ former_____stockholders of_____Mining Company, a corporation heretofore duly organized and existing under and by virtue of the laws of the State of_____, the charter of which corporation was and it still is forfeited by reason of its failure to pay to the Secretary of State of the State of_____, the license tax provided to be paid by corporations and which said corporation had a capital stock of_____dollars, divided into_____shares of the par value of_____dollars each (of which_____shares were unissued), and severally the owners and holders of record on the books of said former corporation of the number of shares of the said capital stock of said former corporation set opposite our respective signatures hereto, and together owning and holding more than_____of the entire issued and outstanding capital stock of said corporation at the time of said forfeiture, being fully advised in the premises, hereby agree, consent to, approve of, ratify and confirm the foregoing deed of conveyance.

In witness whereof, we have hereunto set our hands this the_____ day of_____, 19__.

Name of Stockholder.	No. of Shares.
_____	_____

CERTIFICATE OF FORMER SECRETARY.

I, _____, do hereby certify that I was the duly appointed and acting secretary of the_____Mining Company, the corporation in the foregoing deed of conveyance named, prior to and at the time of the forfeiture of its charter as aforesaid, under the laws of the State of_____. That the capital stock of said corporation was _____dollars, divided into_____shares, of the par value of_____dollars each. That no more than_____shares of said capital stock of said corporation had been issued at the time of the forfeiture of the charter of said corporation as in the deed of conveyanee hereto attached, specifically mentioned, and said_____ shares were the entire capital stock of said corporation then outstanding.

And I do further hereby certify that at the time of said forfeiture of said charter the said parties of the first part in said deed of conveyance

* See 62 Cal. A. 588, 217 Pac. 563.

named, viz: _____and_____. were the only directors of said corporation in office and since said time have been and now are the sole and only directors of said corporation and by reason of said forfeiture of said charter of said corporation have become and now are the trustees for the said_____Mining Company and its stockholders. And I do further hereby certify that the persons signing the above and foregoing ratification were, at the time of said forfeiture and also at the time their respective signatures were affixed to such ratification, stockholders in said corporation holding of record at least_____of the said entire issued and outstanding capital stock of said corporation, and severally were, at such times, the owners and holders of record of the number of shares set opposite their respective names.

Witness my hand and the corporate seal of the said former corporation, by me hereto affixed, this, the_____day of_____, 19__.

Form No. 29.

NOTICE OF FORFEITURE—PUBLICATION.*

(See Elder vs. Horseshoe Co., 194 U. S. 249, 9 S. Dak. 636, 70 N. W. 1060.)

To_____ and_____ and to_____ his heirs, administrators, and to all whom it may concern:

You, and each of you, are hereby notified that during the years_____ _____as co-locator (or as the grantee by mesne conveyances from _____ one of the locators) and as a co-owner in the _____ Claim, I did, as such co-owner expend_____ hundred dollars in labor and improvements upon the said_____ Claim, described as follows, viz: _____ in the _____ Mining District, County of_____ State of _____.

Said _____ Claim was located on_____, by _____, and _____.

The notice of location of said_____ Claim was recorded on_____ in the Office of the County Recorder of said County of_____, in Book of_____, page_____ of the records of said County, which said record is hereby referred to and by reference is made a part hereof. Said amount, to-wit: _____hundred dollars, being one hundred dollars a year, which is the amount of annual expenditure required to hold the said_____ Claim for the year ending at twelve o'clock noon on July 1st, _____ and also for the year ending at twelve o'clock noon on July 1st, _____.

And you, and each of you, are hereby further notified that if within ninety (90) days after this notice by publication, you, or any one of you, fail or refuse to contribute your proportion of such expenditure, viz: _____ dollars, being_____ dollars for each

* When, in California, notice is given by publication in a newspaper, there shall be attached to a printed copy of such notice, an affidavit of the printer, or his foreman, or principal clerk of such paper, stating the first, last and each insertion of such notice therein, and where the newspaper was published during that time, and the name of such newspaper. Such affidavit and notice shall be recorded in the office of the proper county recorder within one hundred and eighty days after the first publication thereof. Civil Code, §1426o.

of said years, your interests, and each of your interests, in said_____ _____Claim shall be forfeited to and become the property of the subscriber under the provisions of §2324 of the Revised Statutes of the United States.

_____ Co-owner.

(State address)

Dated_____ 19_____.

Form No. 30.

NOTICE OF FORFEITURE—PERSONAL SERVICE.*

In the matter of the annual expenditure upon the_____ group of mines situate in_____Mining District, County of _____, State of _____.

To _____ and to all others whom it may or does concern:

You, and each of you, will please take notice and you, and each of you, are hereby notified that during the year_____, to-wit: during the months of_____and _____of that year, as a co-owner in and of the_____Group of Mines, I, the undersigned, as such co-owner, did expend the aggregate sum of_____ Hundred Dollars ($____) in labor and improvements upon the said _____Group of Mines. That said_____Group of Mines embraces and includes the following mining locations or claims, viz.:

(Description.)

That all and singular the said mining claims or locations are situate within the_____Mining District, County of_____, State of_____.

That the notice of location of said_____Lode Mining Claim was recorded on the_____day of_____, in the office of the County Recorder of said County of_____, in Book_____ of_____Records, page_____, of the Records of said county.

That the notice of location of said_____Lode Mining Claim was recorded on the_____day of_____, in the office of the County Recorder of said County of_____, in Book_____ of_____Records, page_____, of the Records of said county.

That the notice of location of said_____Lode Mining Claim was recorded on the_____day of_____, in the office of the County Recorder of said County of_____, in Book_____ of_____Records, page_____, of the Records of said county.

That said record of each of said mining claims or locations is hereby referred to and by reference is made a part hereof.

Said amount, to wit: _____Hundred Dollars ($_____) was expended as aforesaid, in the manner following, that is to say, One Hundred Dollars ($100.00) of said amount was expended upon each of said mining claims or locations in labor and improvements thereon and said labor done and improvements so made upon each of said mining claims or locations was and is worth and of the value of said sum of One Hundred Dollars ($100.00).

* In California the notice and affidavits must be recorded in the office of the county recorder in the county within which the claim is situate within ninety days after the giving of such notice. Civil Code, § 1426*o*. *See* Robinson vs. Briest, 178 Cal. 237, 173 Pac. 89, *but see* Pomeroy vs. Sam Thorpe Co., ___ Ariz. ___, 296 Pac. 255.

That said sum of One Hundred Dollars ($100.00) so expended upon each of said mining claims or locations as hereinbefore aforesaid, being One Hundred Dollars ($100.00) a year; which is the amount of annual expenditure required to hold each of the said several mining claims or locations for the year 19____, as extended by Act of Congress to end on July 1, 19____.

And you, and each of you, will please take notice, and you, and each of you, are hereby notified, that within ninety (90) days after this notice is personally served upon you, you or either, or any one of you, fail or refuse to contribute your proportion or share of said expenditure, to wit: by you said_____ the sum or amount of One Hundred Dollars ($100.00) for said year upon each of the said several mining claims or locations constituting said_____Group of Mines, your interests, and each of your interests, in said mining claims or locations and each and all of them, together with all costs of service of this notice, whether incurred by publication charges or otherwise, shall be and become forfeited to and be and become the property of the undersigned under the provisions of Section 2324 of the Revised Statutes of the United States

Dated: _____, 19____.

_____
Co-owner, residing at

_____

AFFIDAVIT OF SERVICE.

State of_____}
County of_____} ss.

_____, being first duly sworn, deposes and says: That he is, and was at the time of the service of the hereto attached Notice of Forfeiture, a citizen of the United States over the age of eighteen (18) years, and not in any way interested in the mines, mining claims or locations therein particularly mentioned; that he personally served the within and hereto attached Notice of Forfeiture on_____ by delivering to and leaving with him personally in the County of _____, State of_____, on the_____day of _____, 19_____, a true copy of the hereto attached Notice of Forfeiture.

_____

Subscribed and sworn to before me this_____day of_____, 19____.

_____
Notary Public.

My commission expires_____.

CORROBORATING AFFIDAVIT.

State of_____}
County of_____} ss.

_____, being first duly sworn, deposes and says: That he is the person and co-owner giving the notice, a true copy whereof is hereto attached, marked Exhibit "A," and made a part hereof.

That on the_____day of_____, 19____, _____ personally served a true copy of the said notice upon_____, the person and delinquent co-owner therein named, by delivering to and leaving said notice with said_____personally, at the County of_____, State of_____.

Subscribed and sworn to before me this_____day of_____, 19____.

_____
Notary Public.

My commission expires_____.

Form No. 31.

ANSWER—ADVERSE SUIT.

(Title of court and cause.)

Comes now the defendant in the above entitled action, and answering the complaint of the plaintiff herein, says:

1. Defendant avers that he declared his intention to become a citizen of the United States of America on the _____ day of _____, 19__, in the _____ Court of the State of _____, in and for the County of _____.

2. (Deny the allegations of the complaint as the facts may warrant.)

II.

For a further and separate answer and defense herein defendant says:

1. (Repeat paragraph 1, ante.)

2. Defendant avers that he and his predecessors in interest and grantors under and by virtue of a location made by _____ and _____of the premises hereinafter and in the next succeeding paragraph hereof fully described, have claimed, and defendant does still claim adversely to plaintiff an estate and interest in said portion of said pretended _____ mining claim, said portion being the alleged overlap of the said _____ mining claim upon the said alleged _____ mining claim.

3. Defendant denies that his said title, right and estate were acquired by him subsequent to said alleged acquisition of the plaintiff and avers that his right, title and estate and right of possession of, in and to all of the premises hereinafter in this paragraph described and set forth and every part thereof, is of right and that he has the exclusive right, title and interest and right of possession of the same, and every part thereof, as against the plaintiff and all others; and that such right and estate were acquired by the predecessors in interest and grantors of this defendant prior to the alleged acquisition of the said plaintiff's right or estate in said alleged _____ mining claim. And defendant avers that plaintiff has no right, title, interest in or right of possession therein or thereto, or any part thereof. That by virtue of a location made by _____ and _____, each and both of them citizens of the United States on, to wit: the _____ day of _____, 19__, as appears by reference to the notice of location thereof, which is in the words and figures following:

(Location Notice.)

and by reason of mesne conveyances in writing from said _____ and _____, and their successors in interest and grantees, and by a compliance, by defendant, and his predecessors in interest and grantors with the mining acts of Congress, the laws of the State of _____ and the rules, regulations and customs of the miners of the said _____ Mining District, wherein the said premises are situated, defendant is the owner of and entitled to the possession of said _____ mining claim, and of the whole thereof.

III.

For a further and separate answer and defense herein defendant says:

1. (Repeat paragraph 1, ante.)

2. (Allege as in Complaint, Form No. 35, paragraphs 2 to 4, inclusive.)

Wherefore, defendant demands judgment that he is entitled to the possession of the said mining ground in dispute and for his costs herein expended.

Form No. 32.

ANSWER—KNOWN LODE WITHIN PLACER CLAIM.

(Title of court and cause.)

Come now the defendants and answering the complaint herein say:

1. Defendants deny that plaintiff now is or at any time was the owner (in fee simple, or otherwise,) of all the certain real property described in the complaint herein.

Defendants deny that the plaintiff now is, or ever was at any time, the absolute owner of, or entitled to the possession of, those certain premises particularly mentioned and described in paragraph _____ of said complaint; and deny that at any time whatsoever defendants wrongfully or unlawfully entered into and upon said premises, or upon any part or portion of the same, or that they ousted and ejected the plaintiff therefrom, or from any part or portion thereof; or that these defendants have for more than _____ last prior to the commencement of this action, or at any time since, wrongfully withheld, or that they do now wrongfully withhold from the plaintiff the possession of said land and premises, or any part or portion thereof, or wrongfully withhold from plaintiff the possession of other property of any kind or character to damage plaintiff in the sum of _____ dollars, or to the damage of plaintiff in any sum whatsoever.

II. Defendants admit that they claim an interest in the said property adverse to and against the alleged right and/or title and/or interest of the plaintiff, but they deny that their said claim is without right and/or unfounded. On the contrary, defendants allege that long prior to the _____ day of _____, 19__, which is the date of the application for a placer patent made by the plaintiff herein for the said land and premises certain lodes, veins or deposits of ore or rock in place carrying minerals, were known to exist within the boundaries thereof, or by reasonable diligence should have been

known to the applicant for the said patent, the plaintiff herein; that the said application did not include any application for such veins or lodes, or any one thereof, and for that reason the same were excluded and excepted out of the patent issued on the _____ day of _____, 19__, by the government of the United States to the plaintiff herein. That subsequent to said application for patent certain lode claims were located by the defendant, _____, on such known veins or lodes, to wit:

(Description.)

III. Defendants allege that on and before the day of the location of each of the above mentioned lode mining claims, hereinafter mentioned, the premises above described were mineral lands of the public domain and entirely vacant and unoccupied, and were not owned, held or claimed, by any person or party as mining ground, or otherwise, and that while the same were so vacant and unoccupied and unclaimed, to wit, on the _____ day of _____, 19__, said_____, one of the defendants herein, entered upon and located each and every of said veins and lodes and occupied each of the said locations as a lode mining claim.

IV. Defendants further allege that the said locator, said _____, upon the making of each of said locations entered into and took possession of each of said locations, mining ground and premises, erected thereon such stakes and monuments as were necessary to point out and designate the boundaries and extent of each of said lode mining claims, posted a notice of location thereon, did such work thereon and performed all such acts as were required by the mining laws of Congress, of the State of California, and by the laws, customs, rules and regulations of the miners of the district in which each of said lode mining claims are situate and filed his notice of location of each of said claims in the office of the County Recorder of the said County of _____, by whom the same was recorded on the_____day of _____, 19__, in _____ of the _____records of said County. That each of said notices of location are hereby referred to and by reference made a part hereof, for all purposes.

V. Defendants allege that said defendant, _____, remained in the sole possession, occupation and enjoyment of each of said lode mining claims, ground and premises and continued, from the date of each of said lode locations, to work upon, prospect and develop the same until the _____ day of _____, 19__, on which date said _____ in and by his deed in writing conveyed to these defendants, to wit: _____ and undivided _____ interest in each and all of said lode mining claims, and the defendants herein ever since have possessed and controlled, enjoyed and occupied and now are in the actual and peaceable possession of said lode mining claims, and each of them, and every part thereof.

Wherefore, defendants pray judgment that plaintiff take nothing by its said action, and that defendants be adjudged to be the owners and entitled to the possession of the said _____ lode mining claims, and of all veins, dips, spurs and ore bodies contained therein and the ground and premises within the boundaries thereof; and that the said plaintiff, and all persons claiming or to claim by, through or under plaintiff, be forever enjoined and restrained from asserting

any claim or title whatsoever to the above mentioned premises, or any part thereof, and from in any wise hindering or interfering with these defendants, or their successors in interest, in the full and peaceable use and enjoyment of the same; and that defendants' title be established and quieted against plaintiff; and for their costs, and for such other relief as these defendants may be entitled to.

Form No. 33.

ANSWER—UNDERGROUND TRESPASS.

(Title of court and cause.)

Comes now _____, the defendant in the above entitled action and answering the complaint of the plaintiff herein, says:

1. That as to whether or not the plaintiff is now, or ever was at any time, the owner of, or entitled to the possession of that certain lode mining claim known as or called the _____ lode, situated in the _____ Mining District, County of _____, State of _____, described as in the _____ paragraph in the plaintiff's complaint set forth, this defendant has not sufficient information upon which to base a belief and placing his denial upon that ground, defendant denies the same.

2. Defendant denies that any vein, lode or ledge of quartz rock in place, bearing _____ or other precious metal, is found in the said _____ lode mining claim that in its longitudinal course or strike passes into the said pretended _____ lode mining claim, through the _____ end line thereof and extends through the said mining claim in a _____ direction and lengthwise of said mining claim and passes out of said mining claim through the _____ end line thereof, or that the top or apex of said vein, or any vein, lode or ledge lies throughout the entire length of the said mining claim inside the surface thereof extended downward vertically; that said vein, lode or ledge in its downward course departs from the perpendicular at an angle of about _____ degrees from the hoizontal, or at an angle from the horizontal in a _____ direction, or any direction, or that the general course or strike of said vein, lode or ledge, or any vein, lode or ledge lying within the said pretended _____ lode mining claim is nearly or quite coincident with the surface side lines of the said pretended lode mining claim, or that by reason thereof, or for any reason, the plaintiff is now, or at any time mentioned in the complaint, the owner of, or entitled to the exclusive possession of any vein, lode or ledge, or so much thereof as the top or apex thereof lies inside of the said surface boundaries of the said pretended _____ lode mining claim throughout its entire depth, or that the plaintiff has at all times, or at any time, been in possession of said pretended _____ lode mining claim, or said vein, lode or ledge, as in the _____ paragraph of said complaint mentioned, or at all.

3. Denies that the plaintiff has any lode or vein or ledge of mineral-bearing rock in place extending throughout the said pretended _____ lode mining claim, or that any vein or lode or ledge or mineral-bearing rock having its apex within the said _____ lode mining claim has any dip in a _____ direction outside the surface lines of the said pretended _____ lode mining claim.

4. Denies that any vein, lode or ledge or mineral-bearing rock in place having its top or apex within the surface lines of the plaintiff's pretended _____ lode mining claim in its course downward between vertical planes drawn downward through the end lines of said pretended _____ lode mining claim continued in their own direction in its departure from its perpendicular extends to a great depth, to wit: to a point far outside _____ of or _____ or at all, or below, or beyond the workings of the defendant, or any workings of the defendant continued in its downward course between said planes to an unknown distance, or to any distance.

5. Defendant denies that on or about the_____day of_____, 19__, or at any other time he wrongfully or unlawfully entered into or upon that part or portion of any vein, lode or ledge having its top or apex within the lines of the said pretended_____lode mining claim which in its course downward extends outside of and to the_____ of the vertical_____side lines of said pretended_____lode mining claim so continued in their own direction that the same will intersect such exterior portions of said vein, lode, or ledge having its top or apex within such surface lines of said pretended_____lode mining claim, or that he ousted or ejected the plaintiff therefrom or from any vein, lode or ledge, or that he wrongfully took, or carried away therefrom, or converted to his own use large or valuable quantities or any quantity of ore in said vein, lode or ledge constituting the property of the plaintiff of the value of_____dollars, or of any value, or that he has, at all times since, or at any time or since, wrongfully withheld or that he does now wrongfully withhold from the plaintiff the possession of the said vein, lode or ledge so lying to the_____of the side line of the said pretended_____lode mining claim between the planes drawn down through the end lines of said claim as aforesaid, or that he wrongfully withholds from the plaintiff the possession of any vein, lode or ledge, or bodies of ore, or any property of any kind or character to damage plaintiff in the sum of_____dollars, or to the damage of plaintiff in any sum whatever.

6. Defendant alleges the truth to be that all the ores, mineral and rock that have been extracted and carried away from the point in controversy by him are and were a part of a vein, lode or ledge having its top or apex within the surface lines of the_____lode mining claim, the property of this defendant, which said vein, lode or ledge and ores belonged to and were and are the property of this defendant by virtue of the same being a part of the_____lode mining claim, located on the_____day of_____, 19__, by the grantors and predecessors in interest of this defendant, which said_____lode mining claim is now the property of this defendant, together with all ores, ledges, lodes and veins having their apex or top within the surface lines of the said _____lode mining claim.

7. Defendant denies that any of the ores, metals, minerals, rock, or earth which he has mined or removed from within the surface side lines of the said_____lode mining claim extended downward vertically were a part of or belonged to any vein, lode or ledge having its top or apex within the surface side lines of the said pretended_____lode mining claim, the property of the plaintiff.

8. Defendant denies that he has ever removed, extracted, mined or carried away any ores, metals, mineral rock, or earth from any vein, lode, or ledge other than a vein, lode or ledge having its top or apex within the surface of the said_____lode mining claim, the property of this defendant.

Wherefore, defendant prays that this action may be dismissed and that defendant may go hence without day and that he have and recover his costs and disbursements herein.

Form No. 34.

ANSWER—NEGLIGENCE.

(Title of court and cause.)

(After making proper denials and admissions proceed as follows:)

And for affirmative answer defendant herein alleges:

1. The defendant herein repeats and alleges all the matters and things set forth in the subdivisions of its answer and numbered _____, and expressly makes said subdivisions, and each of them, a part of this its further and separate answer and affirmative defense the same as if incorporated herein, and prays that the said subdivisions, and each of them, be taken and deemed a part of this separate answer and defense the same as though herein set out at length.

2. That on the _____ day of _____, 19__, and at all times mentioned in the said complaint, the said mine and the _____ were in as safe and proper conditions as it is possible under the most skillful supervision of the most skillful miners to keep them and each of them. That the most approved method and manner of _____ has been adopted and was in use in said mine on said _____ day of _____, 19__. That the defendant has exercised and did exercise great care in supplying and did supply, its employees at said mine with suitable appliances and safe materials to _____ in a safe and proper condition so as to avoid all possible danger to its employees, and all persons working in or about said _____.

3. That the plaintiff was accustomed to working in mines of a similar character to that of defendant and was perfectly competent to judge of the safety of the said mine, and the safety of _____ wherein he was working, and the manner and method of _____. That the risk of working therein was assumed by the plaintiff as a part of his employment in said mine with a full knowledge of the conditions and safety thereof and of the manner and method of _____ at and before the said _____day of _____, 19__.

4. That the persons whose immediate duty it was and upon whom the responsibility rested to _____ in a safe and proper condition at the time of the plaintiff's alleged injuries, were all fellow servants of the plaintiff at the time of the said alleged accident and injury to plaintiff, and at all times prior thereto, during which the plaintiff was employed in working in the said _____.

5. That said alleged hurt or injuries were and are the result of the negligence of fellow servants of the plaintiff in _____ and not the result of any fault, negligence, neglect, intent or act on the part of defendant.

Form No. 35.

COMPLAINT—ADVERSE SUIT.

(Title of court and cause.)

Comes now the plaintiff in the above entitled action and complains of the defendant, and for cause of action, alleges:

1. That the plaintiff is a citizen of the United States of America.

2. That on or about the_____day of_____, 19__, being citizens of the United States, entered upon and discovered that certain mining ground, and mining claim since then known and designated as the_____mining claim, situated in the_____Mining District, County of_____State of_____, and then and there took possession of and located the same, after discovering therein a vein, lode or ledge of mineral bearing ore in place bearing_____by building large stone monuments at each of the corners of said mining claim and similar monuments at or near the center of each end line thereof and by placing in one of said monuments, to wit: the_____monument, a notice of location of said mining claim and designating the same as the location monument; all of said monuments being built in conspicuous places, and so placed upon the ground that the boundaries of said claim were distinctly marked on the ground and that the boundaries thereof could be readily traced. That at the time of making the said location said ground was a part of the public domain, unoccupied, vacant, and unclaimed. That the said claim so located by the above named persons was described in said notice of location as follows:

(Description.)

That said notice contained the names of the locators, to wit_____ and_____the date of location, the name of the claim, and such a description of the claim located with reference to a natural object and permanent monument as to identify the said claim. That thereafter, on the_____day of_____, 19__, the said locators caused a record of said location notice to be made in the office of the County Recorder of said County of_____and that thereafter, the said locators caused a record of said location notice to be made in the office of the Mining Recorder of said_____Mining District.

3. That after the said location of said_____mining claim all of the said locators of said_____mining claim did, by divers conveyances grant, bargain and sell, convey and confirm all right, title and interest they had in and to said claim to divers other person or persons who, thereafter, conveyed the said mining claim to the plaintiff, who, ever since has been and now is the owner of the said_____mining claim.

4. That the plaintiff and his said grantors have performed more than one hundred dollars ($100) worth of work on said claim each year since_____and performed work thereon of the value of_____ dollars.

5. That subsequent to the said location of the said mining claim and prior to the bringing of this suit, the defendant entered upon and took possession of a portion of said_____mining claim, calling the portion so taken possession of, with other ground, the_____ mining claim, and ousted and ejected the plaintiff from said portion,

and ever since then defendant has claimed, and does still claim adversely to this plaintiff an estate and interest in said portion of said mining claim, the said portion being the overlap of the said_____mining claim consisting of about_____acres, and particularly described as follows:

(Description.)

as appears by reference to a diagram of said claims hereto annexed, marked Exhibit A and hereby made a part of this complaint.

6. That on or about the_____day of_____, 19__, the defendant made an application to the Government of the United States for a patent for the said_____mining claim, including the said portion of the said_____mining claim overlapped. That thereafter, and on or about the_____day of_____, 19__, and within sixty days period of newspaper publication of the notice of such application the plaintiff herein filed his adverse claim against the issuance of the patent to the said defendant with the Register of the United States Land Office at_____, that being the Land Office District in which said_____mining claim is situated; said adverse claim showing the nature, boundaries and extent of such adverse claim; and the plaintiff brings this action for the purpose of determining such adverse claim and the right of possession to the said overlap hereinbefore and in paragraph 5 hereof particularly described.

Wherefore, plaintiff demands judgment that he is entitled to the possession of the said mining ground in dispute and for his costs herein expended.

Form No. 36.

COMPLAINT—ADVERSE SUIT.

(Federal Court.)

(Title of court and cause.)

Comes now the plaintiff in the above entitled action and complains of the defendant, and for cause of action alleges:

I. That he is a citizen of the United States of America, and was at all the times herein mentioned, continuously, and now is a citizen, resident and inhabitant of the County of_____in the State of_____.

II. That said defendant is a corporation organized and existing under and by virtue of the laws of the State of_____having its principal place of business at_____County of_____, State of_____and engaged in the business of mining in the_____Mining District, County of _____, State of _____, and that said defendant is, and at all the times herein mentioned, and prior thereto, was a citizen of said State of_____.

III. That the amount in controversy herein exceeds the sum or value of three thousand dollars ($3,000), exclusive of interest and costs.

IV. That on and prior to the_____day of_____, 19__, the property hereinafter described and known as Section_____in Township_____, Range_____, ___M., in the_____Mining District, County of_____, State of_____, was a part of the vacant and unappropriated public land of the United States, free and open to exploration and purchase by the citizens thereof, for the valuable mineral deposits therein contained.

V. That on said date, to wit: the_____day of_____, 19____, _____plaintiff and_____, being citizens of the United States, entered upon said ground, hereinafter particularly described, and known as the_____Placer Mining Claim, and segregated the same from the public domain, by posting a notice of location thereon and by distinctly marking the boundaries thereof upon the ground, so that the same could be readily traced; and did immediately thereafter, to wit: on or about the_____day of_____, 19____, make a discovery of_____and_____and other valuable minerals and valuable mineral deposits within the exterior boundaries of said_____ Placer Mining Claim, and did, thereafter, to wit: on the_____day of _____, 19__, cause to be recorded in the office of the County Recorder of said County of_____, which was and is the County within which said placer mining claim was and is situate, a true copy of said notice of location of said placer mining claim, giving the names of said locators, said plaintiff and his said associates as the locators thereof, the date of said location, the name of the claim, and such a description of such placer mining claim hereinbefore referred to, and herein after particularly described, with reference to natural objects and permanent monuments so that the same could be readily identified. Said property so located as aforesaid, being described as follows, to wit: the_____quarter of Section_____in Township_____of Range_____, ___M., containing one hundred and sixty acres of land.

VI. Plaintiff further alleges that said plaintiff and his said associates, ever since the said date of the location of said placer mining claim, and now are, the owners of said placer mining claim and location, premises and property, and the whole thereof, as to all persons, save and except the United States of America; in the possession and entitled to the possession of every part of the same. That said plaintiff and his said associates have complied with every rule, regulation and custom, in force in said_____Mining District, and with the provisions of the mining laws of the State of_____and the Acts of Congress in that behalf enacted; and the defendant herein has no right, title or estate whatsoever in or to said placer mining claim or location, or in or to any part, portion or parcel thereof.

VII. Plaintiff further alleges that defendant herein asserts that it is and pretends to be the owner of all of said Section_____in Township_____ of Range_____, _____M. hereinbefore described, under and by virtue of placer mining locations pretendedly made by it, or those under whom it claims, prior to the title of plaintiff, or his said associates, but which said pretended placer mining locations, and each thereof, so claimed by the defendant herein, or those under whom it claims, were pretendedly made by defendant at the time when the said Section_____and the whole thereof, had passed into private ownership, and the same, and no part thereof, was vacant or unappropriated public land, or free or open to exploration, or location, or purchase, as a part of the public domain, under the mining law of the United States, or otherwise.

VIII. That said assertion of title and pretension of ownership upon the part of the defendant herein, is wrongful and without right, and the alleged title of said defendant is fraudulent and void, the said defendant or those under whom it claims, never, at any time, having

made or adopted a discovery of any valuable mineral within the boundaries of said section hereinbefore described, and known as and called by it, the_____Consolidated Placer Mining Claim, or within the boundaries of any part or portion, or parcel of ground claimed by it, within said Section, by whatsoever name by it called.

IX. That the defendant herein, or those under whom it claims, did not, prior to the said location of said plaintiff and his said associates, as hereinbefore aforesaid, or at any other time, mark the boundaries of said or any placer location, therein alleged to be embraced and included in and constituting a part of its said alleged, and pretended_____Consolidated Placer Mining Claim, upon the ground, so that the same could be readily traced, nor traced at all.

X. Plaintiff further alleges that the defendant herein, and those under whom it claims, in fraud of the rights of the citizens of the United States, and particularly in fraud of the rights of plaintiff and his said associates, have caused to be recorded in the office of the said County Recorder, pretended notices of location, describing said Section____in Township____of Range_____, ___M., therein and thereby covering, including and overlapping the said placer mining claim and location of the plaintiff and his said associates in said_____quarter section_____; calling the alleged placer mining locations therein, the_____placer mining claim, pretendedly located upon and pretendedly including all of the northeast quarter of said Section_____; the_____placer mining claim pretendedly located upon and pretendedly including all of the southeast quarter of said Section_____; the_____placer mining claim pretendedly located upon and pretendedly including all of the northwest quarter of said Section_____; the_____placer mining claim pretendedly located upon and pretendedly including all of the southwest quarter of said section; each of said pretended locations pretendedly containing one hundred and sixty acres of land, and said four alleged locations of land pretendedly constituting the said alleged_____Consolidated Placer Mining Claim.

XI. That said notices of location, and each of them, is an assertion of rights claimed under and by virtue of fraudulent, void and fictitious mining locations falsely and fraudulently claimed to have been made by the defendant herein, or those under whom it claims.

XII. That the claims of the defendant herein are all, and each of them is, inferior and subordinate to the title of plaintiff and his said associates, which title, last aforesaid, arises by virtue of the valid location so made by said plaintiff and his said associates, as hereinbefore set forth, and defendant's claims and titles cast a cloud upon the possession and title of plaintiff, and his said associates, and prevent them from enjoying fully and peaceably the fruits of their said ownership.

* XIII. Plaintiff further alleges that the said alleged several placer mining claims, and locations, particularly mentioned in paragraph X hereof, and each of them, is and at all times has been, a fraudulent and void location against the Government of the United States, plaintiffs, said associates and all other persons interested in the ground

* In an action wherein the United States is not actually nor constructively a party it can not be shown that the claim is based upon a "dummy" location. Riverside Co. vs. Hardwick, 16 N. M. 479, 120 Pac. 325. See, also, Hall vs. McKinnon, 193 Fed. 572.

sought to be embraced therein or covered thereby. That at the time of the alleged location of each thereof, and at all times subsequently, there were not eight, nor any bona fide individual claimants as locators thereof, among the eight alleged locators of each of said alleged placer locations, and that one hundred and sixty acres of mineral land were so illegally and fraudulently included within each of said alleged placer mining claims or locations, to wit: said_____placer mining claim, said _____placer mining claim, said_____placer mining claim and said _____placer mining claim, by the defendant herein, or those under whom it claims, for the purpose of thereby surreptitiously acquiring and appropriating to their own use more mineral land in one location than they were entitled to under the mining law of the United States. That the names of_____and_____ named and used as locators of said alleged placer mining claims and locations mentioned in paragraph X hereof, by said_____and_____ were each and all dummies and sham locators and none of said six persons whose names were so used ever had or was intended by said _____ and_____ to have any estate, right, title, or interest whatsoever in said alleged placer mining claims or locations, or of, in, or to any one of them, nor were they, nor any of them, ever informed, or had any knowledge of the existence of said, or of any one of said pretended placer locations at the time of the said pretended location thereof, and said_____and_____did wrongfully and unlawfully conspire with each other at and prior to the date of the alleged location of each of said alleged and pretended placer claims and locations, to wrongfully and fraudulently make and claim the said several alleged and pretended placer mining claims or locations and each of them, in the manner and way aforesaid, and said_____ and_____ by the use of said six sham and dummy locators and did attempt to make said pretended locations, and each of them, in pursuance of such conspiracy, and said defendant has, and now claims, the said 160 acres of mineral land in each of said several placer mining claims and locations in controversy herein and called by defendant herein the _____ Consolidated Placer Mining Claim, under and by virtue of the said false, fraudulent and illegal pretended several locations mentioned and described in paragraph X hereof.

XIV. Plaintiff further alleges that the defendant herein in pursuance of such conspiracy and to fully consummate the same, and wrongfully claiming to be the owner of said alleged and pretended placer mining claims, did heretofore, to wit: on or about the_____ day of _____, 19_____, file or cause to be filed in the United States Land Office at_____ in the State of_____ its application for a patent from the Government of the United States of America, for said alleged and pretended_____ Consolidated Placer Mining Claim, and for the whole thereof, and therein described as embracing all of said Section_____ in Township_____of Range_____, _____M., containing about 640 acres of land.

XV. That in and by said application for patent, defendant herein wrongfully, falsely and fraudulenty set up, alleged and claimed that it, said defendant, was and is the owner and in possession and entitled to the possession of the whole of the said alleged _____ Con-

solidated Placer Mining Claim, embracing all of said Section_____ and the said placer mining claim and location of plaintiff and his said associates.

XVI. That the said defendant has at all times since maintained and prosecuted and now does maintain and prosecute its said false, fraudulent and wrongful application for said patent, and thereby the title of the plaintiff and his said associates in and to said placer mining claim and location hereinbefore mentioned, as duly located by plaintiff and his said associates, is impeached, clouded and encumbered and the value of the estate and property of the plaintiff and his co-tenants therein are greatly depreciated to the great and irreparable damage of the plaintiff and his said associates.

XVII. Plaintiff further alleges that heretofore, to-wit: on the_____ day of_____, 19____, and within the 60 days' period of newspaper publication of the said defendant's notice of application for patent, plaintiff filed his adverse claim against the issuance of such patent to the said defendant for its said alleged and pretended _____ Consolidated Placer Mining Claim, as so applied for, with the Register of the United States Land Office aforesaid, that being the Land Office District in which the said alleged and pretended_____ Consolidated Placer Mining Claim is situate, said adverse claim showing the nature, boundaries and extent of said adverse claim; and plaintiff brings this suit within 30 days after the filing thereof, for the purpose of determining said adverse claim and the right of possession to the said placer mining claim so located as aforesaid by said plaintiff and his said associates.

Wherefore, the plaintiff prays the judgment of this court that said defendant _____ has no estate, interest, possession or right of possession in or to said alleged _____ Consolidated Placer Mining Claim in said _____ quarter of said Section _____ in Township _____ Range _____ M. and the said placer mining claim and location hereinbefore and in paragraph V hereof, particularly described, as the property and estate of the plaintiff and his said associates and the said mineral substances in said _____ quarter of said section _____ contained, or either, or any of them; and that the plaintiff be deemed to be the owner, subordinate to the rights of his said associates, and subject to the paramount title of the United States of America and lawfully in and entitled to the possession of the placer mining claim and location in said paragraph V particularly mentioned and described and of each and every the mineral deposits and mineral substances therein contained, and that the plaintiff's title thereto and to each and all thereof and to the possession thereof be quieted and confirmed as against said defendant and all persons claiming by, through or under it; and that said defendant has not, and never has had, any estate, possession, right of possession, title or interest whatsoever of, in or to said _____ quarter of said Section _____ in Township _____ of Range _____ M., or any part or portion thereof, and that said defendant be forever barred from asserting or claiming any estate, right, interest or right of possession therein, or to any part or parcel thereof, or to any mining claim or location therein; and that plaintiff may have such other and further relief as the nature of his case may require and as shall seem meet.

Form No. 37.

COMPLAINT IN EJECTMENT.

(Precedent in Glacier Co. vs. Willis, 130 U. S. 471.)

(Title of court and cause.)

The plaintiff complains and alleges that it is a corporation organized and existing under the laws of the State of _____, and is a citizen of the State of _____, that the defendants are, and each of them is a citizen of the State of _____, and a resident of _____ in the County of _____ and State last aforesaid and that the property in controversy exceeds the value of three thousand dollars.

The plaintiff further alleges that on the _____ day of _____, 19__, one _____ and one _____, each being a citizen of the United States, went upon the public domain of the United States, theretofore wholly unoccupied and unclaimed, and located on said day a tunnel and tunnel site at the base of _____ Mountain, in _____ Mining District, County of _____, State of _____.

That afterwards, and on the same day, they marked the boundaries of their said location and commenced to run a tunnel into said _____ Mountain, and, after complying with the laws of the United States and the laws of the State of_____, and the local rules and regulations of said _____ Mining District, they caused to be made out and recorded in the Recorder's office of the County of _____ aforesaid, a location certificate of said tunnel claim, which said certificate described the location and boundaries of said tunnel claim.

That from the day of said location until the ouster hereinafter set forth the said locators of said tunnel claim, and their grantees remained continuously in possession of the said tunnel claim, and have expended thereon more than the sum of _____ dollars.

That plaintiff is the owner of said tunnel claim above described by location and purchase, and is now entitled to the quiet and peaceful and exclusive possession thereof by virtue of a full compliance on its part, and on the part of its grantors, with the laws, rules and customs above set forth.

That the plaintiff, and its grantors have been in the peaceful and undisputed possession of said tunnel claim by virtue of said location, occupation, preemption and record for more than _____ years prior to the ouster hereinafter complained of.

That plaintiff and its grantors, for more than _____ consecutive years prior to the acts of the defendants, hereinafter mentioned, paid all the taxes, legally or otherwise assesed upon said tunnel claim, and have worked and mined the same from said _____ day of _____, 19_____, up to the time of the acts of the said defendants hereinafter set forth.

That said tunnel claim, so located, embraces _____ valuable lodes or veins which have been discovered, worked and mined by the plaintiff and its grantors.

That said tunnel claim was, by its locators, named the _____ tunnel claim, and is described more fully as follows:

(Description.)

Plaintiff further alleges that while it was in the quiet and peaceable possession of said tunnel claim, and every part thereof, the defendants wrongfully, and without right, and against the will and without the consent of the plaintiff, to wit: on or about the_____day of_____, 19__, entered upon the premisess, and into said tunnel, so run by plaintiff and its grantors on said claim, and wrongfully and unlawfully ousted the plaintiff therefrom; claiming said tunnel as the_____ (claim).

That on or about said last mentioned date the defendants, without right, made a pretended location of a lode claim across said tunnel and within said tunnel claim, and therein wrongfully ousted the plaintiff therefrom, claiming that they had discovered a lode, which they called the _____ lode.

That the defendants ever since hitherto unlawfully and wrongfully withheld the possession of the said premises and tunnel claim from the plaintiff to its damage in the sum of _____ dollars.

Wherefore, plaintiff demands judgment against the defendants.

1. For the recovery of the possession of said _____ tunnel, tunnel-site and claim.

2. For the sum of _____ dollars, damages for the wrongful withholding thereof.

3. For costs of suit.

Form No. 38.

COMPLAINT—UNDERGROUND TRESPASS.

(Title of court and cause.)

Comes now the plaintiff in the above entitled action and complains of the defendant herein, and for cause of action alleges:

1. That the defendant, the said _____ Mining Company is, and was at all the times hereinafter mentioned, a corporation organized and existing under the laws of the State of _____, having its principal place of business at _____ in said state and engaged in the business of mining at _____ Mining District, in the County of _____ and state aforesaid.

2. That on the _____ day of _____, 19____, plaintiff was and ever since has been, and now is, the owner and possessed and entitled to the possession of that certain parcel of mining ground situate and being in the _____ Mining District in the County of _____, and State of _____, consisting of those two certain contiguous and adjoining pieces of mining ground, the one known as _____ Mining Claim and also known as _____ Lode Claim and in the system of United States surveys for patents for mineral lands from the Government of the United States designated as Survey No. _____, and also so designated in a certificate of purchase therefor from the United States of America, which was issued on the _____ day of _____, 19____, to the plaintiff by the Receiver of the United States Land Office at _____, in the State of _____, and the other known as _____ Mining Claim, and described as follows, to-wit:

(Description.)

together with all the veins, lodes, ledges, dips, deposits and bodies of ore, rock and earth bearing _____ and _____ and other precious metals.

3. That said mining claim and ground lastly hereinbefore mentioned adjoins said _____ Mining Claim or ground on the _____ and that said two lode claims have been worked by plaintiff since about _____, and form and constitute but one parcel of mining ground and one property.

4. That said mining ground contains valuable mineral deposits, lodes, ledges, dips, deposits and veins, rock and earth bearing _____ and _____ and other precious metals; and the said mineral deposits, lodes, ledges, dips, deposits and veins constitute the sole value of said mining ground.

5. That plaintiff was at all the times hereinafter mentioned, and now is engaged in mining and developing the said mining ground, lands and premises, and extracting therefrom the said ores and minerals; and constructed at great expense, and has and had thereon mines, drifts, cuts, excavations and other works necessary for and adapted to the work of mining and developing the said mining ground.

6. That heretofore, and on or about the _____ day of _____ 19_____, the said defendant, said _____ Mining Company, by itself and its agents, servants and employees, forcibly and wilfully, against the will and without the consent of the plaintiff entered into and upon the said mining ground hereinbefore described, and commenced to, and then and thereafter, for the purpose of mining the said ground and extracting the ores therefrom, cut, made and excavated certain drifts and openings into and under and upon the said mining ground, and invaded the drifts, excavations and mines made thereon by the plaintiff, and ever since last mentioned date has intruded and trespassed upon the said mining ground, drifts, excavations and mines of the plaintiff, and has dug up and extracted, taken out of and removed from said mining ground and converted to its own use large quantities of the mineral deposits, earth and ores bearing _____ and _____ other precious metals and the mineral deposits therein of the value of _____ dollars, and upwards, and will thereby take from the said mining ground the entire value thereof, to the great and irreparable injury of the plaintiff.

7. That unless the said defendant, its agents, servants and employees are restrained and enjoined from intruding and trespassing upon the said mining ground, and making cuts, openings and excavations therein and digging up, extracting, removing and carrying away from said mining ground said mineral deposits, rock, ores, and earth bearing _____ and _____ and other precious metals, in the value and substance of said mining ground will be destroyed, and this plaintiff will suffer irreparable injury.

Wherefore, plaintiff prays that this Honorable Court grant to him a writ of injunction *pendente lite* issuing out of and in accordance with the rules and practice of this Honorable Court to be directed to the said defendant _____ Mining Company, to restrain it, and its agents, servants, employees and confederates, from entering into or upon the mine, or mines, mining ground, lode, dips, drifts, cuts, exca-

vations or works, or upon any part of the land, property and premises hereinbefore particularly described, and from working or mining thereon, or making or continuing any cut, opening or excavation on or in said mining ground, or upon or in any part thereof, or digging up, extracting, or removing from said mining ground, or any part thereof, any mineral, mineral deposit, ore, rock or earth, or any mineral substance whatever, whether the same be in place, or heretofore severed from the freehold, and from in any manner hindering or obstructing plaintiff, or his agents, servants or employees, or any, or either of them, in working or mining upon said premises, and from in any manner interfering with the said premises, or with anything thereon; as, also, a restraining order to the same effect until an application for such an injunction can be heard, and that at the final hearing such injunction may be made perpetual and that an account be taken of the waste committed, and for such other and further relief as to this Court may seem just and meet.

Form No. 39.

COMPLAINT—QUIETING TITLE.*

(Precedent in Thompson vs. Spray, 14 Pac. 182.)

(Title of court and cause.)

Comes now the above named plaintiffs, and by their attorneys _____, and for cause of action allege that on the_____day of_____, by an order of_____court of said_____county duly made on that day, and before the filing of this complaint, the said_____was appointed guardian, *ad litem* for_____, a minor. That the plaintiffs now are, and for a long time hitherto have been, the owners of, in the possession of, and entitled to the possession of, that certain mining claim known as_____mining claim and situate, lying and being in the County of_____, State of_____, and bounded and particularly described as follows, to wit:

(Description.)

That said defendant claims an estate and interest in the above described premises adverse to said plaintiffs; that the said claim of defendant is without any right whatsoever, and that the said defendant has not any estate, right, title or interest whatsoever in the said mining claim, land or premises, nor any part thereof.

Wherefore, plaintiffs pray for judgment: (1) that defendant may be required to set forth the virtue of his claim, and that all adverse claims of the defendant may be determined by a decree of this court; (2) that, by said decree, it be adjudged that the defendant has no estate or interest whatsoever in or to said land, mining claim and in this complaint described, and that the right, title and interest of plaintiffs therein to said land and mining claim is good and valid; (3) that the defendant be forever enjoined and debarred from asserting any claim whatsoever in or to said premises and property, or any part thereof, adverse to the plaintiff, and for such other and further relief as to this court may seem meet and proper, and for costs of suit herein.

* For form of complaint in suit to quiet title and for an injunction and restraining order, see Rose's Fed. Proc. Equity Form No. 465.

Form No. 40.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

For precedents see

Iron Co. vs. Campbell, 135 U. S. 286 (known lode within placer claim).

Haws vs. Victoria Co., 160 U. S. 303 (discovery—boundaries—trespass).

Gutierres vs. Albuquerque Co., 188 U. S. 547 (eminent domain—canals—reservoirs).

Williams vs. U. S., 104 Fed. 50 (eminent domain).

Cascaden vs. Dunbar, 191 Fed. 172 (tenancy in common).

Morenhaut vs. Wilson, 52 Cal. 264 (abandonment—absence of intent).

Dwinnell vs. Dyer, 145 Cal. 14, 78 Pac. 247 (conflicting locations).

Harris vs. Lloyd, 11 Mont. 390, 28 Pac. 737 (mining partnership—rights of co-owners).

Lockhart vs. Washington Co., 16 N. M. 246, 117 Pac. 883 (fraud).

New England Co. vs. Broyles, 87 Okla. 55, 209 Pac. 312 (implied obligation to develop oil well—cancellation of lease).

Plummer vs. McLain, ___ Tex. C. A. ___, 192 S. W. 571 (misdescription of claim in patent).

Harrington vs. Chambers, 3 Utah 94, 1 Pac. 362 (conflicting claims—assessment work outside of location).

Eilers vs. Boatman, 3 Utah 159, 2 Pac. 66 (lack of monuments—overlapping locations).

Springer vs. S. P. Co., ___ Utah ___, 248 Pac. 620 (trespass).

Yarwood vs. Johnson, 29 Wash. 643, 70 Pac. 123 (forfeiture—fraudulent relocation by cotenant).

Form No. 41.

INSTRUCTIONS TO JURIES.

For precedents see

Flagstaff Co. vs Tarbet, 98 U. S. 463 (crosswise location).

Argentine Co. vs. Terrible Co., 122 U. S. 478 (discovery).

Larkin vs. Upton, 144 U. S. 19 (broad lode).

Cheesman vs. Shreeve, 40 Fed. 787 (location).

Cheesman vs. Hart, 42 Fed. 98 (parallelism of boundary lines).

Meydenbauer vs. Stevens, 78 Fed. 787 (location—rights of locator).

Walton vs. Wild Goose Co., 123 Fed. 209 (location—excessive location of placer claim—assessment work).

Charlton vs. Kelly, 156 Fed. 433 (discovery).

Rush vs. French, 1 Ariz. 99, 25 Pac. 819 (location, nonresidents—forfeiture—ejectment).

Big Three Co. vs. Hamilton, 157 Cal. 130, 107 Pac. 301 (assessment work—forfeiture).

Willeford vs. Bell, 5 Cal. Unrep. 679, 49 Pac. 6 (sufficiency of marking).

Southern Nevada Co. vs. Holmes, 27 Nev. 107, 73 Pac. 759 (apex suit).

Special Issues.

Bulwer Co. vs. Standard Con. Co., 83 Cal. 589, 23 Pac. 1109 (special issues submitted to jury).

Form No. 42.

ORDER TO SHOW CAUSE AND RESTRAINING ORDER.

(Underground Trespass.)

(Title of court and cause.)

Upon reading and filing the complaint herein (with the affidavit of _____, in support thereof), and on motion of_____, Esq., attorney for the plaintiff.

It is ordered

that the defendant, _____ Mining Company show cause, if any it has, before the above entitled court, at the court-house thereof, in the City of _____, in the County of _____, and State of _____, on the _____ day of _____, 19____, at ____ o'clock, in the forenoon of that day, or as soon thereafter as counsel can be heard, why an injunction pendente lite should not issue, restraining and enjoining said defendant, _____ Mining Company, its agents, servants and employees and confederates from entering into or upon the mining ground situate and being in the _____ Mining District, County of _____, and State of _____, consisting of those two certain contiguous and adjoining premises or mining ground, the one known as the _____ mining claim and also known as _____ lode claim and in the system of United States Surveys for patents for mineral lands from the Government of the United States designated as Survey No. _____, and also so designated in a certificate of purchase from the United States of America, which was issued on the _____ day of _____, 19____, to the plaintiff by the Receiver of the United States Land Office at _____, in the State of _____, and the other described as follows, to wit:

(Description.)

and from entering into or upon the mine or mines, lodes, drifts, cuts, excavations or works, or any thereof, on said mining ground or into or upon any part of said ground, and from working, or mining, or making or continuing any cut, opening or excavation on, or in said mining ground, or on or in any part thereof, or digging up, extracting, taking or removing from said mining ground, or any part thereof, any mineral, mineral deposit, ore, rock or earth, or any mineral substance whatever, whether the same be in place, or severed from the freehold; and from in any manner hindering or obstructing plaintiff, or his agents, servants or employees, or any, or either of them, in working and mining upon said premises, and from in any manner interfering with said premises, or with anything thereon; such cause to be shown on said complaint (and on the affidavit of _____, thereto annexed) and to be herewith served.

And it is further hereby ordered that in the meantime, and until the hearing upon the foregoing order to show cause and the further order of this court, the said defendant _____ Mining Company, its agents, servants and employees, and each and every of them, be, and they are hereby enjoined and restrained and ordered to refrain and desist from entering into or upon the said mining ground, or any

part thereof, in the foregoing order to show cause mentioned and designated; and from entering into, or upon, the mine or mines, lodes, dips, cuts, excavations, or works, or any part thereof, on said mining ground; and from working or mining, or making, or continuing any cut, opening, or excavation on, or in said mining ground; or digging up, or extracting, taking or removing from said mining ground, or any part thereof, any mineral, mineral deposit, ore, rock or earth, or any mineral substance whatever, whether the same be in place or severed from the freehold; and from in any manner hindering or obstructing plaintiff, or his agents, servants, or employees, or any, or either of them, in working and mining upon said premises, and from in any manner interfering with said premises, or with anything thereon, upon the said plaintiff giving bond in the sum of _____ dollars.

And it is further hereby ordered that any and all affidavits, depositions and documents to be used by defendant on the hearing of said order to show cause shall be served, by copy, on the attorney for the plaintiff at least _____ days before the hearing of said order.

Dated _____, 19____.

Form No. 43.

ORDER FOR SURVEY, ETC.—UNDERGROUND TRESPASS.

(Precedent in St. Louis Co. vs. Montana Co., 9 Mont. 288, 23 Pac. 510; State vs. Anaconda Co., 26 Mont. 396, 68 Pac. 570.)

(Title of court and cause.)

This matter coming on to be heard upon the petition for an order for survey, examination, and inspection of all of the shafts and underground workings in the _____ and _____ lode claims, or connected therewith, and an order to show cause having heretofore been issued and duly served upon said _____ Mining Company; and said defendant appearing by counsel; and said petition having been duly heard and considered upon the return of said order to show cause upon evidence introduced by both parties, the court finds that it is necessary that the petitioner have a survey and inspection.

It is therefore ordered that you, the said _____ Mining Company, give to _____ the petitioner herein, a survey, examination and inspection of all of the shafts and underground workings contained within the _____ and _____ lode claims, situate in _____ Mining District, County of _____, State of_____, and of all the underground workings connected therewith and extending into the _____, and _____ lode claims.

It is further ordered that _____ the petitioner herein make such survey, examination and inspection commencing on the _____ day of _____, 19____, and that you, the said _____ Mining Company, at all the times during the said period, upon the demand of said _____ lower and hoist him through said shaft and permit him to enter said underground workings; that you remove all bulkheads and obstructions which may be necessary to have removed to permit such survey, examination and inspection.

That said work of survey, examination and inspection shall be completed within _____ days from the date of this order unless, for good cause, the court shall order a longer time to be used.

Said _____ petitioner herein shall be responsible for all damage done in making said survey, examination and inspection.

The survey, examination and inspection by the said _____ shall be confined within the vertical planes of the end lines of _____ and _____ lode claims, except so far as it may be necessary to run lines in underground workings outside of such planes in order to complete an accurate survey of said workings within the said end lines. Such survey to be conducted so far as possible without interference with the regular and orderly working and operation of the said _____ and _____ lode claims, or the employees of said _____ Mining Company in the discharge of their various duties; and the engineers of the said_____ shall not dispose of, nor sell to any one any plan or section of said _____ and _____ lode claims; or any matter or data obtained or resulting from such survey, except to _____, its agents and attorneys. The surveyors of said _____ are not to enter said _____ and _____ lode claims unless accompanied by three representatives, appointed by said _____ Mining Company, to accompany them, unless, after reasonable notice, not to exceed _____ such persons shall fail to attend. The persons so hereinbefore authorized to make such survey shall not take nor remove from said _____ and _____ lode claims any samples of ore or minerals at any point therein, but they shall be allowed to examine and trace the walls of the vein or fissure; and for this purpose they shall be allowed to use the pick and remove such material as shall enable them to make such survey, examination and inspection. A copy of this order shall be sufficient notice to said _____Mining Company, its agents, servants, officers and employees of the right of said _____ and the persons named in this order to make said survey, examination and inspection, and to enter the premises herein described for such purpose.

Done in open court this _____ day of _____, 19____.

Form No. 44.

PETITION FOR SURVEY, ETC.—UNDERGROUND TRESPASS.

(Precedent in State vs. Anaconda Copper Co., 26 Mont. 396. 68 Pac. 570.)

(Title of court and cause.)

Comes now_____and respectfully alleges and shows to the court: That he is now, and for a long time prior hereto has been the Lessee from the Owners of an undivided_____of the_____lode mining claim, situated in the_____Mining District, County of_____, State of_____, and lying adjacent to the_____and_____ lode claims on the_____and entitled to become the purchaser of said portion of said lode claim under and by virtue of an agreement from the owners thereof. That the_____Mining Company is in the possession of the_____and_____lode claims, and of all the shafts and underground working therein.

That, as petitioner is informed and believes, certain underground workings have been made by said_____Mining Company into the said_____lode claim. That there are certain veins or ore bodies

which have their tops or apices in the said lode claim but so far depart from a perpendicular in their downward course as to pass into the _____and_____lode claims beneath the surface thereof, and that as petitioner is informed and believes said_____ _____Mining Company has been and is now engaged in extracting valuable ores from said_____lode claims and the veins and ores belonging thereto, and that certain of the underground workings made in and extending from the_____and_____lode claims are upon the veins and ore bodies which belong to said_____ lode claim.

That the only means of access to said underground workings is through the shafts in said_____and_____lode claims in the possession of said_____Mining Company and the underground workings in said claims and extending therefrom. That it is necessary for your petitioner to have a survey, examination and inspection of all of the shafts and underground workings in said_____ and_____lode claims and the underground workings extending therefrom or connected therewith, in order to ascertain, protect, and enforce his rights to the_____lode claim, and to the veins and ore bodies belonging thereto.

That on the_____day of_____your petitioner served upon said_____Mining Company a demand and request in writing of which Exhibit "A" hereto attached and hereof made a part, is a copy, but that said_____Mining Company has failed and refused for more than_____days since the service of said demand and request upon it to grant the same or to permit your petitioner to have the survey, examination and inspection therein, as requested.

That as your petitioner is informed and believes it will be necessary for him to have access to said shafts and underground workings in said_____and_____lode claims by at least_____persons, for a period of_____days, in order to make a proper and thorough survey, examination and inspection of the same.

Wherefore, your petitioner prays an order of the court, or the judge thereof, requiring the said_____Mining Company to appear and show cause why an order for survey, examination and inspection of said_____and_____lode claims, and of all the shafts and underground workings therein contained, should not be granted to him in accordance with the allegations of this petition.

Form No. 45.

VERDICT—ADVERSE SUIT.

(Precedent in Bennett vs. Harkrader, 158 U. S. 441.)

(Title of court and cause.)

We, the jury find for the_____.

_____,
Foreman.

Form No. 46.

NOTICE OF LODE LOCATION.*

TO ALL WHOM IT MAY CONCERN:

This mining claim, the name of which is the _____ Mining Claim, is and was located by the undersigned, on the_____ day of _____ 19_____.

The length of this claim is _____ feet, and _____ claim _____ feet in a_____ direction and _____ feet in a _____ _____ direction from the center of the discovery _____, at which this notice is posted, lengthwise of the claim, together with _____ feet in width on each side of the center of said claim. The general course of the lode is from the _____ to the _____.

The claim is situated in _____ Mining District, County of _____, State of _____, about _____ in a _____ _____ direction from _____.

The surface boundaries of this claim are marked upon the ground as follows: Beginning at _____ _____ at a point in a _____ direction _____ feet from the discovery shaft (at which this notice is posted), being in the center of the _____ end line of said claim; thence _____ feet to a _____ being the _____ corner of said claim; thence _____ feet to a _____ being at the _____ corner of said claim thence _____ feet to a _____ at the center of the _____ end of said claim; thence _____ feet to a _____ being at the _____ corner of said claim; thence _____ feet to a _____ at the corner of said claim; thence _____ feet to the place of beginning.

_____

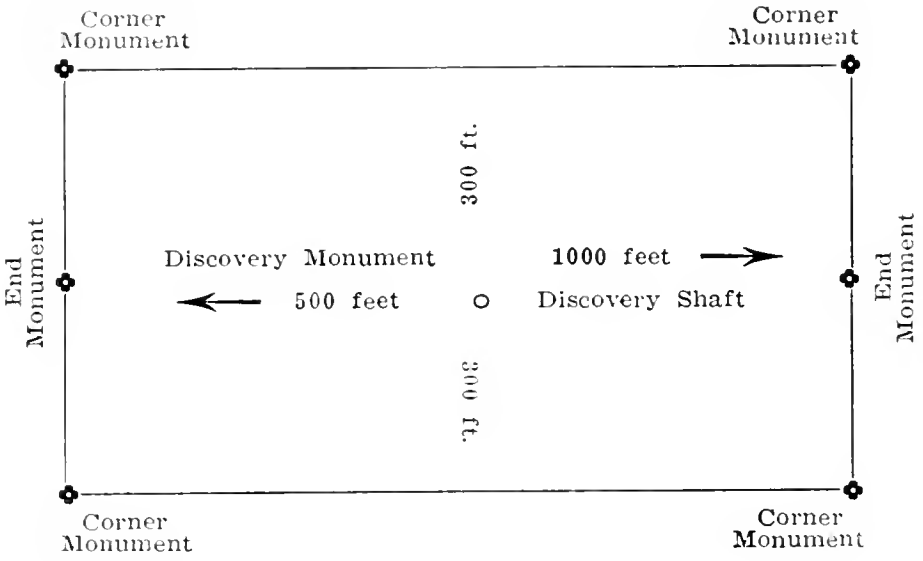
_____

_____

Locators.

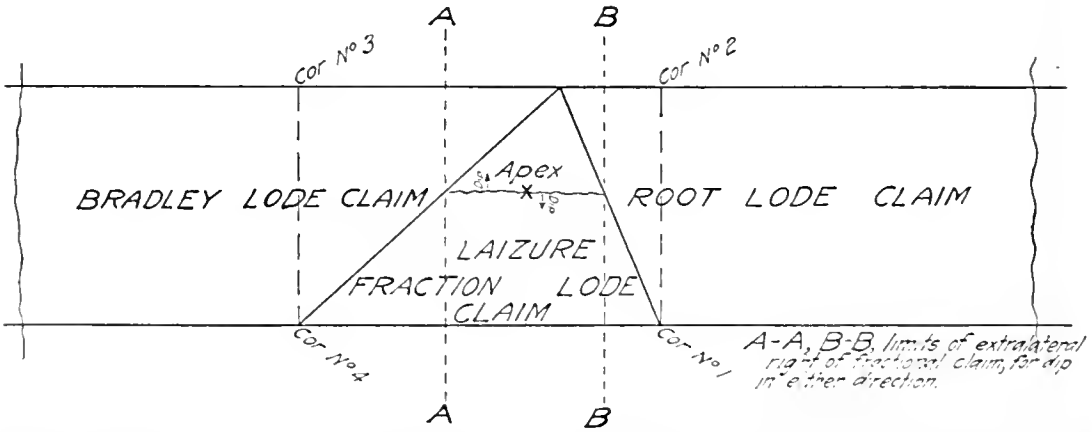
* For another form of location notice see Hammer vs. Garfield, 130 U. S. 291.

This diagram is intended to give a general idea of plan of location.



Fractional Lode Location.

Under the authority of the case of Jim Butler Co. vs. West End Co., 247 U. S. 454, a fractional location may be perfected by placing its location monuments upon adjoining territory, as suggested in the hypothetical case illustrated by the following diagram, and the extra-lateral right, if any, thus secured in consonance with the dip. See, also, Del Monte Co. vs. Last Chance Co., 171 U. S. 55.



NOTE.—All notices of location, or of forfeiture, or of annual expenditure substantially must conform to the law of the state or the local rules of the mining district within which the claim is situated.

Form No. 47.

AMENDED NOTICE OF LODE LOCATION.*

I make this amended location of the _____ lode claim, claiming by right of discovery, location, primal appropriation, and possession _____ feet, linear, on this vein or lode _____, the same being _____ feet along the said vein or lode in a

* For another form of amended location see Porter vs. North Star Co. 133 Fed. 756.

_____ direction from the discovery stake and_____ feet along the said vein or lode in a _____ direction therefrom, together with _____ feet in width on each side of the center at the surface of said vein or lode.

Situate in _____ Mining District, County of _____, State of _____, and more particularly described as follows, to wit:

(Description.)

This amended location is made in conformity with the original location, made _____, 19_____, recorded _____, 19_____, in Book _____, page _____, of_____ _____, in the office of the Recorder of said county, and it is made for the purpose of more definitely describing the boundaries of said lode claim, correcting any irregularities, informalities or errors, supplying omissions and correcting any defects which may have existed or do exist in the original location, or the record thereof, hereby waiving no rights acquired under and by virtue of said original location. And if the original location is void, then this amended location shall be an original location, and this amended location notice an original notice of location

Date of Original Discovery_____, 19_____.
Date of Amended Location_____, 19_____.

_____,
Locator.

Form No. 48.

NOTICE OF MILL-SITE LOCATION.

(330 feet by 600 feet equals 5 acres.)

Notice is hereby given that the undersigned, proprietor of that certain vein or lode claim known as the _____ mining claim (or the owner of that certain quartz mill or reduction works known as the _____) has this day located five (5) acres of non-mineral land to be known as the _____ mill-site, situated in the _____ Mining District, County of _____, and State of _____, and described as follows:

Beginning at the northeast corner of said mill-site, a post marked N.E. cor. No. 1, which corner is about _____ feet in a _____ direction from the corner of the _____ mining claim, U. S. survey No. ____, thence west _____ feet to a post marked N.W. cor. No. 2; thence south _____ feet to a post marked S.W. cor. No. 3, thence east _____ feet to a post marked S.E. cor. No. 4; thence north _____ feet to the place of beginning.

Dated _____, 19_____.

_____,
Locator.

Form No. 49.

NOTICE OF PLACER LOCATION.

(Precedent in Kern Oil Co. vs. Crawford, 143 Cal. 298, 76 Pac. 1111.)

Placer Location (on surveyed land).

Notice is hereby given that the undersigned has this _____ day of _____, 19_____, located a placer mining claim situated in _____ Mining District, County of _____, State of _____, described as follows: the _____ of Section _____, in Township _____, Range _____. _____M., containing _____ acres.

This claim shall be known as the _____ placer mining claim.

_____,
Locator.

Form No. 50.

NOTICE OF TUNNEL SITE LOCATION.*

Notice is hereby given that I, the undersigned, have this_____ day of_____, 19____, located a tunnel right, the name of which shall be and is_____Tunnel Claim, for the purpose of discovering mines on the line thereof. Said tunnel right or location is situate in_____Mining District, County of_____, State of_____, and is described as follows: Commencing at the face or point of commencement of said tunnel, at which this notice of location is posted, and running thence three thousand feet in a _____direction, to a post marked_____, and_____ feet wide on each side of the center line of said tunnel. The boundary lines of said tunnel are marked by stakes (*or monuments*) placed along said lines at an interval of not more than (*six*) hundred feet from the face or commencement of said tunnel to the terminus of three thousand feet therefrom, and respectively marked_____. Said tunnel shall be_____feet in width and_____feet high in the clear. This tunnel claim is located about_____from _____. (*State courses and distances to some natural object or permanent monument as shall identify the claim or tunnel right.*)

_____
Locator.

* Mr. Shamel, in his work on Mining Law, says: "The question as to the width of the tunnel claim on each side of the center line thereof is much in doubt from the conflicting decisions, and it is deemed safest to establish the lines of the claim seven hundred and fifty feet distant from the center line, on either side thereof, and to make the notice accordingly. It has, however, been held that the claim may be fifteen hundred feet in width on either side of the center line—thus practically making the entire claim three thousand feet square—and from this it would follow that upon discovery of a lode within the tunnel, the location might be made in such a way as to give fifteen hundred feet from the point of discovery *in either direction* (though not in both directions.) The writer doubts the correctness of this position. * * * The form may be varied as desired in this particular. G. D. F. See Ellet vs. Campbell, 33 Pac. 521 (aff'd. in 167 U. S. 116); Enterprise Co. vs. Rico-Aspen Co., 66 Fed. 200" (aff'd. in 167 U. S. 108) (page 331). In Morrison's Mining Rights (15th ed.) it is said: "It is safer for the tunnel claimant to elect at the outstart to take seven hundred and fifty feet on each side, or some other definite number of feet on each side, of the bore of his proposed tunnel. (Page 312.) See also Costigan Min. Law, page 232, and Min. Regs., pars. 16, 17, 18.

State of_____}
County of_____} ss

_____, being first duly sworn according to law, deposes and says, that he is the locator of_____Tunnel Claim. That it is his *bona fide* intention to prosecute work on said tunnel with reasonable diligence for the discovery of mines and the development of the same. That he has commenced such tunnel at the face or commencement of said tunnel as described in the foregoing notice of location and has driven said tunnel a distance of_____therefrom, at an expense of_____dollars.

_____

Subscribed and sworn to before me, this_____day of_____, 19____.

_____

Notary Public.

My commission expires_____.

Form No. 51.

ADVERSE CLAIM.

In the United States Land Office at _____, State of_____.

In the matter of the application of _____ Mining Company, a corporation, for a patent for the _____ mining claim situate in _____ Mining District, County of _____, State of _____, Section _____, Township No. ____, Range No. ____, _____ Meridian.

State of_____}
County of_____} ss

To the Register of the United States Land Office at _____, State of _____:

_____, being first duly sworn, according to law, deposes and says that he is a citizen of the United States, born in the State of _____, and residing at _____, in the County of _____, and State of _____.

Deponent further says that in virtue of a compliance on his part and that of his grantors with the laws of the United States relating to taking up, locating and holding mining claims or mineral lands in the public domain and with the laws of the State of _____, and with the local laws, customs and usages of the _____ Mining District, deponent has become, and now is, the owner, in possession of and entitled to own and possess _____ linear feet on the _____ vein, lode or ledge of quartz and other rock in place, bearing _____ and _____, together with certain surface ground appurtenant thereto for the convenient use thereof in working said vein, lode or ledge; said claim embracing in all _____ acres in superficial area, situate, lying and being in the _____ Mining District, County of _____, State of _____.

Deponent further says that the facts relative to his claim, right and title of possession to said vein, lode or ledge and mining ground, claim and premises are substantially as follows: That on and before the day of the location thereof, hereinafter mentioned, the said _____

vein, lode or ledge and mining premises were mineral lands of the public domain and entirely vacant and unoccupied and were not owned, held or claimed by any person or party as mining ground, or otherwise, and that while the same were so vacant, unoccupied and unclaimed, to wit: on the _____ day of _____, 19__, _____ and _____, each of them being citizens of the United States, entered upon and explored the premises, discovered and located the said _____ vein, lode or ledge and occupied the same as a mining claim.

That the said premises so located and appropriated consist of _____ feet in a _____ direction on and along the said vein, lode or ledge from the location stake and _____ feet in width, as will more fully appear by reference to the notice of location, a duly certified copy whereof is hereunto annexed, marked Exhibit "A," and made a part hereof. That the said locators upon the making of said location entered into and took possession of said vein, lode or ledge, mining ground, claim and premises, erected thereon such stakes and monuments as were necessary to point and designate the boundaries and extent thereof, did such work thereon and performed all such acts as were required by the mining laws of Congress, and of the State of _____ and by the laws, customs, rules and regulations of the miners of the said _____ Mining District, in which said claim is situated and filed their said notice of location in the office of the County Recorder of said County of _____, by whom the same was recorded on the ____day of_____, at page_____ of Book_____ of_____ of the Records of said county.

That said locators remained in the possession, occupation and enjoyment of the said vein, lode or ledge, mining claim, ground and premises and continued from the date of said location to work upon, prospect and develop the same until the _____ day of _____, 19____, on which date the said locators, owners, and possessors of said vein, lode or ledge, and said mining ground, claim and premises, by their deed in writing, good and sufficient in the law, conveyed all of said _____ vein, lode or ledge, mining ground, claim and premises, so as aforesaid located by them, to _____, who thereupon entered into, took possession and control, and has since possessed, controlled, enjoyed and occupied all of said _____ vein, lode or ledge, mining ground, claim and premises. That the said locators and said _____, their said grantee and the adverse claimant herein did comply with every rule, regulation and custom in force in the said _____ Mining District, and with the provisions of the mining laws of the State of _____, and of the Acts of Congress in that behalf enacted.

That there is a _____ vein, lode or ledge with _____ wall within said mining ground, claim and premises of an average width of_____, running in a _____ and _____ direction, containing _____ vein matter carrying _____; and there is blocked out, or in sight _____ tons of ore therein.

That there has been a large amount of money expended on said _____ vein, lode or ledge and said mining ground claim and premises by said _____, the adverse claimant herein, and his grantor and predecessors in interest aforesaid, to wit: _____ dollars, in _____, and there has been extracted from said vein, lode or ledge and said mining ground, claim and premises, more than _____ tons of ore of the value of _____ dollars. That by reason of the facts

aforesaid deponent has become and now is the rightful owner (except as against the paramount title of the United States), and the lawful possessor of the said vein, lode or ledge and the said mining ground, claim and premises.

That the abstract of title, herewith presented and made a part hereof, shows the deed, conveyance and transfer, whereby deponent became, and is vested with all the right, title and interest of the said locators in and to the said vein, lode or ledge, and said mining ground and premises, so located as aforesaid.

Deponent further says that the pretended mining claim of said applicant for patent known as the _____ mining claim, overlaps, embraces and includes a part and portion of deponent's said vein, lode or ledge, mining ground, claim and premises.

That the relative position of said several mining claims and the boundaries and extent of said overlap, at the surface, are more particularly set forth, mentioned and specifically described by courses and distances in the plat hereto attached, marked Exhibit "B," and made a part hereof.

Wherefore, deponent does dispute and contest the right of said applicant for a patent from the government of the United States for said pretended_____mining claim, and respectfully asks that all further proceedings in the matter of said application be stayed in said land office until the controversy shall have been settled by a court of competent jurisdiction.

Subscribed and sworn to before me, this_____day of_____, 19____.

_____

Notary Public.

My commission expires_____.

Form No. 52.

AFFIDAVIT OF CITIZENSHIP.*

State of_____}
County of_____} ss.

_____, being first duly sworn according to law, deposes and says: that he is the applicant for patent for the _____mining claim Serial No. _____ situate in _____ Mining District, County of _____ and State of _____. That he is a native born citizen of the United States of America. That he was born at _____ in the County of _____, State of _____, and that he now is and for more than _____ years last past has been a resident of_____, in the County of _____, State of _____.

_____

Subscribed and sworn to before me, this_____day of_____, 19____.

_____

Notary Public.

My commission expires_____.

* In case an applicant has declared his intention to become a citizen or has been naturalized, his affidavit must show the date, place, and the court before which he declared his intention, or from which his certificate of citizenship issued, and present residence. Min. Regs., par. 68.

Form No. 53.

AFFIDAVIT OF CHARGES AND FEES.

(Caption as in Form No. 51.)

State of_____}
County of_____} ss.

_____, being first duly sworn according to law, deposes and says, that he is the attorney in fact for the _____ Mining Company, the applicant for patent for the _____ mining claim, designated as Serial No. _____. That said applicant has paid the following charges and fees for publication, and surveys and fees and money to the Register of the Land Office, viz:

To the Public Survey Office _____, $_____
To the U. S. Mineral Surveyor for making the survey____, $_____
To _____ for publication of notice _____, $_____
To the Register for filing application _____, $_____
To the Register for the land embraced in the claim_____, $_____

_____

Subscribed and sworn to before me, this_____day of_____, 19____.

_____
Notary Public.

My commission expires_____

Form No. 54.

AFFIDAVIT THAT NO KNOWN VEIN EXISTS WITHIN PLACER LOCATION.

(Caption as in Form No. 51.)

State of_____}
County of_____} ss.

_____ and _____, of the said County and State, being first duly sworn, each for himself, and not one for the other, deposes and says: That he is well acquainted with the _____ Mining Claim, embracing _____ acres, situated in the _____ Mining District, County of _____ and State of _____, owned and worked by _____, the applicant for a United States patent therefor.

That for many years he has resided near, and often been upon said mining premises, and that no known vein or veins of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper exist on said placer mine and claim, or on any part thereof, so far as he knows, and he verily believes that none exist thereon.

_____

_____

Subscribed and sworn to before me, this_____day of_____, 19____.

_____
Notary Public.

My commission expires_____.

Form No. 55.

FINAL AFFIDAVIT OF POSTING.

(Caption as in Form No. 51.)

State of_____}
County of_____} ss.

_____, being first duly sworn according to law, deposes and says, that he is the duly authorized attorney in fact and superintendent of the _____ Mining Company, the claimant of the _____ mining claim in _____ Mining District, County of _____ and State of _____, the official plat of which premises designated by the Office Cadastral Engineer as Survey No. _____, together with the notice of its intention to apply for a patent therefor, was posted thereon on the _____ day of _____, 19__, as fully set forth and described in the affidavit of _____ and _____, dated the _____ day of _____, 19__, which affidavit was filed in the land office at _____ in the State of _____ in this case, and that the plat and notice so mentioned and described remained conspicuously and continuously upon said mining claim from and including the said _____ day of _____, 19__, until and including the _____ day of _____, 19__, including the sixty days' period during which notice of said application for patent was published in the newspaper.

_____

Subscribed and sworn to before me, this_____day of_____, 19_____.

_____
Notary Public.

My commission expires_____.

Form No. 56.

AFFIDAVIT OF EXPENDITURE ON PLACER CLAIM.

(Caption as in Form No. 51.)

State of_____}
County of_____} ss

We, _____ and _____, being severally duly sworn, on oath depose and say, that we are citizens of the United States and of the State of _____, that we are well acquainted with the situation and character of the _____ mining claim owned by _____ Mining Company, located in _____ Mining District, County of _____, State of _____, in Section _____, Township _____, Range _____, _____ Meridian.

That the same is a placer mining claim containing _____ acres. That we have no financial interest in said mining claim. That we are conversant with the working of said mining claim, and that to the best of our knowledge and belief the amount expended on said mining claim in labor and improvements by the said claimant and its grantors is not less than $500.

That the said labor and improvements consist of _____.

(Here fully describe same.)

_____

_____

Subscribed and sworn to before me, this_____day of_____, 19____.

_____

Notary Public.

My commission expires_____.

Form No. 57.

PRELIMINARY AFFIDAVIT OF POSTING.

(Caption as in Form No. 51.)

State of_____}
County of_____} ss

_____ and _____, each for himself and not one for the other, being first duly sworn according to law, deposes and says, that he is a citizen of the United States over the age of twenty-one years and was present on the _____ day of _____, 19__, when a plat representing the _____ mining claim and premises and certified to as correct by the Office Cadastral Engineer of the District and State of _____ and designated by him as Survey No. _____, together with a notice of intention of _____ Mining Company to apply for a patent from the government of the United States for the mining claim and premises so platted, was posted in a conspicuous place upon said mining claim, to wit:

(Describe place of posting.)

where the same could be easily seen and examined. The notice so conspicuously posted upon said mining claim being in words and figures as follows, to wit:

(Insert Notice of Posting, Form No. 69.)

_____

_____

Subscribed and sworn to before me, this_____day of_____, 19____, and I hereby certify that I consider the above deponents credible and reliable witnesses and that the foregoing affidavit and notice were read by each of them before their signatures were affixed thereto and the oath made by them.

_____

Notary Public.

My commission expires_____.

Form No. 58.

AFFIDAVIT OF PUBLICATION.

(Caption as in Form No. 51.)

State of_____}
County of_____} ss

_____ being first duly sworn, according to law, deposes and says that he is the _____ of the _____, a _____ newspaper, published at _____, in the County of _____, State of _____. That the annexed notice of the intention of _____ Mining Company to apply for a patent from the government of the United States for the _____ mining claim designated as Serial No. _____, was published in said newspaper _____, commencing on the _____ day of _____, 19____, and ending on the_____ day of _____, 19____, as follows, to wit:_____

_____

Subscribed and sworn to before me, this_____day of_____, 19____.

_____
Notary Public.

My commission expires_____.

Form No. 59

AGREEMENT OF PUBLISHER.

(Caption as in Form No. 51.)

I, _____, owner and publisher of the_____, a_____ newspaper of general circulation, published at_____, in the County of_____and State of_____, hereby agree to publish in said newspaper the notice of the intention of_____Mining Company to apply for a patent from the government of the United States for the_____mining claim designated as Serial No._____and situated in the_____Mining District, County of_____, State of _____, as required by the mining laws of the United States, and to hold said applicant alone responsible for my charges for making such publication; and no claim nor charge whatsoever shall be made by me against the government of the United States, or any of its officers or agents therefor.

In witness whereof, I have hereunto set my hand this _____ day of _____, 19____.

_____

Form No. 60.

APPLICATION FOR PATENT.

In the United States Land Office at_____, in the State of_____.

Application of_____Mining Company, a corporation, for a patent for its claim of_____linear feet of the_____Lode, bearing _____and_____, together with surface ground adjacent and

appurtenant thereto, embracing an area of____acres, lying and being in the_____Mining District, County of_____, State of_____, and officially designated by the Office Cadastral Engineer as Survey No._____, in Township No._____, Range No._____, _____Meridian, as shown by the official plat thereof filed herewith and the official field notes of survey hereto attached.

State of_____}
County of_____} ss

To the Register of the United States Land Office for the District of Lands subject to sale at_____, in the State of_____.

_____ being first duly sworn according to law, on his oath, deposes and says that he is a citizen of the United States, over the age of twenty-one years, residing at_____in the County of_____, State of_____, and that he is the agent and superintendent of _____Mining Company, and is duly authorized and empowered to verify and file this application, as well as appear by a resolution of the board of directors of said company, a copy whereof is hereto attached, marked Exhibit "A," and made a part hereof.

That the said_____Mining Company is a corporation duly organized and existing under and by virtue of the laws of the State of_____, having its principal place of business at_____in the State of_____, as will appear by a certified copy of its articles of incorporation, hereto attached, marked Exhibit "B," and made a part hereof.

Deponent further says that the said _____ Mining Company, in virtue of a compliance on the part of itself and its grantors with the laws of the United States relating to taking up, locating and holding mining claims or mineral lands in the public domain and with the mining laws of the State of _____, and with the local laws, customs and usages of the _____ Mining District, has become and now is the owner of and in actual possession of and entitled to so own and possess _____ linear feet on the _____ lode, being a mineral vein or lode or ledge of quartz and other rock in place, bearing _____ and _____, together with certain surface ground appurtenant thereto, for the convenient use thereof in working said lode, vein or ledge; said claim embracing in all _____ acres in superficial area; situate, lying and being in the _____ Mining District, County of _____ State of _____, the boundaries and extent of which said vein, lode or ledge and claim, at the surface, are more particularly set forth, mentioned and specifically described, by course and distance, in the official field notes of survey thereof, hereto attached, marked Exhibit "C" and made a part hereof; and also in the official plat of said mining claim designated as Survey No. _____, Township No. _____, Range No. ____, _____ Meridian, and which said plat is now posted conspicuously upon said mining claim and premises; to which said plat and field notes of said Survey No. _____, reference is hereby particularly made as fully describing and setting forth by actual survey the boundary lines at the surface of the vein, lode, ledge, and mining ground so owned by, in the possession of, and for which the said _____ Mining Company hereby makes application for a patent; this deponent making the said plat and field notes of survey of said

Survey No._____, a part of this statement as describing the mining premises hereby sought to be patented and wherein the same are described as follows, to wit:

(Description.)

(There is expressly excluded from this application for patent the following portion of said Survey No._____, to wit:_____, as shown on said official plat.)

Deponent further says that the facts relative to the_____Mining Company's claim, title and right of possession to said vein, lode, ledge and mining premises are substantially as follows:

That on and before the day of the location thereof, hereinafter mentioned, the premises hereinbefore described were mineral lands of the public domain and entirely vacant and unoccupied, and were not owned, held, or claimed, by any person, or party as mining ground, or otherwise; and that while the same were so vacant and unoccupied and unclaimed, to wit: on the____day of_____, 19__, _____, each and all of them being citizens of the United States, entered upon and explored the premises, discovered and located the said_____ vein, lode or ledge and occupied the same as a mining claim.

That the said premises so located and appropriated consist of_____ feet in a_____direction on and along the said vein, lode or ledge from the location stake and_____feet in width, together with all the dips, spurs, angles, depths, widths, offshoots, sinuosities and variations, as will more fully appear by reference to the notice of location, a duly certified copy whereof is hereunto attached, marked Exhibit "D" and made a part hereof.

That the said locators, said_____and his said associates, upon the making of said location entered into and took possession of said_____ vein, lode or ledge and said mining ground, claim and premises, erected thereon such stakes and monuments as were necessary to point and designate the boundaries and extent thereof, did such work thereon and performed all such acts as were required by the mining laws of Congress, of the State of_____, and by the laws, customs, rules and regulations of the miners of the district in which said claim is situated, and filed their said notice of location in the office of the County Recorder of the said County of_____, by whom the same was recorded on the_____day of_____, 19__, in Book_____at page_____of_____of the Records of said county

That said locators remained in the possession, occupation and enjoyment of the said_____vein, lode or ledge and said mining claim, ground and premises and continued, from the date of said location, to work upon, prospect and develop the same until the_____day of _____, 19__, on which date the owners and possessors of said _____vein, lode or ledge, mining ground, claim and premises by their deed in writing, good and sufficient in the law, conveyed all of said vein, lode or ledge and mining ground, claim and premises so as aforesaid located by said_____, and his said associates, to _____, and thereupon said_____entered into, took possession and control, and commenced to work upon and develop the same, and so continued in such possession and work until the_____day of _____, 19__, on which date the said_____by his deed in

writing, good and sufficient in the law, conveyed all of said_____ vein, lode or ledge and said mining ground, claim and premises, to _____Mining Company, the applicant for patent herein, and thereupon the said corporation entered into, took possession and control, and has since possessed, controlled, enjoyed, and occupied and is now in the actual and peaceable possession of all of said_____ vein, lode or ledge and said mining claim, ground and premises.

That the said locators, said_____and his said associates and their said grantee and said corporation, did comply with every custom, rule, regulation and requirement in force in the_____Mining District, and with the provisions of the mining laws of the State of _____, and of the acts of Congress in that behalf enacted.

That there is a *true fissure* vein, lode or ledge with *well defined* walls carrying *gouge*, within said claim, having an average width of_____ feet, running in a_____and_____direction and containing *quartzose* vein matter carrying *iron* and *copper pyrites*, and there is blocked out or in sight_____tons of ore therein of an average value of_____ dollars per ton.

That the precise place where said vein, lode or ledge was discovered or disclosed within said location is at a point_____.

That by reason of the facts aforesaid the said_____Mining Company, the applicant for patent herein, has become and is the rightful owner (except as against the paramount title of the United States), and the lawful possessor of the aforesaid_____vein, lode, or ledge and the said mining ground, claim and premises.

That the abstract of title herein, duly certified by_____, shows the various deeds, conveyances and transfers whereby the said _____Mining Company, the applicant for patent herein, became and is vested with all the rights, title and interest of the said locators, said_____and his said associates and their said grantee in and to said_____vein, lode or ledge and said mining ground, claim and premises, so located as aforesaid.

In consideration of which facts, and in conformity with the provisions of Chapter VI of Title XXXII, of the Revised Statutes of the United States, application is hereby made for and in behalf of said _____Mining Company, for a patent from the government of the United States for the said_____vein, lode or ledge, deposit, mining ground, claim and premises so officially surveyed and platted.

_____

Subscribed and sworn to before me this_____day of_____, 19__, and I hereby certify that I consider the above deponent a credible and reliable person, and that the foregoing affidavit, to which was attached the field notes of survey of the_____mining claim, was read and examined by him before his signature was affixed thereto.

_____

Notary Public.

My commission expires_____.

NOTE.—SHOWINGS BY APPLICANTS FOR PLACER PATENTS. Paragraph 60 of the Mining Regulations, 49 L. D. 15, provides that in placer applications, in addition to the recitals necessary in and to both vein or lode or placer applications, the applicant must furnish certain data, and that since no report of a mineral surveyor is required where the claim is described by legal subdivisions, the claimant should describe in detail the shafts, cuts, tunnels, or other workings claimed as improvements, giving their dimensions, value, and the course and distance thereof to the nearest corner

of the public surveys. The precise point of discovery upon the placer claim should be given along with the points on the claim where cuts or other work has been done by the placer claimant as patent expenditure. 51 L. D. 265.

Form No. 61.

Department of the Interior.

MINERAL ENTRY.

U. S. Land Office, _____, No._____

Application to Purchase.

Receipt No._____

The undersigned, claimant___under the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two, and legislation supplemental thereto, hereby appl_____to purchase that Mining Claim known as the_____ _____ Section_____, Township_____, Range_____, _____Meridian, designated as Survey___No._____, said Survey___No._____ extending _____ feet in length along said_____vein or lode, but expressly excepting and excluding from this application all that portion of the ground embraced in mining claim___designated as Survey___ No._____ and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground: said lode claim embracing_____ _____acres and said Mill-Site claim_____acres, in the _____Mining District, in the County of_____and_____of_____ as shown by the survey thereof, and hereby agree___to pay therefor _____ Dollars, being the legal price thereof.

Dated_____, 19__.

_____

UNITED STATES LAND OFFICE AT_____,

_____, 19__.

I HEREBY CERTIFY that the aforesaid Mining Claim or Survey_____ No._____as applied for above, is subject to entry by the above-named applicant___; the area of said Lode claim being_____ acres and of said Mill-Site claim_____acres, and the legal price thereof_____dollars.

_____

Register.

Form No. 62.

APPLICATION FOR REPAYMENT.

(Precedent in Repayment, 39 L. D. 146.)

To the Commissioner of the General Land Office.

Sir: I hereby make application for the return of the purchase money and commissions paid with my_____under the_____law,

for the_____of_____section_____, township_____, range_____, as per register's receipt No._____, issued at _____, bearing date the_____day of_____, 19__, and which is surrendered herewith, and on oath declare that I am the identical (or legal representative of the) person who made such payment, and that there was no fraud or attempted fraud in connection with the effort to obtain title to the above described tract of land.*

_____
(Applicant sign here.)

_____
(Post-office address.)

State of_____}
County of_____} ss

Subscribed and sworn to before me this_____day of_____ 19__.

_____
Notary Public.

My commission expires_____.

Form No. 63.

LETTER OF ATTORNEY.

Know all men by these Presents:

That I, _____, of_____, have made, constituted and appointed, and by these presents do make, constitute and appoint _____, of Washington, D. C., my true and lawful attorney, for me, and in my name, place and stead, to do all things necessary in connection with my application for repayment of the purchase price and fees paid by me on Mineral entry No._____, _____for the _____and_____mining claims in Township_____Range _____M.,_____, which was filed_____, 19__, and to receive any warrant or draft issued in making the repayment aforesaid. And for the purposes aforesaid, I do hereby grant unto my said attorney full power and authority to do and perform all and every act whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue hereof, hereby annulling and revoking all former powers of attorney or authorizations whatever in the premises.

In witness whereof, I have hereunto set my hand the_____day of_____, in the year One Thousand Nine Hundred and_____.

(2 witnesses.)

* If the receipt has been lost or destroyed, so state.

Form No. 63a.

APPLICATION FOR REPAYMENT OF EXCESS OR UNUSED MINING SURVEY DEPOSIT.

(Under act of February 24, 1909, 35 Stat., 645.)

The District Cadastral Engineer,

_____

I hereby make application for the repayment of_____ _____ dollars and _____ cents ($_____) being the excess or unused mining survey deposit made in connection with my application for official survey of the_____ _____ mining claim, mineral survey No. ____, as per certificate No. _____ issued by the _____, _____, 19___, in the amount of $_____, and on oath declare that I am the identical person who made said payment (or_____legal representative or duly authorized agent, as evidenced by authorization hereto attached).

_____
(Signature)

_____
(Post Office address.)

State of_____)
County of_____) ss.

Subscribed and sworn to before me this_____day of_____, 19__.

_____

OFFICE OF DISTRICT CADASTRAL ENGINEER.

_____

I certify that the foregoing claim is correct as appears from the records of this office.

_____
Office Cadastral Engineer.

Form No. 64.

APPLICATION TO DISTRICT CADASTRAL ENGINEER FOR SURVEY OF MINING CLAIM—PUBLIC SURVEY OFFICE.

_____

_____, 19__

District Cadastral Engineer:

_____

Sir:

_____ _____, claimant__, hereby make__ application for an official survey under the provisions of Chapter six, Title thirty-two, of

the Revised Statutes of the United States, and regulations and instructions thereunder, of the mining claim known as the_____, situate in_____Mining District_____, County_____ in Section_____, Township No._____, Range No._____. Said claim is based upon a valid location made on_____, 19__, and duly recorded on_____, 19__, and is fully described in the duly certified copy of the record of the location certificate, filed herewith. Said certificate contains the name__ of the locator__, the date of location, and such a definite description of the claim by reference to natural objects or permanent monuments as will identify the claim, and said location has been distinctly marked by monuments on the ground, so that its boundaries can be readily traced.

____request that you will send_____an estimate of the amount required to defray the expenses of platting and other work in your office, required under the regulations, that_____may make proper deposit therefor, and that thereupon you will cause the survey to be made by_____, U. S. Mineral Surveyor, and proper action to be taken thereon by your office, as required by the United States mining laws and regulations thereunder.

_____

_____

Claimant___.

(By his agent or attorney)

To be signed in writing only.

P. O. Address

_____

_____

Form No. 65.

APPOINTMENT OF ATTORNEY IN FACT.

At a regular called meeting of the directors of the_____Mining Company, held at its office in the city of_____in the State of _____this_____day of_____, 19__, there was a legal quorum of said directors present, to wit:

Messrs. _____and_____

Absent: Messrs._____

After due and legal proceedings the following preamble and resolution were adopted by the unanimous vote of the directors present:

Whereas, it is the intention of this corporation to apply for a patent from the government of the United States for its certain mining claim, ledge, lode and premises situate, lying and being in the_____ Mining District, County of_____, State of_____ and called the_____Mining Claim.

Now, therefore, be, and it is hereby

Resolved, That_____the superintendent and managing agent of this corporation be and he is hereby fully authorized and empowered for and on behalf of this corporation, and in its name to do all acts whatsoever necessary or proper for the purpose of making and completing said application for and procuring the patent for said mining claim and to make and file any and all affidavits or other papers of any

kind necessary or required for the procuring of said patent for said mining claim and premises.

I hereby certify the foregoing to be a full, true and correct transcript from the minute book of the Board of Directors of_____Mining Company and a full, true and correct copy of the preamble and resolution adopted at a regularly called meeting of said Directors held at the office of said corporation in the city of_____, County of _____, State of_____.

Witness my hand and the corporate seal of_____Mining Company, by me hereto affixed this_____day of_____, 19__.

_____,

Secretary_____Mining Company.

Form No. 66.

CERTIFICATE THAT NO SUIT IS PENDING.

(Caption as in Form No. 51.)

United States of America
_____District of_____ } ss
_____Division.

Serial No._____

I, _____, Clerk of the District Court of the United States for the_____District of_____, do hereby certify that I am the Clerk of the District Court of the United States for the_____ District of_____. I do further certify that from an examination of the records of the United States District Court, in and for the _____District of_____Division, I find that no suit, action or proceeding of any character whatsoever was or has been commenced in said court on or subsequent to the_____day of_____, involving the right of possession or affecting the title to the_____ Lode Mining Claim or the_____Lode Mining Claim, or either of them, or any part thereof, situate in the_____Mining District, County of_____, State of_____, and wherein_____is plaintiff and_____Mining Company is defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this_____day of_____, A. D._____.

_____

Clerk of the District Court of the United States for the _____District of_____.

Form No. 67.

CERTIFICATE THAT NO SUIT IS PENDING.

(Caption as in Form No. 51.)

State of_____ }
County of_____ } ss

I, _____, do hereby certify that I am the duly elected, qualified and acting clerk of the County of_____State of_____, and ex officio clerk of the_____Court of the State of_____, in and for the County of_____.

And I do hereby further certify that there is now no suit or action of any character pending in said court involving the right of possession to the_____mining claim, or any part thereof, and there has been no litigation before said court affecting the title to said mining claim, or any part thereof, for_____years last past, or within the period prescribed by the statute of limitations affecting real property, to wit:_____years, other than what has been finally decided in favor of said_____Mining Company.

In witness whereof, I have hereunto set my hand and affixed the seal of said_____Court this_____day of_____, 19__.

_____

County Clerk and ex officio Clerk of the_____Court of the State of_____in and for the County of_____.

Form No. 68.

CLERK'S CERTIFICATE OF FINAL JUDGMENT.*

(Caption as in Form No. 51.)

State of_____}
County of_____} ss

I, _____, do hereby certify that I am the duly elected, qualified and acting clerk of the_____Court of the State of_____in and for the County of_____, and I do further hereby certify that in a certain action pending in said court and numbered_____in the files and records thereof, wherein_____was plaintiff and_____was defendant, judgment was rendered in said court on the_____day of_____, 19__, in favor of said_____and against said _____. That said action was an adverse suit brought in support of an adverse claim filed in the United States Land Office at_____in the State of_____, by said plaintiff to determine the right of possession of that certain mining claim situate in the_____Mining District, County of_____State of_____, known as the_____mining claim.

That an appeal was taken from said judgment to the Supreme Court of the State of_____, by said_____. That thereafter, and on the_____day of_____, 19__, said appeal was dismissed in and by said Supreme Court. That no further appeal is or has been filed in said matter. That the judgment above described and fully set forth in the certified copy of the judgment-roll in said action numbered_____is a final judgment as the time for appeal from said judgment has, under the law, expired.

In witness whereof, I have hereunto set my hand and affixed the seal of said_____Court this_____day of_____19__.

_____

Clerk of the_____Court of the State of_____in and for the County of_____.

*See Mining Regulations, paragraph 85.

Form No. 69.

NOTICE OF POSTING OF APPLICATION FOR PATENT.

Legal Notice of the Application of_____Mining Company for a United States Patent.

State of_____}
County of_____} ss

_____Mining Company hereby gives notice that under and in pursuance of Chapter VI of Title XXXII of the Revised Statutes of the United States,_____Mining Company, a corporation organized and existing under the laws of the State of_____having its principal place of business and post-office address at_____in the State of_____and engaged in the business of mining at_____ Mining District, in the County of_____State of_____and which is authorized to locate a mining claim under the provisions of said Chapter VI, and which has complied with its terms, does claim _____linear feet of the_____vein, lode, ledge or mineral deposit bearing_____and_____with surface ground_____ feet in width, lying and being situate within the_____Mining District, County of_____, State of_____, and has made application to the United States for a patent for said mining claim, vein, lode, ledge and mineral deposit and intends to and will file in the United States Land Office at_____, in the State of_____, that being the proper land office, its said application for patent, under oath, showing such compliance, together with the plat and field notes of the survey of the claim, made by or under the direction of the District Cadastral Engineer for the State and District of_____, showing accurately the boundaries of the said claim, which are distinctly marked by monuments on the ground wherein and whereby the boundaries and extent of said claim, on the surface, are described as follows, to wit:

(Description.)

The names of the adjoining and conflicting claims, as shown by said plat and survey, are the_____officially designated as Survey No._____on the north, and by the_____Mining claim (unsurveyed) on the east and said claim of said_____Mining Company is designated as Survey No._____in the said official plat posted herewith.

Any and all persons claiming adversely the mining ground, vein, ledge, premises, or any part of the same so designated, surveyed, platted and applied for, are hereby notified that unless their adverse claims are duly filed according to law and the regulations thereunder, within the sixty days' period of the publication of the notice of said application with the Register of the United States Land Office at _____in the State of_____, they will be barred in virtue of the provisions of said statute.

Dated and posted on the ground this_____day of_____, 19___.

_____Company.

By_____

Its Superintendent and Attorney in Fact.

Witnesses:

NOTE.—Areas intended to be excluded from the application for patent must be expressly stated in both the posted and published notice as well as in the application for patent. Min. Regs., pars. 38–39.

Form No. 70.

PUBLISHED NOTICE OF APPLICATION FOR PATENT.*

U. S. Land Office_____

M. E. No._____

_____19_____

Notice is hereby given that_____Mining Company by _____attorney in fact, for_____, has made application for patent for the_____and_____, lode mining claims, Survey No._____(in unsurveyed T._____R._____, _____B. and M.) in_____Mining District, _____ County, _____, described as follows:

(Description.)

There are no adjoining nor conflicting claims.

The location notice_____is recorded in Book_____, page_____ (mining locations)_____, _____.

_____

Register.

Form No. 71.

NOTICE OF FILING OF ADVERSE CLAIM.

Department of the Interior

United States Land Office

_____

_____

Sir:

You are advised that on_____, there was filed in this office, during the statutory period provided therefor, the adverse claim of _____for_____claim, against the issuing of patent to_____for_____mining claim.

Now, therefore, under section 2326, Revised Statutes of the United States, and paragraph 83 of the regulations thereunder, approved March 29, 1909, "the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, and to prosecute the same with reasonable diligence to final judgment, and that, should such adverse claimant fail to do so, his

* The above notice is in accordance with government requirements and contains all the essential data necessary for publication. See 50 L. D. 556.

adverse claim will be considered waived, and the application for patent be allowed to proceed upon its merits."

Very respectfully,

_____

Register.

Form No. 72.

PROTEST.*

(Precedent in Grand Canyon Co. vs. Cameron, 36 L. D. 66.)

In the United States Land Office at_____in the State of_____

In the matter of the application of_____for a United States patent for_____mining claim known as the_____and lodes and millsites in Section_____, Township_____, Range_____of _____. Protest of_____Company.

To the Register of the United States Land Office for the district of land subject to sale at_____in the State of_____.

State of_____ }
County of_____ } ss.

_____, being duly sworn, according to law, on his oath deposes and says: that he is the_____of the_____Company, the protestant herein, and is duly authorized and empowered to verify and file this protest as will appear by a resolution of the board of directors of said company, a copy whereof is hereto attached, marked Exhibit "A" and made a part hereof.

That the said_____Company, the protestant herein, is, and since the_____day of_____, 19___, has been a corporation maintaining and operating a railroad for the carriage of freight and passengers from the town of_____in the State of_____ to a point on the rim of the_____in said state near what is known as the_____Trail, as will appear by a certified copy of its articles of incorporation hereto attached, marked Exhibit "B," and made a part hereof.

That on the_____day of_____, 19___, the said_____ filed his application to the Government of the United States for a patent for the mining claim known as the_____and lodes and millsites in Section_____, Township_____, Range_____of_____; and which said application has ever since been and still is pending and undetermined.

That at the time of the location of said alleged lodes the applicant for patent had made no discovery of any valuable deposit of mineral within the limits of either, or any of said locations and has not since made any such discovery; and that the lands so located by him do not contain valuable deposits of any kind, so far as known.

*Under the Rules of Practice, 51 L. D. 547, a verified protest, in duplicate, must be filed with the local register and be corroborated by at least one witness having such personal knowledge of the facts in relation to the contested entry, as, if proven, would render it subject to cancellation, and these facts must be set forth in the affidavit. If the contest affidavit does not contain the date and number of the entry or a correct description of the land it may be held to be fatally defective. Fosdick vs. Shackleford, 47 L. D. 558; Roark vs. Tarkington, 51 L. D. 183.

That the plat of survey and the notice of the application for patent aforesaid were not posted in a conspicuous place upon said mining claim. That if said plat and notice were posted at all they, and each of them, were posted where they could not be seen.

That the notice of application for patent for said mining claim was published in a weekly newspaper in_____called the_____, a newspaper of small circulation and read by few persons. That said notice, as published, was defective in this: That it failed to give the connecting line of said mining claim with a corner of the public surveys or a United States mineral monument. That it failed to give the names of the adjoining and conflicting claims, or the number of the survey thereof.

That the expenditures in labor or improvements upon the said lodes are insufficient in amount and kind for patent purposes.

That said_____, said applicant for patent, is seeking by means of fraud, deceit and misrepresentation to acquire a patent for the lands embraced in said mining claim in that such lands are not valuable for minerals and the said alleged mining claims were not located for mining purposes but for the purpose of controlling, so far as possible, the use of a portion of the_____Trail leading from the terminus of the line of railroad of this protestant down to the walls of the_____Cañon of the_____ River to said river, and thereby placing himself in a position either to prevent the public from using said portion or to pay to said_____ such sums of money as he shall see fit to exact for the privilege of using said trail.

That the boundaries of the said locations were so fixed upon the face of the earth as to include that portion of said trail known as the _____which, because of the topography of the ground traversed by it, is located upon the only practicable and feasible route for a trail from the terminus of the protestant's line of railroad to the_____ River, and that as far as can be determined from an inspection of the surface of the ground and the small amount of excavation thereon, the course of the said alleged mining claims was determined by the course of the said portion of said trail rather than by the course of any lode or mineral bearing vein.

That the lands embraced in the so-called_____and_____ mill-sites are not now and never have been used or occupied for either mining or milling purposes, and that said_____is seeking to acquire patent to said mill-sites and each of them by means of fraud, misrepresentation and deceit and as part of a scheme devised by him for acquiring control of said_____Trail and the waters flowing in what is known as_____Creek.

That in carrying out said fraudulent scheme and purpose said_____ _____made pretended locations of lodes and mill-sites along and across said trail from its head on the rim near the terminus of the line of railroad of this protestant, to the foot of said trail at the_____ River, all in the_____Cañon of the_____River, so located as to include the greatest possible portion of said trail.

That the_____Cañon of the_____River is one of the great natural wonders of the world, is visited by large numbers of people from all parts of the world, practically all of whom travel over the

line of railroad of this protestant, and the most of whom make the trip over said trail down to said river.

That said trail and said alleged mining claim and mill-sites are within the_____Forest Reserve.

That this protest is made for the purpose of preventing the consummation of what protestant verily believes to be a fraudulent scheme to obtain patents for lands within a forest reserve regardless of their value for mining uses and to secure control of the waters flowing in what are known as_____Creeks; and also for the purpose of securing to the public and particularly to all persons who travel upon the protestant's line of railroad with the intention of visiting the _____Cañon of the_____River the right freely and unrestrictly to travel upon and over said trail down into said cañon.

Wherefore, protestant respectfully prays that a hearing be ordered to allow it to prove the foregoing allegations, protect its legal rights, and also to show cause why said application for patent should be canceled.

_____
Post-office address

_____

Subscribed and sworn to before me, this_____day of_____, 19____.

_____
Notary Public.

My commission expires_____.

Form No. 73.

AFFIDAVIT OF LOSS OF REGISTER'S FINAL CERTIFICATE.*

State of_____)
County of _____) ss.

_____, being first duly sworn according to law, deposes and says: that he is the identical person who, on the_____day of_____, 19___, made Mineral Entry No.___in the_____ land office, for the_____mining claim. That affiant has lost the Register's final certificate of entry issued to him at the date of said mineral entry, and wholly is unable to find the same, though he has made diligent search therefor. That affiant is the present owner of said_____mining claim, not having sold the same since the date of said mineral entry.

Wherefore, affiant asks that the United States' patent issued upon said mineral entry be delivered to him.

_____

Subscribed and sworn to before me, this_____day of_____, 19____.

_____
Notary Public.

My commission expires_____.

*NOTE.—If affiant claims as a transferee of the entryman, the fact should briefly be stated, showing the loss of said certificate, either by his transferee or by the affiant, and alleging affiant to be the present owner of the claim.

TABLE OF CASES.

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

C

(References are to sections.)

(References are to sections.)

(References are to sections.)

D

(References are to sections.)

(References are to sections.)

E

(References are to sections.)

(References are to sections.)

G

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

K

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

N

(References are to sections.)

O

(References are to sections.)

(References are to Sections.)

(References are to sections.)

Q

R

(References are to sections.)

(References are to sections.)

S

(References are to sections.)

(References are to sections.)

(References are to sections.)

T

(References are to sections.)

(References are to sections.)

U

(References are to sections.)

(References are to sections.)

V

W

(References are to sections.)

(References are to sections.)

Y

(References are to sections.)

Z

STATUTES CITED.

(References are to sections.)

(References are to sections.)

TEXTBOOKS CITED.

(References are to sections.)

(References are to sections.)

INDEX.

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

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(References are to sections.)

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(References are to sections.)

(References are to sections.)

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